

## EXPERT WITNESSES TO NO LONGER ENJOY IMMUNITY FROM SUIT

On 30 March 2011 the Supreme Court delivered its judgment in *Paul Wynne Jones v Sue Kaney* [2011] UKSC 13. In a majority decision (Lord Hope and Lady Hale dissenting) the court held that the immunity from suit for breach of duty (whether in contract or in negligence) that expert witnesses have enjoyed in relation to their role in legal proceedings should be abolished. Protection will still remain in respect of liability for defamation.

At first instance, Blake J struck out the Appellant's claim against the Respondent expert for negligently agreeing a joint statement in personal injury proceedings which had resulted in a settlement on terms less favourable than might otherwise have been achieved. It was not disputed that the Respondent had been negligent; rather she maintained that she was immune from suit. Despite striking out the claim, Blake J determined that it raised an issue of public importance and granted a leapfrog certificate (s.12 Administration of Justice Act 1969) enabling a direct appeal to the Supreme Court.

Although the appeal only focused on the narrow issue of whether expert witness immunity applied to joint statements, the Supreme Court found that it raised the much broader issue of whether public policy justified experts having the benefit of any immunity from liability.

The dissenting opinions were concerned that an incautious removal of immunity from one class of witness might destabilise the protection given to witnesses generally, and counselled that such decisions should be left to Parliamentary reform.

In a detailed consideration of the authorities, the majority expressed surprise that expert witnesses' immunity had not been challenged before, and determined that when barristers' immunity from liability in negligence had been removed (*Arthur JS Hall & Co v Simons* (2002) 1 AC 615 HL), it had been wrong to distinguish expert witnesses. There was no longer any justification to suggest that an expert's duty to their client would be supplanted by their duty to the court, in respect of evidence presented in proceedings, thereby giving rise to immunity from liability. A contrast should no longer be drawn between these two duties owed by an expert witness, and there is a clear distinction between holding an expert witness immune from liability for breach of the duty that he has undertaken to a party, and granting immunity to a witness of fact from liability against a claim for defamation, or some other tortious claim. The latter may not have volunteered and certainly owed no duty of care.

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The majority found no justification to assume that, if expert witnesses were liable to be sued for breach of duty, they would be discouraged from providing services, or be inhibited from giving an honest opinion, even if adverse to a client's case. Persons providing professional services are always at risk of being sued for breaches of duties of care and they customarily insure against that risk. *Hall v Simons* has not impacted on barristers' readiness to perform their duties and it follows that the immunity afforded expert witnesses in relation to their participation in legal proceedings should also be abolished.

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