THE IMMUNITY OF EXPERT WITNESSES

Developments in the UK may result in a decision from the Supreme Court whereby expert witnesses do not retain immunity from being sued in relation to evidence given in civil proceedings.

In the recent UK case of Jones v Kaney [2010] EWHC 61 (QB) Mr Jones alleged that Ms Kaney provided negligent opinion evidence when she acted as Mr Jones’ psychiatry expert in a previous personal injury claim arising out of a road traffic accident.

Ms Kaney was a consultant clinical psychologist 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, 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.

Ms Kaney applied to have Mr Jones’ claim struck out on the grounds that, as an expert witness, she enjoys immunity from suit in respect of such matters.

The expert witness immunity is based upon Court of Appeal authority, Stanton v Callaghan. Mr Jones’ case is that Stanton v Callaghan is no longer good law for two reasons: (1) that the immunity can no longer survive in light of the House of Lords’ decision in Arthur Hall v Simons (in which a barrister’s immunity from suit was abolished); and (2) the expert witness immunity is inconsistent with the right to a fair trial enshrined by Article 6 of the European Convention on Human Rights.

At first instance, before Blake J, Ms Kaney’s argument succeeded. The Judge considered himself to be bound by Stanton v Callaghan. The Judge therefore struck out Mr Jones’ claim. However, in his judgment, the Judge also stated:

“However, although I conclude that it remains good law, I have doubts as to whether [Stanton v Callaghan] will continue to remain so for the reasons canvassed by the Claimant and the discussion summarised above. I conclude that there is a substantial likelihood that on re-examination by a superior court, with the power to do so, it will emerge that the public policy justification for the rule cannot support it.”

The Judge therefore granted a certificate, pursuant to section 12 of the Administration of Justice Act 1969, granting leave to appeal direct to the Supreme Court on the point and effectively leap-frogging the Court of Appeal.

Comment

As the law currently stands an expert witness in civil proceedings is immune from being sued. The court has the power to sanction poorly performing experts by public criticism or by curbing their recoverable costs as has happened from time to time in leaky building claims.

1 [1999] 2 WLR 745
2 [2000] 3 WLR 543
However, it is the instructing client that suffers the main impact of such measures and not the expert. This blanket immunity has historically been justified by citing the public interest in expert witnesses giving frank and accurate evidence without fear of recourse by a client whose case is lost. The Supreme Court will be putting this policy consideration under the magnifying glass shortly.

It seems likely that the UK Supreme Court may abandon the blanket immunity rule for expert witnesses as it is too broad to be justifiable any longer.

An expert’s duty of care to their instructing client should be ongoing during civil proceedings and not confined to advice provided technically outside of those proceedings. Ordinary principles of professional competence should require the expert to perform in a non-negligent manner when, for example, signing a joint expert statement or producing a report for service in proceedings.

A change in the law to remove the immunity would hopefully discourage irresponsible experts. In the current challenging economic climate, expert witness work provides a valuable source of income to professionals (and others) who might otherwise be short of work. As things stand an individual can hold themselves out as an expert (there is no universal accreditation system) and accept instructions in the comfort that, in broad terms, mistakes can be made without serious financial consequences. This can provide indirect encouragement to enterprising but insufficiently experienced expert witnesses.

Obviously any change in the law would open up a new area of exposure for both experts and their professional indemnity insurers. Over time, poorly performing experts would find themselves as defendants in proceedings by disgruntled clients and obtaining PI cover would become increasingly difficult for them.

For those would like to learn more about expert witness immunity in the UK, click here to read a paper prepared by Jonathon Selby Barrister at Keating Chambers.
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