

IS EXPERT WITNESS IMMUNITY FROM SUIT A THING OF THE PAST IN CONSTRUCTION LAW?

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Is expert witness immunity from suit a thing of the past in construction law? This article explores whether immunity for expert witness should be abolished or not; whether there is a need to distinguish between immunity from suit from actions in negligence, and immunity from suit from actions in defamation. The analysis from case law shows that it is most likely that in the future, immunity will be largely curtailed. It may be considered just and fair for immunity from suit to remain a significant legal and moral obligation for expert witness in view of human rights and right to a fair trial, although we can see there is evidence of a change in the concept of immunity. It can be argued that parties should ensure they employ competent experts to give them appropriate advice, experts should be accountable for the evidence they provide for the court at trials, and immunity from suit should not be enjoyed by expert witness if Article 6 of the European Convention on Human Rights on the right to a fair trial cannot be upheld. Therefore, it is necessary for the courts to modernise their approach to this particular area of law, and to comply with Article 6 of the European Convention on Human Rights. However, it can be argued that if immunity from suit is removed, very few experts will be prepared to be an expert witness for fear of being liable for negligent evidence. In most circumstances, it would be challenging to please the clients as well as carrying out the overriding duty to the court simultaneously. It makes more sense for the expert witness immunity from suit to be maintained but establishing criteria for departures instead of granting blanket immunity.

Keywords: construction law, expert witness, human rights, immunity.

INTRODUCTION

Is expert witness immunity from suit a thing of the past in construction law? This article explores whether immunity for expert witness should be abolished or not; whether there is a need to distinguish between immunity from suit from actions in negligence, and immunity from suit from actions in defamation.

Cresswell J. in *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.*² had clearly elucidated the role of expert witness:

“Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation...”

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² [1993] 2 Lloyd's Rep. 68, 81-82

An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise... An expert witness in the High Court should never assume the role of an advocate.

An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion...

An expert witness should make it clear when a particular question or issue falls outside his expertise...

If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court."

DUTY OF EXPERT WITNESS

Main Duty

The main duty of an expert witness is to assist the court on specialist and technical issues with his or her expertise, to give independent expert advice and evidence. The duty to the court overrides any obligations to the parties who instruct or pay the expert. In a highway design case of *Carpenter v Pembrokeshire County Council*³,

Pembrokeshire County Council had designed and constructed a fairly steep driveway approach to the claimant's property. Two issues were considered: first, whether the driveway was too steep hence unsafe to be used and second, whether it is negligent to design such driveway. Mr Fletcher, the expert evidence was unacceptable to McKinnon J because he had taken the role as an advocate for the claimant and abandoned his independent role as an independent expert witness. It is submitted that, an expert has to provide impartial opinions devoid of influence from any of the parties. The underlying reason of expert witness immunity from suit is to promote full and frank discussions so that the information an expert witness provides will not be repeated elsewhere or used as evidence against the instructing party.

Stanton v Callaghan - absolute immunity from suit⁴

In *Stanton v Callaghan*⁵, the defendant, a consulting engineer was appointed to prepare a report on the subsidence of the plaintiff's home. He recommended a total underpinning work at an estimated cost of £77,000 was needed. The plaintiff relied on the defendant's report for a claim submitted to the insurers but the claim was rejected. The plaintiff, then, brought an action against the insurers relying on the defendant's expert advice. After a meeting between the parties' experts, the defendant revised his initial report and an agreed solution was made in a joint statement agreeing on a remedy around £21,000 for reducing subsidence by polystyrene infill as an alternative solution. This joint statement gave the plaintiff little room to reject the insurers' payment. For this reason, the plaintiff subsequently sued the defendant in negligence and breach of the implied terms of his contract of retainer. However, the defendant applied to strike out the plaintiff's claim on the ground of the Rules of the Supreme Court Ord.18 r.19 as disclosing no reasonable cause of action or, alternatively, as an

³ [2002] EWHC 1968

⁴ "Is expert witness immunity from suit a thing of the past in construction law?" by Phebe Mann in Cambridge University Law Society Per Incuriam, 88th Edition, Lent 2014, p11

⁵ [1999] 2 WLR 745

abuse of process, but was rejected by the court. The defendant appealed and was allowed to do so because it was in the public interest to encourage full and frank discussion between experts, and that required a freedom to make proper concessions without fear that any departure from previous advice to the retaining party would be considered negligent, and immunity was justified.

Jones v Kaney

The *Stanton v Callaghan*'s principles of the role of expert witnesses seem to have been forsaken in the recent case of *Jones v Kaney*⁶. Mr. Jones alleged that his psychiatric expert, Dr. Kaney, had provided negligent opinion evidence in a previous personal injury claim arising out of a road traffic accident. She signed a damaging joint witness report negligently due to her inadequate preparation, even though she did not agree with the content. The argument Mr. Jones put forward was that *Stanton v Callaghan*⁷ may not be good law any more:

Firstly, the House of Lords had abolished the advocates' immunity in *Arthur Hall v Simons*⁸;

Secondly, it is not compatible with Article 6 of the European Convention on Human Rights.

The extent of *Stanton v Callaghan*'s protection includes the production or approval of the expert's report as well as the joint experts' agreement contents. However, the immunity does not cover advice given by the expert to the client on the benefits of different issues concerning the case. Dr. Kaney applied to have Mr. Jones' claim struck out based on the grounds of expert witness immunity from suit. Blake J considered himself to be bound by the authority of the Court of Appeal case of *Stanton v Callaghan*. Hence, Dr. Kaney succeeded in striking out Mr. Jones' claim.

Although at this instance the judgement of Blake J concluded that *Stanton v Callaghan* is still good law, he is not convinced that the doctrine of expert witness immunity will continue to remain. He granted an Administration of Justice Act 1969 section 12 certificate allowing the appeal to be heard by Supreme Court, if it would wish to, without going through the Court of Appeal.

The decision by the Supreme Court in *Jones v Kaney* [2011]⁹ determined that the duty of expert witnesses applies to tribunals, civil, criminal and family proceedings.

They owe a duty of care to provide honest, independent and unbiased opinions to the court and give advice to their instructed client. The opinions and advice given by the expert witnesses should be within their area of expertise. These include advice on preexpert report, expert witness report, joint meetings and joint reports, and on evidence given in court. Furthermore, the duty includes contractual obligations under section 13 of the Supply of Goods and Service Act 1982, or in negligence (*Hedley Byrne v Heller* [1964]¹⁰).

⁶ [2010] EWHC 61 (QB)

⁷ [1999] 2 WLR 745

⁸ [2000] 3 WLR 543

⁹ [2011] UKSC 13

¹⁰ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

Arthur Hall v Simons

My argument over this issue is that if an engineer who negligently designs an unsafe structure can be sued, why an engineering expert who provides negligent evidence against the above negligent engineer cannot? Two approaches of immunity from suit are considered in *Arthur Hall v Simons*¹¹.

First Approach:

Lord Steyn suggested that if an advocate does not enjoy immunity from suit, would it undermine his overriding duty to the court, in particular if his conduct was bona fide dictated by his perception of his role to the court. The court cannot hold him negligent. This can be applied to an expert witness.

Second approach:

Lord Hobhouse and Lord Hoffmann's approach is that the duty of an expert witness is to provide the truth in court as set out in the Civil Procedure Rule irrespective of which party called or cross-examined him, similar to the role of an advocate.

In the light of the abolition of immunity from suit of advocates as seen in *Arthur Hall v Simons*, where does immunity from suit of expert witness stand? It is likely that it will follow the same trend, so that it would be compatible with Article 6 ECHR relating to the right to a fair trial.

Liability in Negligence

Jonathan Selby¹² had considered whether the ratio in *Arthur Hall v Simons* is relevant to the liability in negligence as an expert witness. He considered the nature of an expert's evidence as opinion evidence as opposed to evidence of fact. The court seeks reliability and correctness of the expert's evidence. Such evidence is similar to that of an advocate. The second area Selby considered is the nature of the expert's loyalty. Both the experts and the advocate are instructed and paid by their client. When they are once instructed by a party, it is unlikely that the other parties to the litigation can instruct them as there is a conflict of interest. The third area Selby discussed is the nature of current immunity provided to expert witnesses. The role of an expert witness is two-fold. On one hand an expert has to advise the client, on the other hand, he has to fulfil his duty to the court. Distinction may have to be drawn between the two purposes. However it is impracticable to distinguish between them because there is not much difference in the expert's advice to the client and the expert's evidence in court: the expert advice given to client would end up as expert evidence given in court. In this respect, there is close resemblance between an advocate and an expert. Selby argued that it is important to draw the distinction between immunity from suit from actions in negligence, and immunity from suit from actions in defamation. If the expert needs protection only in telling the truth, he only needs protection from actions in defamation. Negligence concerns whether the expert has done his job properly. It would be negligent if the expert provides dishonest opinions to the court.

¹¹ [2000] 3 WLR 543

¹² Jonathan Selby's discussion in his winning essay of the inaugural Bar Law Reform Essay Competition titled "Expert Witness Immunity from suit from actions in negligence should be abolished"

Public Policy

The arguments concerning public policy for expert witness immunity are to encourage truthful and fair evidence, and to provide orderly management and conduct of the trial. Holland J in *Landall v Dennis Faulkner and Alsop*¹³ expressed his view on the necessity of the expert immunity, in order to evade the tension between a desire to assist the court and the fear of the consequence of a departure from previous advice given. One of the arguments is that in the public interest the experts can have full and frank discussions before the trial without the fear of any departure from previous advice, given to the party who has retained him, may be considered as evidence of negligence. This is analogous to the concept of legal professional privilege raised by Taylor CJ in *R v Derby Magistrates' Court, ex p B*¹⁴ "... that a man must be able to consult his lawyer in confidence, since otherwise he may hold back the truth. The client must be sure that what he tells the lawyer in confidence will never be revealed without his consent."

The authors of this article disagree with Eady J's reasoning in *Raiss v Palmano*¹⁵ that an expert witness would still entitle to immunity for reasons of public policy even the expert has been dishonest. He indicated that there should be "*no undue inhibition*" on a witness who resiles from his earlier opinion if he subsequently realises that it is wrong. It is submitted that an expert witness should be accountable for his evidence in court and answerable to his client; he should perform his professional duties and be responsible for his professional negligence. In our opinion, "*no undue inhibition*" would have gone too far.

Competence of Expert Witness

The incompetence of an expert witness may jeopardise the right of the defendant to a fair trial. One of such cases is *Pearce v Ove Arup Partnership Ltd*¹⁶. In this case, an architectural student, Pearce, had made some drawings of a town hall in 1986. He claimed that an English civil engineering company together with the Dutch architects and builders as well as the Dutch local authority had infringed his copyright under the Dutch copyright statutes by erecting the Kunsthall in Rotterdam. Pearce claimed that the features of Kunsthall's design had been copied from his Docklands plans, therefore infringing his UK and Dutch copyrights. Mr. Wilkey was an expert witness for this case. He had submitted a report, wearing an expert hat of a professional architect. Jacob J had raised the issue that Mr. Wilkey did not stand back and take an objective view as to how the alleged copying could have been done. He bore an important responsibility for this case ever coming to trial. In considering the 'substantial part' principle, the judge struck out the action on the grounds that there was insufficient similarity between the building and the claimant's drawings. It was held that "*Kunsthall was independently designed with a similar feature to Pearce's design*" hence there was no infringement incurred. In particular the judge held that the degree of similarity between the claimant's drawings and those of the defendants was not sufficient to give rise to an inference of copying. He considered that the claim was based on speculation and accordingly ordered the whole claim against each of the

¹³ [1994] 5 Med LR 268

¹⁴ [1996] AC 487, 507, [1997] 2 WLR 779

¹⁵ [2000] All ER (D) 1266, (2002) 18 Con LJ 348

¹⁶ [2002] ECDR CN2

defendants to be struck out. The judge found Mr. Wilkey's evidence was so biased and irrational that he conclude Mr. Wilkey failed in his duty to the court.

The parties should be entitled to make Mr. Wilkey liable for his substandard expert advice. It can be argued that the enjoyment of Mr. Wilkey's immunity from suit violates the principle of Article 6 of the European Convention on Human Rights on the right to a fair trial.

The first author of this article marshalled¹⁷ Raynor J in the Mercantile Court (Queen Bench Division) in the case of *Growing Capital Limited v Calvert and Calvert*

[September 2010]. This case concerns the selling of a garden centre by the defendant to the claimants. The claimants claimed damages for breach of warranties in the Sale Agreement concerning the state of the premises; the defendants counterclaimed the unpaid balance of the price payable under the Sale Agreement. It was observed that there had been some measure of agreement between the defendant's expert, Mr. Cross, and the claimants' expert, Mr. Appleyard, in the initial experts' joint statement. However, as for the sloping glass roof, there was profound disagreement between the experts. Raynor J recorded that Mr Appleyard's opinion was that the glass is "*brittle and subject to breakage without notice*", and thus presented a substantial risk of very serious injury to members of the public under the glass roof. In Mr Appleyard's opinion, the replacement of the glass was required under the provisions of BS 5516¹⁸. Mr Cross's opinion, on the other hand, was that the glass roof, which had been in situ in the original structure since 1998, presented no real risk to users of the premises and that safety glass was not reasonably required given the nature and degree of risk.

In closing, Mr Bird, Counsel for the Claimant, can only rely on the evidence of the defendant's expert, that the use of safety glass in roof glazing would be advantageous in the event of fire, in support of his argument that the substitution of safety glass was reasonably required under BS 5516 because Mr Appleyard had never suggested that the replacement of the glass was indicated by fire considerations. As an expert witness, his role is to assist the court on specialist and technical issues. In our opinion, Mr. Appleyard did not seem to fulfil his duty because he had not done sufficient preparation for the case; he had not visited the property but relied solely on photographs, therefore his evidence may carry less weight than Mr. Cross' evidence.

Should an expert be in a privileged position protected from action even when carrying out his duties negligently?

No, *Martin v Watson*¹⁹ determined that an expert witness is liable any tort of malicious prosecution such as giving malicious evidence procured the prosecution. An expert witness will be liable for his/her misfeasance in public office, or conspiracy to injure because of giving fabricated evidence (*Darker v Chief Constable of the West Midlands Police*²⁰).

¹⁷ sitting with the judge at the Bench in Court

¹⁸ British Standard BS 5516-1: 2004: Patent glazing and sloping glazing for buildings

¹⁹ [1996] AC 74

²⁰ [2001] 1 AC 435

Liability of Expert Witness

The RICS²¹ advises the expert to consider liability for any negligent acts or omissions concerning an early advice and report, while preparing joint statements with the opponent's expert, giving evidence including anything said or done during the giving of evidence. It would not be surprised that an expert may also be liable for the costs of the litigation if the expert acted unreasonably. Expert witnesses, for obvious reasons, are not immune from criminal offenses such as perjury and perverting the course of justice or for contempt of court.

The decision of *Jones v Kaney* also suggested that the expert should ascertain the position in the jurisdiction where the report will be received as well as the jurisdiction the expert operates.

Article 6 of the European Convention on Human Rights (ECHR)

It is arguable that the immunity from suit of an expert witness is contravening Article 6 of the European Convention on Human Rights (ECHR) on the right to a fair trial. In *Stevens v Gullis and Pile*²² the defendant's expert had persistently been breaching the Court's order and Civil Procedure Rules Part 35 Practice Direction. The court prohibited the defendant to rely on his expert evidence. It is the defendant who lost his right to a fair trial due to the incompetence of his expert witness. On this account, the case law is yet to be further developed on immunity from suit of an expert witness.

CONCLUSIONS

Is expert witness immunity from suit a thing of the past in construction law? Case law shows that it is most likely that in the future, immunity will be largely curtailed. It may be considered just and fair for immunity from suit to remain a significant legal and moral obligation for expert witness in view of human rights and right to a fair trial, although we can see there is evidence of a change in the concept of immunity. We argue that parties should ensure they employ competent experts to give them appropriate advice, experts should be accountable for the evidence they provide for the court at trials, and immunity from suit should not be enjoyed by expert witness if Article 6 of the European Convention on Human Rights on the right to a fair trial cannot be upheld. Therefore, it is necessary for the courts to modernise their approach to this particular area of law, and to comply with Article 6 of the European

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