

JONES v KANEY: THE REMOVAL OF EXPERT WITNESS IMMUNITY AND ITS POTENTIAL IMPACT ON FORENSIC SCIENTISTS

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Abstract: In 2011 the Supreme Court made an historic decision to divest expert witnesses of the absolute immunity they have enjoyed for over 400 years. According to this ruling, expert witnesses can now be sued in civil proceedings for wrong-doings relating to the evidence they produce. This article describes the basis of this ruling and what it means to expert witnesses, particularly forensic scientists, in terms of giving evidence in court. It outlines, with case examples, how expert witness immunity has changed over time to match increasing demands for the services these witnesses provide. The article also provides case examples of miscarriages of justice and considers what may have been the result for forensic scientists in these cases if this ruling had been in place for them.

Keywords: Expert Witnesses, Expert Immunity, Forensic Scientists, Negligence.

1. Introduction

The Supreme Court ruled in the case of *Jones v Kaney* [2011] UKSC 13 that expert witnesses are no longer immune from being sued for the evidence they give in court. This article offers a critical analysis of the potential impact of the ruling on expert witnesses in general and on forensic scientists in particular. A brief outline of this landmark case and what the law was before this ruling will first be given, before examining the changes it introduced and the effect these may have in the United Kingdom on expert witnesses, including forensic scientists.

2. Expert Immunity

There are generally two types of witnesses: lay witnesses and expert witnesses. Lay witnesses are members of the public who may have witnessed a crime or other incidents. They have always enjoyed immunity from suit for what they say in the witness box (Wall 2009). Expert witnesses, on the other hand, are individuals with specialist knowledge of a particular topic. They are called into court to explain the scientific evidence and interpretations they have ascertained while receiving financial rewards in return (Wall 2009). At present, judges determine who can be an expert in the course of a trial, although this can be subject to a judicial notice from a previous court's decision to accept an expert to present their evidence before the court (Shaw 2011). Those usually called to serve in this capacity include forensic scientists. Since forensic science is a diverse field, these range from geneticists to botanists, chemists and biologists, among others. Although expert witnesses can

be called to assist the courts in both civil and criminal proceedings, forensic scientists mainly assist in criminal proceedings, since they usually work alongside the police and the criminal justice system (Wall 2009).

Like lay witnesses, expert witnesses have enjoyed immunity in respect of the written and oral evidence they provide. This stance was recently re-affirmed in *Stanton v Callaghan* [2000] QB 75, where the Court of Appeal emphasised that expert witnesses are protected from being sued in civil proceedings where they have clearly acted negligently. The basis for maintaining immunity for witnesses was to prevent them from being deterred from attending court, and to ensure that they feel able to give evidence in an open and honest way without fear of being sued for the things they communicate (Capper 2013). In regards to experts, negligence claims could also cause a 'chilling effect' on the supply of forensic scientists and expert witnesses in general (Devaney 2012). It has also been argued that immunity should be maintained in order for them to perform their duty to the court and try to avoid a conflict of interest between this duty and the duty to their client, especially because they are paid by the client (Nyambo 2012; Dellen 2011). As important as these factors are, the Supreme Court ruled, in *Jones v Kaney* [2011] UKSC 13, that expert witnesses no longer have immunity from being sued for negligence. In a 5:2 majority vote, the ruling ultimately overturned *Stanton v Callaghan* [2000] QB 75 and changed the status quo massively (Manby and Yeginsu 2011).

2.1. Background to the *Jones v Kaney* case

The events which led to the ruling began on 14 March 2001 when the claimant, Mr Jones, suffered severe physical and psychological injuries in a traffic accident, which instigated post-traumatic stress disorder (PTSD). On 20 March 2001 he asked his solicitors to put in a claim for personal injury and the solicitors instructed the defendant, a clinical psychologist by the name of Dr Sue Kaney, to examine Mr Jones. She reported that Mr Jones was suffering from PTSD. The insurers hired a consultant psychiatrist of their own, who reported that Mr Jones was exaggerating the extent of his symptoms. When asked by the judge to prepare a joint statement, a document was prepared by the consultant psychiatrist which said that Mr Jones' psychological reaction to the accident did not reach the level of PTSD. It also stated that Mr Jones had been deceitful and deceptive in what he was saying and his behaviour raised doubts as to whether his account was genuine. Dr Kaney, who had previously engaged in a telephone discussion with this expert, had not read the joint report when she appended her signature to the document. The contents proved damning for Mr Jones' case, which meant he had to settle for significantly less compensation. He, therefore, brought civil proceedings against Dr Kaney, citing negligence in agreeing to the joint statement. Dr Kaney tried to

dismiss the claim in court, stating she had immunity from liability in negligence relating to her performance. The case went all the way to the Supreme Court, where a total of seven judges sat. The majority (namely Lord Philips, Lord Brown, Lord Collins, Lord Kerr and Lord Dyson) ruled that it was not in the public interest for expert witnesses to remain immune from litigations brought by clients who believe their experts have breached their duty of care towards them (Choong and Barrett 2014). The judgement sought to give the client more protection against the substandard practices of some experts, to reflect the growing number of expert witnesses called upon in civil and criminal proceedings. It was pointed out that the status quo was out of date and needed to be amended for the twenty-first century (Carr and Evans 2011). Furthermore, their Lordships did not believe that the so-called 'chilling effect' on expert witnesses was a reason to leave the law as it stood, since most experts are competent and can acquire special indemnity insurance to protect themselves from such claims (Dellen 2011). They also believed that the supply of expert witnesses would not change much, because the majority of expert witnesses carry out their roles in an effective and professional manner. There would, in other words, be no risk of being sued if they perform their duties carefully (Carr and Evans 2011).

Before this ruling, expert immunity had been in place for over 400 years, i.e. long before modern negligence laws were established and before forensic scientists and other expert witnesses were even called to court for a financial reward. This may make the period following the *Jones v Kaney* ruling a very uncertain time to be an expert witness (Nyambo 2012).

2.2. Loss of disciplinary immunity from professional bodies

However, expert witnesses' immunity has been slowly on the decline in the last decade. The Court of Appeal's ruling in *General Medical Council v Meadow* [2006] EWCA Civ1390, for example, stated that a professional can be subjected to disciplinary proceedings by their own regulatory bodies for wrongdoings arising from their roles as expert witnesses (Dellen 2011). In this case, Professor Sir Roy Meadow had given evidence against Sally Clark, a woman accused of and later convicted for murdering two of her children. However, it was later discovered that Meadow's evidence was seriously flawed, as the statistics he had used to support his testimony for the prosecution were totally incorrect. Sally Clark's father brought a complaint of serious professional misconduct against him before the General Medical Council (GMC). The Council has the power to issue warnings, place conditions on registration and suspend, or even remove, a medical practitioner from the register if it is deemed that their fitness to practise is impaired (GMC 2014). After conducting a fitness to practise hearing, Meadow was struck off the medical register (Williams 2010). Meadow then appealed his

removal from the register to the High Court and won (*Meadow v General Medical Council* [2006] EWHC 146 (Admin)). The GMC appealed to the Court of Appeal, which ruled that even though Meadows' standards fell short of what is required of expert witnesses, they did not amount to serious professional misconduct and that the High Court was right to reinstate him (Williams 2010). The Court, as mentioned above, nevertheless made it clear that expert witnesses could now be subjected to disciplinary proceedings by their professional bodies and be sanctioned accordingly if necessary (Mitchell 2007).

Of course this only applies to expert witnesses who are regulated by professional bodies such as the GMC. It is, therefore, important to note who regulates forensic scientists to assess the level of scrutiny applied to the quality and delivery of service, and the powers available to this regulator, compared with the regulators of other professional bodies. Forensic scientists are subjected to the National Forensic Framework - Next Generation (NFFNG) requirements. They are regulated by the Forensic Science Regulator, which maintains scientific standards for forensic services throughout the criminal justice system and the competence of individual forensic scientists after the Council for Registration of Forensic Practitioners (CRFP) closed down in 2009 (Junor 2011; Science and Technology Committee 2013). This is supported by the Forensic Science Advisory Council, which monitors the compliance of quality by forensic service providers and the United Kingdom Accreditation Service (UKAS), which has the power to remove the accreditation from forensic providers and ensures that forensic practice by practitioners meets the ISO17025 accreditation standards (Science and Technology Committee 2013). Furthermore, in 2012 the quality accreditation was extended to include forensic practice at a crime scene with the introduction of ISO17020 (Science and Technology Committee 2013). Forensic scientists can therefore already be subjected to disciplinary proceedings for the role they play as expert witnesses.

The decision in *Jones v Kaney* was in part a reflection of the need for a wrong to be remedied, which was what happened in the *Meadow v General Medical Council* case. The latter undoubtedly influenced, at least to a certain extent, the decision made by the Supreme Court. If immunity is no longer enjoyed from disciplinary proceedings, it may have seemed logical to the Supreme Court to remove it from civil proceedings as well (Mitchell 2007; Dellen 2011).

3. Impact on forensic scientists

It is important to highlight that the Supreme Court's ruling does not apply to lay witnesses. They still enjoy immunity from civil proceedings (Gordon 2012; Legal News 2011). The reason for this

continued immunity is because lay witnesses are not paid to be witnesses. As such, they still need protection to enable them to give evidence in a free and honest manner (Shapiro 2011). The ruling only applies to expert witnesses and forensic scientists alike, because they are paid by their clients to perform their duty in giving evidence, whether written or oral. However, both lay and expert witnesses are still protected from defamation in civil and criminal proceedings (Pattenden 2011).

The Supreme Court's ruling is already expected to make a noticeable impact on forensic scientists. They are now liable for any work they undertake for their clients in civil cases, whether written or oral (Carr and Evans 2006; The Forensic Science Society 2011). This can be a positive development. Initial/preparatory evidence that is prepared for the client could be of a higher standard and higher degree of accuracy and it will ensure expert witnesses are confident and careful with the opinions they express and the evidence they submit to the court (Shapiro 2011; Levin and Whitham 2012; Lord Collins in *Jones v Kaney* para 85-86). This ruling could also deter the more inexperienced experts from becoming expert witnesses, which could then encourage more experienced experts to fill the void (Beale and Company 2011). This could bring much more wealth and experience to the role of a forensic scientist, because most experienced experts are competent and knowledgeable enough to carry out this role (Beale and Company 2011). In addition, every forensic scientist attending court and/or giving evidence for a client must now have professional indemnity insurance to protect themselves against suit from their clients (Solan 2013; The Forensic Science Society 2011). This was not necessarily required before the ruling was made, since expert witnesses were immune from being sued. Professionals who did have insurance could see the cost of this insurance increase as a result of this ruling (Ross 2013).

A potentially negative aspect of this ruling is national differences. While the rule applies to England and Wales it does not apply to Scotland which still retains immunity. This could give rise to inconsistencies in the amount of protection/immunity that expert witnesses have in different parts of the United Kingdom (Gordon 2012). This could lead to confusion and cases of a similar nature reaching different judgements where a claimant is trying to sue their expert. More importantly, it could lead to more expert witnesses wanting to testify for a client in Scotland rather than in England and Wales (Rennie et al. 2012). This ruling could also make expert witnesses reluctant to testify in court for fear of being sued for giving evidence which later turns out to be incorrect and, not only this, but being sued by multiple clients for past cases they have dealt with (UK Register of Expert Witnesses 2011). In addition, whilst it is clear that this ruling applies to breach of duty or negligence arising from civil proceedings, there have been no relevant cases brought since 2012, which may give

an indication if this also applies in criminal proceedings (Choong and Barrett 2014), where the majority of forensic scientists' work takes place.

In the past there have been injustices in criminal proceedings where experts' evidence has led to the conviction and imprisonment of innocent people; one example being the 'Birmingham Six', where six people (Patrick Hill, Richard McIlkenny, Johnny Walker, Billy Power, Gerry Hunter and Hughie Callaghan) were convicted of murder in 1974 for the bombings of two pubs in Birmingham. They spent seventeen years in prison before they were subsequently found not guilty in 1991 (Walker and Starmer 1999). It was found that the scientist in this case (Dr Skuse) could have contaminated the samples because his own hands tested positive for explosive substances and the scientist did not rule out other possibilities for the positive results that were given. The source of nitroglycerine which was discovered could have also come from nitrile contamination used in the soap that he cleaned the porcelain bowls subsequently used in the test (Dennis 1993; Edmond 2002). Because other substances can give the same positive results, this made the scientist negligent and careless in his duties for not considering other possible sources of nitroglycerine (Edmond 2002). Another case, known as the Maguire Seven, was similar to the Birmingham Six case, in that the forensic evidence was based on nitroglycerine that was found on six of the accused's hands and swabs taken from under their fingernails, but their convictions were solely based on this evidence. It was not disclosed to the defence that other materials could have caused the positive results (McKeone 1990). These convictions were eventually overruled but the experts could not be convicted for negligence at the time.

If the *Jones v Kaney* ruling had been in place back then, the experts could have been sued for negligence or incompetence considering the lack of transparency and impartiality in regards to the test results and that the tests used to conduct the evidence were seriously flawed, discredited and potentially contaminated. However, since the law is now changed for civil proceedings, it could only be a matter of time before the same is clearly acknowledged for criminal proceedings (Nyambo 2012).

4. Conclusion

There is no doubt that the Supreme Court's ruling in *Jones v Kaney* has rocked the foundations of a law which had been in place for more than 400 years. It has now been more than three years since this judgement was passed and its impact within the forensic field and the wider expert witness community is still to be fully realised. Of particular significance is the question of whether the loss of

immunity also relates to experts' work in criminal proceedings. Is this only a matter of time? This work has attempted to critically analyse and highlight a number of the potential impacts which continue to have ramifications today and will have for years to come.

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