



Liability of expert witnesses post *Jones v Kaney*

by Stefan Cucos

Introduction

Prior to March 2011 expert professionals enjoyed a partial immunity from negligence actions in circumstances where they were acting as expert witnesses. The case of *Jones v Kaney* [2011] UKSC 13 means that if an expert provides negligent expert evidence that expert can be sued those instructing him. Whilst time will tell as to the full impact of this change, the implications of this decision will affect not only established experts but also the litigants on whose behalf they act.

Jones v Kaney is about the immunity of experts. Prior to this case, experts were generally protected from being sued by disgruntled parties to litigation because they enjoyed a long-established rule which said that, except for reasons of bad faith, no witness could be sued for anything said or done in the ordinary course of court proceedings.¹ The implication since *Jones v Kaney* is that a client can seek redress from an expert that has acted negligently or dishonestly.

In *Jones v Kaney*, Dr Kaney was retained by Mr Jones as an expert clinical psychologist. Mr Jones had been knocked off his motorbike by a car whose driver, Mr Bennett, was drunk, uninsured and driving whilst disqualified. Mr Bennett admitted liability. The only matter for the court to decide on was the level of damages Mr Jones could recover.

Dr Kaney duly produced her own report on Mr Jones's condition. It concluded that Mr Jones had suffered from depression and Post-Traumatic Stress Disorder ("PTSD").

A consultant psychiatrist, Dr El-Assra, instructed by the relevant insurer also examined Mr Jones and concluded that he was exaggerating his symptoms. The experts were ordered by the court to prepare a joint statement of matters on which they agreed and those on which they did not agree. These points were discussed between the experts by telephone. Following their telephone conversation Dr El-Assra prepared a draft joint statement which he sent to Dr Kaney who signed it without any amendment or comment at all. The joint statement of the experts contradicted Dr Kaney's previous evidence and concluded that Mr Jones was "deceptive and deceitful" and that he was no longer suffering from PTSD.

The case settled out of court but for far less than Mr Jones might otherwise have recovered had Dr Kaney not signed that joint statement. Mr Jones sued Dr Kaney whose defence relied solely on a claim of expert immunity. Her defence prevailed at first instance. However, the judge gave permission for Mr Jones to leap-frog the Court of Appeal and appeal direct to the Supreme Court.

The majority in the Supreme Court (5 to 2) concluded that in deciding the question of expert liability the appropriate starting point should not be the presumption that expert immunity must be maintained unless it could be shown to be unjustified. Instead, it was held that for every wrong there should be a remedy, and on that basis an expert had to justify the existence of any immunity on which his defence relied as being in the public interest. If he could not justify that immunity, and it could be shown that he had acted negligently or dishonestly, then it would be open to his client to seek the appropriate redress.

¹ *Dawkins v Rokesby* (1873) LR QB 255

In *Jones v Kaney* the Supreme Court recognised that in dispensing with expert immunity in certain cases a number of concerns arose. The main reason given in support of expert immunity had been the long-held concern that an expert witness might, in breach of his duty to the court, be reluctant to give evidence contrary to his client's interests if there was a risk that this might lead the expert witness' client to make a claim against him. However, the Court saw no conflict between an expert's duty to provide the services of an expert to the client with reasonable skill and care on the one hand whilst on the other exercising its duty to the court to help the court on those matters within its expertise. This duty "overrides any obligation" to the person from whom experts have received instructions or by whom they are paid.²

The Court also considered the so-called "chilling effect", where experts, who would previously have been prepared to give evidence, might become harder to find because of the possibility of vexatious claims from their clients. The Court decided that immunity was not necessary to ensure an adequate supply of expert witnesses and cited the decision in *Hall v Simons* [2002] 1 AC 615 which effectively removed the comparable immunity for advocates from negligence claims brought by their own clients. *Hall v Simons* had not led to fewer advocates being ready to perform their duty and the Court considered that *Jones v Kaney* would not diminish the appetites of experts to perform theirs in the future.

Whilst *Jones v Kaney* has abolished the principle of "complete" expert immunity, the Supreme Court's decision does not affect the absolute privilege defence open to expert witnesses from defamation claims, nor does it undermine the long-established immunity of other witnesses in litigation. This is principally because the Court saw a marked difference between holding an expert witness liable for breach of duty to its retaining client and the witness of fact who may not owe a duty of care and may not be giving evidence voluntarily in any event.

Nonetheless, *Jones v Kaney* does hold certain implications for parties to litigation who retain experts. First, it is vital the client establish that the expert witness has sufficient professional indemnity insurance to cover expert witness activities. In the vast majority of cases well-established experts will have the requisite cover and this issue should not arise. At the same time, the underskilled expert may be deterred which should be regarded as a good thing. However, the cost of engaging the services of experts could rise.

Secondly, clients can now expect experts to limit or exclude their liability altogether through contractual means. Provided those terms comply with Unfair Contract Terms legislation courts may uphold them. For the client and his solicitors it may be necessary to accept some exclusions of liability up to the amount of reasonable PI cover.

Thirdly, the removal of immunity means that experts will need to entirely at ease with their given opinion. At the same time they will need to be alive to the potential pressure from clients or solicitors or other the experts involved in the case to change their initial views. In giving her evidence during the course of the first-instance trial, it emerged that Dr Kaney had not seen Dr El-Assra's reports when they held their crucial telephone discussion. Dr Kaney had nonetheless felt under pressure to sign the joint statement even though her view was that Mr Jones had been "evasive" rather than "deceptive" and that Mr Jones had indeed suffered from PTSD but that this was now resolved. As we can now see, this approach was simply not the approach for which an expert is paid and it resulted in an satisfactory settlement for Mr Jones and lengthy court proceedings for Dr Kaney.

² Civil Procedure Rules, Pt 35.10

The 2011 case of *Trebor Bassett Holdings Ltd & Anor v ADT Fire and Security PLC*³ describes just how far experts can deviate from what is expected of them under their duty to the court to furnish the court with specialist knowledge. It also provides an example of what can happen when experts “fall out” over deeply entrenched opposing attitudes. This led to the experts abandoning their joint statements during the course of litigation which were only provided part-way through the trial. However, because the experts were too bullish in their respective approaches to the litigation they could not focus on the issues between the parties and were rightly criticised for being unable to do so. The evidence they eventually gave was of little or no use to the court in any event.

Given the decision in *Jones v Kaney*, an expert instructed in litigation should now be more cautious when it comes to expert meetings and, in particular, in signing a joint expert report without briefing their client fully on any proposed departure from their earlier opinions. The opinions of experts may now take less unequivocal and more circumspect standpoints so that the “unacceptably partisan” attitudes adopted in *Trebor Bassett* become a thing of the past. This need not necessarily be a bad thing for clients if it leads to parties adopting less entrenched positions and actually finding greater common ground disputes easier and quicker to resolve.

Conclusion

The *Jones v Kaney* decision has changed the landscape for experts as providers of expert opinion evidence who also engage in without prejudice discussions on behalf of their clients with other experts. Professional experts who once enjoyed immunity for claims of negligence must now just why they should continue to enjoy that immunity where their negligence has caused a loss to their client. Many experts will feel justifiably concerned at the removal of their immunity, and the result of may be that rather than not providing expert services at all their views will now be less trenchant at the outset of a case than previously seen.

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³ EWHC 1936 (TCC)