

Lord Kerr at the Expert Witness Institute AGM

Reflections on *Jones v Kaney*

18 June 2014

I had the good fortune to meet Sir Michael Davies, the founding chairman of this estimable institute but, sadly only once. He and I sat beside each other during the service that is held in Westminster Abbey to mark the beginning of the new legal year. It must have been 2004. He entertained me throughout the period before the service began (and, if I am honest, during parts of the service itself) with a fund of amusing and witty anecdotes and was enormously friendly. He told me that he had been coming to the service for nigh on fifty years and, in all that time, it had never rained on the procession of the judges. As we left the Abbey, fat raindrops quickly led to a torrential downpour. I would not have blamed Sir Michael if he had felt that I had put a hex on his record but he merely remarked, “I see you have kindly brought the Irish weather with you”.

Now your current chairman, I know well. He was kind enough to write to me about a dissenting judgment that I had written about someone who was convicted of murder even though he had not fired the fatal shot but had been engaged in an exchange of fire with the person whose bullet caused the death. Tony summed it up much better than I had been able to by saying, “I am yet to be convinced that, having lost a duel so badly that I never even fired my gun and having just survived thanks to the skills of the surgeon, I could be

convicted of my own attempted murder whether as a principal (causing my own attempted murder!) or as an accomplice.”

His way with words, of course, is the reason that I find myself here this evening. He invited me to allow my name to be associated with the institute, assuring me that I would merely have to attend the occasional meeting and that no great effort on my part would be required. Suddenly, however, I found that I had agreed to give a lecture on *Jones v Kaney*¹, a case which, I hazard, is about as controversial as one could imagine for an audience that includes expert witnesses. I am still not quite sure how this came about but I am quite certain that it has more than a little to do with the seductive skills of your chairman.

I should start by saying something about the facts of the case, although I am sure that many of you will be familiar with it in detail. Mr Jones had been struck by a car in March 2001. This caused him, on his own account certainly, considerable physical and psychiatric injury. His solicitors instructed Dr Kaney, a clinical psychologist, to prepare a report on Mr Jones’ psychological condition for use in court. She reported that he was suffering from post-traumatic stress disorder. In the ensuing litigation, the defendant admitted liability; so the only question was how much damages Mr Jones ought to get. He was examined by the defendant’s own psychiatric expert, who considered him to be exaggerating his symptoms. The judge ordered that expert and Dr

1. [2011] UKSC 13.

Kaney to prepare a joint statement. That statement recorded (apparently wrongly) that Dr Kaney had agreed that the appellant had not, after all, suffered PTSD. It also recorded that she had found his account of his symptoms to be deceitful. That rather pulled the rug out from under Mr Jones' feet, and he settled at a much lower figure than he might have otherwise have expected to be awarded.

The case that we in the Supreme Court heard was his appeal against the High Court's dismissal of his action against Dr Kaney for negligence. The dismissal of that action had been mandated by an earlier Court of Appeal decision in the case of *Stanton v Callaghan*², which made expert witnesses immune from suit for breach of duty in relation to the evidence they gave in court or for the views they expressed in anticipation of court proceedings.

We allowed the appeal by a majority of five to two. Four of my colleagues and I held that the starting point was the principle that every legal wrong demanded a remedy. Any exception to that rule had to be justified as being necessary in the public interest. Since no good justification was advanced, it followed fairly straightforwardly that the immunity should be lifted. Two of my colleagues, the then Deputy President, Lord Hope, and his successor to that post, Lady Hale, dissented. They took the view that the departure that had to be justified was in fact the departure from the, as they

2. [2000] QB 75.

saw it, long-established principle that expert witnesses enjoyed the immunity in question.

I should like to speak first about this dichotomy, which may be said to underpin the principle of *Jones v Kaney*. I should then like to say something more briefly about another, which speaks to the practical implications of the judgment: namely, the difference between the court's power to enforce experts' duties towards it, and that of an expert's client to enforce the expert's duty towards his or herself.

The proper starting point

The two possible starting points, which I have outlined above, were very neatly put by Lord Dyson at [108–9]:

There are two possible views as to the correct starting point for a consideration of the question whether experts should have immunity. The first is that there is a general rule that every wrong should have a remedy and that any exception to this rule must be justified as being necessary in the public interest.

The second is that there is a different general rule, which is long established and founded on grounds of public policy, that witnesses may not be sued for anything said in court and that, if there is to be an exception to that rule, it too must be justified in the public interest. This is Lord Hope's approach. He acknowledges that the general rule that where there is a wrong there should be a remedy is a valuable guide in the right context. But he says that this rule cannot prevail in the present context because it runs contrary to long

established authority. In other words, the existence of a long established exclusionary rule is itself a sufficient reason for holding that it is necessary to deny a remedy to those who have suffered a wrong.

Lord Dyson and Lord Phillips went on to advance sound reasons for preferring the former of these starting points. But I should like to start by identifying another beyond those which they outlined and which, I have to confess, I did not articulate in my judgment. That further point is this: if one adopts the second starting point, that preferred by Lord Hope and Lady Hale, it involves the long-standing common law principle that every wrong deserves a remedy yielding to the other, avowedly long-standing common law rule of expert witness immunity. The impasse is immediately apparent. If two tenets of the common law conflict with each other, it is hardly satisfactory for a Supreme Court to say that the more concrete one, or the older one, must always prevail. Rather, we must surely have to look to the substance of the conflicting requirements and decide which in principle results in a more sensible result, which may or may not be the one that is in greater harmony with the rest of the law. Or, as Lord Dyson put it more pithily, ‘The mere fact that the immunity is long-established is not a sufficient reason for blessing it with eternal life.’³

As it happens, however, it was unnecessary to rely on that argument because it was clear that an expert witness’s litigation immunity was *not* a

3. [112].

hallowed monument of the common law at all. Lord Dyson dealt with this at paras 110 and 111:

[U]pon close examination the rule that an expert witness retained for reward is immune from liability is not long established. ... [T]he fact that there was a long standing rule that all who participated in a trial enjoyed absolute privilege was not because they did not owe a duty of care to those who might be adversely affected by what they said at the trial. As Lord Phillips points out, this rule was established long before the modern law of negligence and, in particular, long before liability for negligent misstatement was first recognised. There is no long established rule that witnesses are immune from liability to their clients in respect of what they say at trial and in connection with litigation. ... the distinct position of such witnesses does not seem to have received the attention of the courts until the *Palmer* case [1992] QB 483. It is true that the *Palmer* case has been approved on a few occasions, but in so far as the rule has been applied in relation to the liability of expert witnesses to their clients, it has shallow roots.⁴

The majority was therefore left to ask what justification, if any, there was for upholding this immunity for experts. I shall turn to the particular reasons we had for finding none in a moment, as I imagine that some of you may still need some convincing. But I should like to pause for a moment to reflect on the import of the approach that I, like Lord Dyson and others, took.

Stated baldly, the import of our approach was that every rule of the common law which departs from fundamental principle must be capable of justification as rational and necessary. Furthermore, the fact that it was found

4. [110–111].

to be justified in the past does not establish its immunity in perpetuity. It must be open to challenge and must be able to withstand attack at any time, however longstanding it may be. As I put it, a court ‘should not be deflected from conducting a clear-sighted, contemporary examination of the justification for’ preserving the rule in question. That may be startling, but I shall say at once that there is a major qualification to it and that is that, at least in my own view, this applies only to rules that conflict with principles which are so important that they are effectively pillars of the common law.

Examples of such fundamental principles are that contracts are in general to be upheld or that justice must not be done in secret. The availability of a remedy for a legal wrong is one such fundamental principle. Lord Dyson described the concurrence of wrong and remedy as ‘cornerstone of any system of justice’, while I described it as ‘the unalterable backdrop against which the claim to immunity must be made’.

It is, I think, interesting to see how the principle that a legal wrong must have a concomitant remedy has been deployed in a different context. Last year a case from the Cayman Islands came before us in the Judicial Committee of the Privy Council, *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17. We were invited to apply the principle that every wrong demands a remedy to a case where the courts below had held that they were bound by unequivocal earlier decisions of courts including the House of Lords that the tort of malicious prosecution did

not apply to civil proceedings. In that case the appellants were a chartered surveyor called Alan Paterson and two companies which he ran. Sagicor was an insurance company and they appointed Mr Paterson and his firm to act as loss adjusters in valuing a claim made by the proprietors of a residential development on Grand Cayman. The development had been extensively damaged in Hurricane Ivan in September 2004. Staged payments were made to builders for repair work. These were made on the recommendation of Mr Paterson. In the course of the repairs a new senior vice president was appointed to the insurance company and he became convinced that Mr Paterson had fraudulently authorized payments that were not due to the builders. There was absolutely no foundation for that belief.

Notwithstanding this, the senior vice president set out to ruin Mr Paterson. He caused proceedings alleging fraud to be issued against him and he saw to it that very damaging articles appeared in the local press about the proceedings. Mr Paterson suffered massive losses. The judge found that these amounted to something in excess of 1.3m Cayman dollars. It was established that the action had been taken against Mr Paterson for the wholly improper motive of trying to destroy him but the courts below felt that their hands were tied because of the strength of the authority that one could not recover compensation for malicious prosecution of civil proceedings. By a majority of 3-2 we found that the principle that every legal wrong should have a remedy must come to Mr Paterson's aid and the old rule that there was

no tortious liability for maliciously prosecuting civil proceedings should be swept away.

What these cases (*Jones* and *Crawford*) illustrate is that the potential breadth of the principle that a legal wrong should have a remedy is capable of giving rise to all sorts of claim that previously would not have been possible.

I am inclined to be relaxed about that, but I do recognize that judges may not always have the resources to determine the consequences of tidying away all the irrational bits of the common law. And strong arguments were presented to us, particularly in the Cayman Island case that the possible implications of our decision had not been sufficiently appreciated. One can readily acknowledge that, at times, what looks to be irrational on its face may be thought on reflection to be worth keeping if the consequences of removing it would be dire; many business arrangements, in particular, may have been made on the basis that the law is settled in a particular way, and an unexpected alteration of that may prove very costly to a lot of people.

Lady Hale's analysis in the *Crawford* case is therefore very instructive. Lady Hale was of course a former member of the Law Commission, and therefore has a great deal of insight into the process of legislative change. Despite being in the minority in *Jones v Kaney*, she was, like me, in the majority in *Crawford*, and explained why she reached a different outcome in that case at [83]–[84]:

This Board can research the existing state of the law in this country (which will apply in the Cayman Islands unless there is some local legislation to the contrary). It can research the law in some comparable common law jurisdictions, but by no means all. But it does not have the resources to research and develop the policy arguments, conduct empirical research and consult the legal and general public on possible ways forward. It was for those reasons that I did not support the abandonment of the long-established principle of witness immunity in order to impose a duty of care on certain professional witnesses in *Jones v Kaney*.

But that was a case where there was (and remains) a clearly established immunity which the court was being invited to curtail. The majority felt able to take that radical step in the light of modern developments in the law and in pursuit of the first rule of public policy. They also felt that the judiciary were particularly well suited to develop the law relating to their own proceedings. This too is a case which is particularly well suited for judicial development: it is about the use and misuse of judicial proceedings; the law is entirely judge-made; and some would say that it is in a judge-made mess. If so, the judges should do what they can to sort it out. It is unfair to expect Parliament to do so.

I would endorse this analysis of the proper scope for judicial titivation, although I respectfully disagree with Lady Hale that *Jones v Kaney* was not of a piece with *Crawford* in this respect. Indeed, not only was the immunity of expert witnesses a ‘judge-made mess’, but a very recently created one that was best mopped up before it set in too deep.

Moreover, there was in fact a great deal of evidence of how the removal of expert witness immunity operated in practice: as Lord Collins noted, it had

already happened in many jurisdictions of the United States, namely California, Missouri, Pennsylvania, Connecticut, Massachusetts, and Louisiana. In those jurisdictions, the following rationales had been found to hold good:

The reality is that an expert retained by one party is not an unbiased witness, and the threat of liability for negligence may encourage more careful and reliable evaluation of the case by the expert. Consequently, the threat of liability will not encourage experts to take extreme views. The client who retains a professional expert for court-related work should not be in a worse position than other clients. The practical tools of litigation, including the oath, cross-examination, and the threat of perjury limit any concern about an expert altering his or her opinion because of potential liability. The risk of collateral litigation is exaggerated. There is no basis for suggesting that experts will be discouraged from testifying if immunity were removed—most are professional people who are insured or can obtain insurance readily, and those who are not insured can limit their liability by contract. See, for a critical analysis, Jurs, *The Rationale for Expert Immunity or Liability Exposure and Case Law since Briscoe: Reasserting Immunity Protection for Friendly Expert Witnesses* (2007–2008) 38 U Mem LR 49.

This comparative material confirmed the analysis of Lord Phillips, who gave the leading judgment for the majority. He carefully identified each of the factors that was said to justify retention of the immunity, and explained why none of them held. At the risk of boring those of you who have read the judgment in detail, I propose to summarize that analysis here.

The first justification was that expert witnesses might prove reluctant to testify if the immunity were removed. The short answer to this was that there was no evidence, or even explanation, of why ‘the risk of being sued in relation to forensic services [should] constitute a greater disincentive to the provision of such services than does the risk of being sued in relation to any other form of professional service’.

Next, Lord Phillips asked, ‘Is immunity necessary to ensure that expert witnesses give full and frank evidence to the court?’ There was no empirical evidence one way or the other so far as expert witnesses were concerned. But there was of course a great deal of insight to be had in the analogous position of barristers, whose own immunity from suit had already been lifted:

It was always believed that it was necessary that barristers should be immune from suit in order to ensure that they were not inhibited from performing their duty to the court. Yet removal of their immunity has not in my experience resulted in any diminution of the advocate's readiness to perform that duty. It would be quite wrong to perpetuate the immunity of expert witnesses out of mere conjecture that they will be reluctant to perform their duty to the court if they are not immune from suit for breach of duty.

Consequently, Lord Phillips concluded that it was ‘paradoxical to postulate that in order to persuade an expert to perform the duty that he has undertaken to his client it is necessary to give him immunity from liability for breach of that duty.’

In my own judgment I observed that this purported justification, that experts could only be persuaded to perform their duty if they were immune from liability for breach of it, had been doing the rounds since litigation immunities first appeared. It had been given a ‘modern twist’ in *Jones v Kaney* by the suggestion that not only would witnesses be deterred from giving evidence but that those who testified would be inclined to tailor their evidence to guard against the risk of being sued. Both these consequences were claimed to be the product of fear that would descend on potential witnesses faced with the daunting prospect of adverse litigation.

The rather incongruous outcome of this process of reasoning was that although initially an expert could be expected to be sanguine about the prospect of suit when giving preliminary advice, he would be overcome by fear and apprehension as the date for trial approached. It would also lead to the paradox articulated by Lord Phillips in para 42 of his judgment to the effect that a more convincing case for an immunity could be made, not at the stage of giving evidence, but at the earlier stage when advice that may subsequently prove inconvenient may have been given.

Next there was the issue whether expert witnesses might be harassed by vexatious claims for breach of duty. There was no evidence that barristers, from whom immunity had been removed some years earlier, had suffered from this problem. And the nature of a claim against an expert meant that the contingency was still remoter in these circumstances:

Where, however, a litigant is disaffected because a diligent expert has made concessions that have damaged his case, how is he to get a claim against that expert off the ground? It will not be viable without the support of another expert. Is the rare litigant who has the resources to fund such a claim going to throw money away on proceedings that he will be advised are without merit? The litigant without resources will be unlikely to succeed in persuading lawyers to act on a conditional fee basis. A litigant in person who seeks to bring such a claim without professional support will be unable to plead a coherent case and will be susceptible to a strike out application. For these reasons I doubt whether removal of expert witness immunity will lead to a proliferation of vexatious claims.

Moreover, any such claim by a person who had been criminally convicted would be struck out as an abuse of process unless he or she had already been successful in having that conviction overturned on appeal.

I should like to add a final brief thought in this regard. *Jones v Kaney* did not address the standard of care that ought to apply. That is, should the expert be held to the ordinary standard of negligence, or should there be some higher threshold before liability bites, such as (as is, crudely expressed, the case in clinical negligence) that no reasonable expert would have acted as the defendant expert did? While for obvious reasons I could not express a concluded view, I can see the attraction of the latter from the perspective of discouraging vexatious claims against experts, but on balance am inclined to think, first, that the experience of clinical negligence cases suggests that there is little correlation between the standard of care and the likelihood of a claim's being brought; and, secondly, that the question is best answered by

reference to the overarching theme of *Jones v Kaney*, that every departure from ordinary principles demands cogent justification.

An expert's duties to the client and to the court

All of you will be familiar with the duties that you owe both to your clients and to the court. So I shall not rehearse those here, but instead come straight to the neat analysis of the relationship between them that Lord Dyson gave at [99]:

There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Thus the discharge of the duty to the court cannot be a breach of duty to the client. If the expert gives an independent and unbiased opinion which is within the range of reasonable expert opinions, he will have discharged his duty both to the court and his client. If, however, he gives an independent and unbiased opinion which is outside the range of reasonable expert opinions, he will not be in breach of his duty to the court, because he will have provided independent and unbiased assistance to the court. But he will be in breach of the duty owed to his client.

The pressing question is whether this analysis will be borne out in reality. After all, experts and their clients do not approach each case with an omniscience about whether the opinion is in the final analysis within the range of reasonable expert opinions; it is the possibility of being sued by

one's client that is alleged to have a chilling effect. And, while I maintain that such a chilling effect was not at all evident from the evidence before us in *Jones v Kaney*, the danger is not that experts will be dissuaded from testifying but that the strengthened ability of their clients to seek redress against them will encourage them, insidiously and perhaps even unconsciously, to prefer a course that even more than before favours the side for which they are hired.

The timing of this lecture compels me to say that I am not endorsing the content of the recent Panorama investigation by the BBC into certain dishonest expert witnesses. If anything, I was heartened that the documentary makers were able to find so few dishonest witnesses to fill their half-hour. But it does highlight the difficulty, from a court's point of view, of how to deal with witnesses who have an economic interest in the presentation of a case one way or another.

The problem is that this strengthening of the client's hand has not been accompanied by a countervailing strengthening of the courts' ability to enforce experts' duties towards them. Those powers are drastic when they need to be—none of you would ever wish to be convicted of perjury—but they are rarely deployed. Perhaps they are so rarely deployed that witnesses do not fear them quite as much as they ought to. And short of such sanctions courts arguably do not have good mechanisms for promoting compliance with experts' duties to the court in more minor ways.

To reprise another theme of *Jones v Kaney*, there may be something to be gained from looking once more across the Atlantic. Judge Richard Posner, an eminent scholar of law and economics as well as a federal judge, has suggested certain ways of improving the accountability of experts. Though he was writing specifically in the context of economic expert witnesses⁵, Judge Posner's suggestions seem to me to be applicable to expert witnesses in all fields:

First, to make judicial criticism a more effective method of bringing reputation costs to bear on the errant expert, the American Economic Association (or a for-profit firm that marketed the information to law firms) should maintain a roster of all testimonial appearances by members of the association. The roster could contain an abstract of the member's testimony (or, if the roster took the form of a web page on the World Wide Web, the entire testimony) and would also record any criticisms of the testimony by the judge or by the lawyers or experts on the other side of the lawsuit. Then, the profession could monitor its members' adherence to high standards of probity and care in their testimonial activities.

It may be objected that this project is to one side of the AEA's main mission, which is to support economic research and teaching. But the AEA purports to represent the economics profession as a whole; many of its members are not academics; shoddy economic testimony can impair the reputation of the profession as a whole; and to the extent that testifying diverts economists from research and teaching, and may even distort those activities, the maintenance of high

5. 'The Law and Economics of Expert Witnesses', 13(2) *Journal of Economic Perspectives* 91-99 (1999).

standards in economic testifying supports the research and teaching functions.

Second, lawyers who call an economic expert as a witness should be required to disclose the name of all the economists whom they contacted as possible witnesses. This will alert the jury to the problem of "witness shopping." Suppose that the lawyer for the plaintiff hired the first economist whom he interviewed and the lawyer for the defendant hired the 20th economist whom she interviewed. The inference is that the defendant's economic case is weaker than the plaintiff's. The parallel is to conducting 20 statistical tests of a hypothesis and reporting, as significant at the 5 percent level, the only one that supported the hypothesis.

While I have my doubts that the second suggestion is altogether practicable, I think that there may be something in the first. The jurisdictions of the United Kingdom are collectively still small enough that a roster of experts could be maintained along these lines. And I dare to hope that such a system might even prove attractive to experts themselves, since enhanced transparency of this sort is likely to help them assert their overriding duty to the court when faced with the demanding clients that I am sure many of you have had to face.

But all of that takes me much deeper into the territory of your experiences than mine, I shall conclude there and thank you for your forbearance.