Is Expert Immunity in New Zealand on the Brink? - John Green

The United Kingdom Supreme Court in Jones v Kaney [2011] UKSC 13 has abolished the principle of expert witness immunity from suit in relation to evidence given in civil proceedings by a 5 to 2 majority decision handed down on 30 March 2011.

The ruling is significant for those who undertake work as expert witnesses in the UK, who may now be sued by their clients for breaches of duty committed in the course of all work that they undertake. Previously, the immunity protected experts in relation to work undertaken in proximity to court hearings.

The immunity of expert witnesses has a long history that dates back over 400 years to an era long before it became common for forensic experts to offer their services under contracts for reward. The immunity has its origin in a reaction to an actual or perceived tendency on the part of disgruntled litigants, or defendants in criminal proceedings, to bring proceedings for libel or slander against those who have given evidence against them. Thus the immunity originally took the form of absolute privilege against a claim for defamation and it extended to all who took part in legal proceedings.

This privilege was extended, in the form of immunity from suit, to other forms of action in tort. In Stanton v Callaghan [2000] 1 QB 75 (CA), a case also involving the preparation of a joint statement for use in legal proceedings, the Court of Appeal affirmed that immunity extended to an expert’s oral evidence at trial and the contents of the report on which the oral evidence was based, although Nouse LJ noted that the extent of an expert witness’s immunity from suit was still in the course of development.

BACKGROUND

A consultant clinical psychologist was retained to act as an expert witness for the claimant in a personal injuries claim. Following a telephone discussion between the experts in the case, the claimant’s expert signed a joint statement prepared by the opposing expert that was radically different from her previous opinion, without making any comment or amendment. She later said that the joint statement did not reflect what she had agreed in the telephone discussion but that she had felt ‘under pressure’ to sign it. As a result of the damaging nature of admissions in the joint statement, the claim was settled for a sum that was considerably less than
would have been the case if the claimant’s expert had not signed the joint statement in the terms that she did.

The claimant brought proceedings against the expert. The expert relied upon the principle that an expert witness in civil proceedings is immune from being sued. At first instance the expert was successful and the claim was struck out because Blake J considered he was bound by the leading authority of Stanton v Callaghan. The Judge expressed doubt that this immunity would survive scrutiny by a superior court. His Honour certified that the case involved a point of law of general public importance and the issue came before the Supreme Court as a result of a ‘leap-frog’ certificate enabling the claimant to bypass the Court of Appeal in its appeal against the strike out decision based upon the immunity rule.

SUPREME COURT DECISION

Lord Phillips’ leading judgment framed the key question to be addressed as follows: Does public policy justify holding an expert witness immune from liability in negligence in relation to the performance of his duties in that capacity? The onus was on the expert to justify the immunity behind which she sought to shelter and Lord Phillips decided that justification was not made out. In a neatly segmented judgment, Lord Phillips examined amongst other things, the purposes of the immunity, its scope, and whether it is justified. Central to his decision were the following considerations:

A key argument raised by the expert was that removal of the immunity would have a “chilling effect” on expert witness work, rendering experts more reluctant to provide their services and fearful of giving evidence contrary to their clients interests. This argument was dismissed. It was deemed paradoxical to state that in order to persuade an expert to perform his duty to his client it is necessary to grant immunity from liability for breach of that duty. It was also observed that the removal of immunity from barristers (Arthur Hall v Simons [2000]) had had no such “chilling effect” on that profession.

The expert also raised the risk of numerous vexatious claims against experts by their former clients whose expectations in the litigation were not met. This argument was also afforded little weight, in part because such claims would not be viable without the support of another expert witness who would need to declare that the expert in question expressed views that could not be reasonably held within that profession (i.e. the Bolam test).
It was considered that removal of the immunity was unlikely to deter the expert from giving full and frank evidence. If an expert expresses a view honestly held, even if it differs from the view originally expressed, the expert has nothing to fear from a disgruntled client provided the opinion is tenable and soundly based.

Therefore, there were no compelling public policy reasons to support the upholding of the immunity.

Lord Phillips, concluded at [61] that “no justification has been shown for continuing to hold expert witnesses immune from suit in relation to the evidence they give in court or for the views they express in anticipation of court proceedings.”

THE NEW ZEALAND POSITION - WHERE TO FROM HERE?

In New Zealand the Courts have applied witness immunity to negligence claims against experts. In B v Attorney General [1997] NZFLR 550 (FC), the immunity of an expert witness was affirmed by Gallen J who noted that a witness enjoys absolute immunity from any form of civil action in respect of evidence given during the proceedings. In RIG v Chief Executive of the Ministry of Social Development HC Auckland, CIV-2008-404-0033461, 27 July 2009, Cooper J observed that the common law rules providing for immunity of witnesses include expert witnesses. His Honour stated at [74] that “the immunity applies not only to evidence given in court but in statements made for the purpose of later giving evidence.”

Until recently, barristers in New Zealand were immune from suit in relation to court and pre-trial work intimately connected with the conduct of a case, but in Lai v Chamberlains [2007] 2 NZLR 7 the Court followed the approach of the House of Lords in Arthur Hall v Simons and swept away the advocate’s immunity from liability in negligence in New Zealand.

Following the loss of advocates’ immunity from liability in New Zealand under Lai v Chamberlains it would seem strongly arguable that the expert witness should also have no such immunity on the basis that the expert witness is more akin to an advocate giving opinion evidence in contrast to a witness of fact. Indeed, the Supreme Court indicated that witness immunity may well not extend to the professional witness for negligence in the preparation of reports which may form the foundation of evidence and hinted at the need for further consideration of this position of the expert witness saying that it “may need reassessment.”
In *Jones v Kaney*, Lord Phillips observed at [18] that:

A significant distinction between an expert witness and a witness of fact is that the former will have chosen to provide his services and will voluntarily have undertaken duties to his client for reward under contract whereas the latter will have no such motive for giving evidence...there is a marked difference between holding the expert witness immune from liability for breach of the duty that he has undertaken to the claimant and granting immunity to a witness of fact from liability against a claim for defamation, or some other tortious claim, where the witness may not have volunteered to give evidence and where he owes no duty to the claimant.

At [50] Lord Phillips expressed the position of the expert witness vis-à-vis the advocate in the following terms:

Thus the expert witness has this in common with the advocate. Each undertakes a duty to provide services to the client. In each case those services include a paramount duty to the court and the public, which may require the advocate or the witness to act in a way which does not advance the client's case. The advocate must disclose to the court authorities that are unfavourable to his client. The expert witness must give his evidence honestly, even if this involves concessions that are contrary to his client's interests. The expert witness has far more in common with the advocate than he does with the witness of fact.

In light of the position taken by the Supreme Court in the UK, and the almost parallel development of the law in New Zealand, it would appear that there is a substantial likelihood that the New Zealand Courts will in the near future hold that the public policy justification for the immunity rule can no longer be supported and abandon the blanket immunity for expert witnesses as it is too broad and disproportionate as to be justifiable any longer: arguably the rule is even vulnerable to attack on human rights grounds.

**WHAT DOES THIS MEAN FOR BUILDING EXPERTS?**

Building and construction disputes very often rely on evidence from experts on issues such as the existence and causes of defects, the scope remediation work, quantum of loss and expense claims, and delay analysis. Such expert evidence is not only instrumental in deciding these issues but it will usually play a significant and important role in any decisions on settlement.
When the Weathertight Homes Resolution service was established in 2003 there were insufficient building experts in New Zealand to meet the demand created by the leaky building crisis. Since that time many new ‘experts’ have joined their ranks to meet the market demand and accepted instructions as experts in relation to any and all building related matters in the comfort that, in broad terms, mistakes can be made without serious financial consequences.

Regrettably, a good deal of expert evidence in building and construction disputes exhibits shortcomings which are lamentable. Expert evidence is often unreliable and has a tendency to mislead as experts feel compelled to give valuable service to the person who employed them and to support the desired position. The expert often finds it difficult to remain independent and unwittingly becomes drawn into being an advocate for the cause and a ‘team player’, failing to recognise that his or her views might be compromised as he or she works hard to contribute to the goal of securing victory for the side. In short, and notwithstanding the pro forma adoption of the Code of Conduct for Expert Witnesses at the beginning of every brief of evidence, experts in New Zealand building cases routinely go on to give evidence that is as partisan as ever.

Nonetheless, many expert witnesses do play an indispensable role in contributing to the preparation and pre-trial settlement of cases and impartially assisting the decision maker to understand technical matters and to find the truth in an ever increasing number of complicated and technically complex cases.

A change in the law would be a welcome development and would serve to deter irresponsible experts and further discourage enterprising but insufficiently adept expert witnesses from undertaking the work in the first place.

If an expert does his or her job properly and the expressed view is reasonable, the expert has nothing to fear. Liability will still depend on proving professional negligence and the loss that flowed from such negligence.

We await any further developments in the New Zealand courts with interest and anticipate that immunity from suit for expert witnesses in relation to the evidence they give in court or for the views they express in anticipation of civil proceedings in New Zealand is on the brink!
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