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Sent: 06 May 2011 17:52

To: UK2

Subject: [WAPI] UK: Supreme Court Abolishes Rule On Expert Witness Immunity

NEWS - "without comment"

United Kingdom: Supreme Court Abolishes Rule On Expert Witness Immunity

06 May 2011

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On 30 March 2011, in a landmark decision, the Supreme Court abolished the four hundred year rule on expert witness immunity. As a result, expert witnesses instructed in civil litigation proceedings will no longer benefit from immunity from suit in respect of evidence given by them in court or arbitration or work which is carried out in preparation for the giving of such evidence.

Background

The facts

In March 2001, the Claimant had been hit by a car which resulted in physical and psychiatric injuries. He instructed solicitors with a view to bringing a claim in personal injury against the driver of the car. The solicitors in turn instructed the Defendant expert, a clinical psychologist, to prepare a report on the Claimant's psychiatric injuries for the purposes of the personal injury claim. The Defendant concluded that the Claimant was suffering from post traumatic stress disorder ("PTSD") as a result.

The Claimant subsequently issued proceedings and liability was admitted by the driver of the car, who instructed his expert to examine the Claimant and prepare his own report. The driver's expert concluded that the Claimant was exaggerating his symptoms. The judge ordered the two experts to hold a discussion and prepare a joint statement recording the outcome of that discussion to assist the Court at trial.

The Defendant expert signed a joint statement which wrongly recorded that she agreed with the driver's expert and found the Claimant to have exaggerated his symptoms. As a result of this joint statement, the Claimant's case was so badly damaged that he felt bound to settle his claim for a far lower sum than he might else have achieved.

The claim

As a result, the Claimant brought a claim in negligence against the Defendant expert. The Defendant expert applied for the claim to be struck out on the basis of the Court of Appeal's decision in Stanton v Callaghan [2000] QB 75, that expert witnesses were entitled to immunity from suit for

breach of duty in respect of joint statements prepared for the Court. The first instance Judge granted the strike-out application but gave the Claimant permission to leap-frog the Court of Appeal and appeal directly to the Supreme Court as a matter of public importance.

History of the Rule

The rule on witness immunity dates back four hundred years. It overlapped with the general immunity from suit enjoyed by advocates until this was abolished by the House of Lords in 2000 (Hall v Simons [2002] HL 615), on the basis that it could no longer be justified.

The rule derived from the Court's desire to avoid disappointed litigants bringing claims against witnesses whom they considered to have been responsible for the loss of their case. The justification for the rule was a concern that an expert witness might not be willing to give evidence to the Court which was contrary to his or her client's interests, for fear that the client might sue them.

Supreme Court Decision

By a majority of five to two, the Supreme Court held that there was no rationale for continuing to hold expert witnesses immune from suit for breach of the duty (whether in contract or negligence) owed to their client in relation to the evidence they give in Court or the work carried out in preparation for Court proceedings.

In reaching this decision, Lord Phillips compared the expert's concurrent duties to his client and the Court to those owed by advocates to their clients and the Court. He concluded that where experts are retained pursuant to the Civil Procedure Rules (which they are likely to be), the expert agrees with his client that he will perform the duties he owes to the Court. He is also subject to an implied contractual duty to perform his services with reasonable care and skill. In this way, the expert's duties are the same as those of the advocate. In both cases, they are required to carry out their services with reasonable care and skill, whilst observing their overarching duty to the Court, which might require them to act in a way that does not advance their client's case.

A particular fear of the dissenting minority, however, was that this abolition of immunity would result in an influx of worthless claims brought by disappointed litigants. Whether or not this will materialise remains to be seen, although it is worth noting that the abolition of advocate immunity in 2000 did not have this effect in relation to claims brought against advocates.

What does this mean in practice?

In short, it is now open to litigants to sue their experts for negligence and breach of contract in the performance of their duties in preparing for and giving evidence in Court proceedings. In many ways, this is a welcome change in the law, which will allow litigants to take action against experts whose negligence or incompetence has cost them their case.

It is not entirely clear from the Supreme Court decision whether the abolition shall have retrospective effect. The decision in Hall v Simons in respect of advocates' immunity was held to have retrospective effect and, although it was handed down in 2000, it was applied to the conduct in question in those proceedings, which occurred in 1991. As a result, in Awoyomi v Radford [2007] EWHC 1671, the judge held that the end of advocate immunity occurred in 1991. If the same approach is followed in the present

case, professional negligence claims against experts could relate back to November 2005. Potential claimants will have to be wary of the six year limitation period for any such claims.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Specific Questions relating to this article should be addressed directly to the author.

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