

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.

New York
Seven Times Square
New York, NY 10036
+1.212.209.4800
+1.212.209.4801 [fax]

Boston
One Financial Center
Boston, MA 02111
+1.617.856.8200
+1.617.856.8201 [fax]

Washington, DC
601 Thirteenth Street NW
Suite 600
Washington, DC 20005
+1.202.536.1700
+1.202.536.1701 [fax]

Hartford
185 Asylum Street
Hartford, CT 06103
+1.860.509.6500
+1.860.509.6501 [fax]

Providence
10 Memorial Boulevard
Providence, RI 02903
+1.401.276.2600
+1.401.276.2601 [fax]

London
8 Clifford Street
London, W1S 2LQ
United Kingdom
+44.20.7851.6000
+44.20.7851.6100 [fax]

Dublin
Alexandra House
The Sweepstakes
Ballsbridge, Dublin 4
Ireland
+353.1.664.1738
+353.1.664.1838 [fax]

www.brownrudnick.com

Brown Rudnick LLP is a Limited Liability Partnership ("LLP") regulated by the Solicitors Regulations Authority and registered in England & Wales, No. OC300611. We use the word "partner" to refer to a member of the LLP, or to an employee or consultant with equivalent standing and qualifications. A full list of members, who are either solicitors or registered foreign lawyers, is open to inspection at the registered office, 8 Clifford Street London W1S 2LQ.

Information contained in this Alert is not intended to constitute legal advice by the author or the lawyers at Brown Rudnick LLP, and they expressly disclaim any such interpretation by any party. Specific legal advice depends on the facts of each situation and may vary from situation to situation.

Distribution of this Alert to interested parties does not establish a lawyer-client relationship. The views expressed herein are solely the views of the authors and do not represent the views of Brown Rudnick LLP, those parties represented by the authors, or those parties represented by Brown Rudnick LLP.

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.

BROWN RUDNICK is an international law firm with offices in the United States and Europe. Our 200 lawyers provide assistance across key areas of the law, including complex litigation and arbitration, finance, bankruptcy and restructuring, corporate, intellectual property, tax, government law and strategies, climate and energy, and real estate.

For further information on this topic, please contact your Brown Rudnick lawyer or one of the following lawyers:

Steven Friel
+44.20.7851.6059
sfriel@brownrudnick.com

Stephen Hallam
+44.20.7851.6071
shallam@brownrudnick.com

Neil P. Micklethwaite
+44.20.7851.6086
nmicklethwaite@brownrudnick.com

Neill Shrimpton
+44.20.7851.6073
nshrimpton@brownrudnick.com

Christian Toms
+44.20.7851.6009
ctoms@brownrudnick.com

