

## EXPERTS CAN BE NEGLIGENT: WHAT DOES IT MEAN FOR YOU?

by

**Nigel Jones QC, Hardwicke**  
**Amanda Tipples QC, Maitland Chambers**

**Nigel Jones QC** is a commercial trial lawyer and adviser recommended as a leading silk in his four areas of specialist practice: Commercial Litigation, Insurance & Reinsurance, Construction, and Commercial Professional Negligence described as “a class act with a finely honed strategic mind noted for his vast intelligence and experience” (Chambers & Partners) and “refreshingly in tune with business life” whose “bedside manner wins clients over instantly” (Legal 500).

He has often appeared in one or more of The lawyer’s Top Ten cases of the year and counts among his clients some of the country’s leading and specialist solicitors, banks and lenders, insurance companies and Lloyds’ syndicates, utility and energy companies, construction and property companies and national housebuilders, listed companies, national and international franchise companies, local authorities, national and international businessmen and high-profile sportsmen. He is a class/group action specialist, an experienced mediation advocate and also acts as a commercial arbitrator and mediator.

Key sector/subject specialisations include utilities & energy, franchising & commercial agents, insurance, solicitors, joint ventures, arbitration, commercial fraud, property development, construction, banking and professional indemnity. He is regularly instructed in high value and complex work, much of which remains below public radar.

He is a member of Hardwicke and his full CV can be found at [www.hardwicke.co.uk](http://www.hardwicke.co.uk).

**Amanda Tipples QC** is experienced in general chancery and commercial litigation, in particular real property and landlord and tenant, traditional chancery, partnership, insolvency and corporate recovery, charities, VAT and Duties and confiscation proceedings. She has extensive court and specialist tribunal advocacy experience. Her cases are often complex and of high value, and sometimes involve an international element. Amanda has appeared in a wide range of reported cases over the years.

Before taking silk, Amanda was one of the Junior Counsel to the Crown (appointed to undertake civil advocacy and advisory work for government departments) for over eight years and, from January 2006, was on the A Panel, the most senior of the three panels of Junior Counsel to the Crown.

In 2011 edition of Chambers UK Amanda is recommended in Partnership, Real Estate Litigation and Chancery: Treasury Counsel. In the 2010 edition of Legal 500 Amanda is recommended in Company & Partnership and Property Litigation. In the directories Amanda is described as “staggeringly effective when in court”, “hugely well-regarded”, “conscientious and thorough in all she does”, “detail-orientated”, “bright and determined” and a “committed advocate”. She is also a “strategic thinker”, “fantastic for insolvency-related property disputes” and “a lawyer who gets stuck in and argues her case with real conviction”.

Amanda is a Recorder (Crown Court). Amanda also acts as an arbitrator and as a mediator. She is a member of Maitland Chambers and her full CV can be found at: <http://www.maitlandchambers.com/barristers/>.

## **IMMUNITY FROM SUIT IN RELATION TO COURT PROCEEDINGS: BACKGROUND**

1. It is well established that certain persons involved in litigation enjoy immunity from suit on the grounds of public interest.
2. Immunity from suit serves to protect the judicial process by freeing those involved from undue pressure and preventing re-litigation.

### **(a) Witnesses of fact**

3. Nature: When a witness of fact comes to court to give evidence he has the benefit of an absolute immunity from suit. He cannot be sued for anything written or spoken in the course of the proceedings. That rule has been established for centuries.
4. Extent: The immunity is limited to statements in court or to a statement which is part of the preparation of evidence for court proceedings.
5. Reason: However “Immunity is a derogation from a person’s right of access to the Court which requires to be justified”: Darker v Chief Constable of West Midlands [2001] 1 AC 435, HL at 446D, per Lord Hope of Craighead.
6. The reason why witnesses of fact are immune from suit is grounded in public policy:
  - (1) To protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims.
  - (2) To encourage honest and well meaning persons to assist justice; in the interest of establishing the truth and to secure that justice may be done.
  - (3) To secure that the witness will speak freely and fearlessly.
  - (4) To avoid multiplicity of actions in which the value or truth of the evidence of a witness would be tried all over again.

(see Darker v Chief Constable of the West Midlands Police [2001] 1 AC 435, HL summarised in Jones v Kaney [2011] 2 WLR 823, HL at 819F-830B).

**(b) Advocates**

7. Until July 2000 advocates were immune from suit in respect of work done in court and to limited category of pre-trial work: Rondel v Worsley [1969] 1 AC 191, HL; Saif Ali v Sydney Mitchell & Co [1980] AC 198, HL. The decision in Arthur J Hall & Co v Simons [2002] 1 AC 615, HL removed that immunity entirely.
8. However, advocates should continue to enjoy immunity from suit in respect of any action brought against them on the ground that things said or done in proceedings were said or done maliciously: see Darker *supra*.

**(c) Expert witnesses: Prior to March 2011**

9. It is interesting to note that the first reported case in which immunity was invoked against a claim for breach of duty of care brought against a professional expert witness by his client was relatively recent: Palmer v Durnford Ford [1992] QB 483, Mr Simon Tuckey QC.
10. In Stanton v Callaghan [1999] PNLR 116 the Court of Appeal held that an expert witness was immune both in respect of his evidence at trial and in respect of the contents of his report prepared for exchange, but not for advice given as to the merits of his client's claim.
11. That was the position until March this year when the Supreme Court gave judgment in Jones v Kaney [2011] 2 WLR 823, HL. That was an appeal against a decision of Blake J which, given the decision in Stanton v Callaghan, was allowed to proceed direct (or leapfrog) to the Supreme Court.

## JONES v KANEY [2011] 2 WLR SC, 823

### (a) The brief facts

12. The claimant, Paul Jones, suffered physical and psychiatric injuries in a road traffic accident and instructed the Defendant, Dr Kaney, a clinical psychologist to examine him and prepare a report for the purposes of personal injury proceedings. Dr Kaney concluded in her report that Mr Jones was suffering from post-traumatic stress disorder. Proceedings were issued and liability was admitted, although quantum remained in issue. The opposing expert expressed the view that Mr Jones was exaggerating his physical symptoms. The District Judge ordered the experts on both sides to prepare a joint statement.
13. The experts had a telephone discussion and the opposing expert then prepared a draft statement, which Dr Kaney signed, to the effect that Mr Jones, who was said to be deceptive and deceitful, did not have any psychiatric order. Dr Kaney was questioned by Mr Jones' solicitors about the discrepancy between the joint statement and her earlier assessment, and why her opinion had changed so radically. Dr Kaney's answers provided an "unhappy picture" (the view of Blake J at first instance) of how the joint statement had come about. In particular, Dr Kaney had not read the other side's expert report before participating in the joint meeting, she let the other side's representatives draft the statement, and she then signed it because she felt "pressurised to do so" even though it did not represent her views. The agreed facts were, of course, unusual in that Dr Kaney had admitted putting her signature to a joint report that did not express her views.
14. Mr Jones applied to change his psychiatric expert, but that application was refused by the District Judge. Mr Jones then settled his claim.
15. Mr Jones then brought proceedings in negligence against Dr Kaney, claiming that he had settled for significantly less than he would have achieved if Dr Kaney had not signed the joint statement in the terms in which she did. Dr Kaney applied for the claim to be struck out on the basis that she enjoyed immunity from suit as an expert

witness. The claim was struck out, but Mr Jones was given permission to appeal to the House of Lords.

## **(b) The decision**

16. Mr Jones' appeal was allowed. The Supreme Court decided (by a majority of 5 to 2) to abolish expert witnesses' immunity from suit for breach of duty in relation to their participation in legal proceedings.

17. This is because the general rule is that every wrong should have a remedy and any exception to that rule has to be justified as being necessary in the public interest and should be kept under review. There was no justification for continuing to hold that expert witnesses should be immune from suit for breach of duty in relation to the evidence which they give in court or for the views which they express in anticipation of court proceedings.

18. The onus was on Dr Kaney to justify "fairly and squarely" the immunity behind which she sought to shelter. She argued that removal of the immunity, and the introduction of potential liability, would:

(1) Make expert witnesses more reluctant to provide their services at all (837B). The Supreme Court held that this point was not made out (and there was no evidence before the Court to support it; cf 841C-D). Lord Phillips, for example, said he could not see any justification for it because "all who provide professional services which involve a duty of care are at risk of being sued for breach of that duty. The customarily insure against that risk" (840F-G).

(2) Deter an expert witness from giving full and frank evidence in accordance with his duty to the court when this conflicted with the interests of his client (837D and 838D-E). Counsel for Dr Kaney argued that this risk had become more significant since the Civil Procedure Rules 1998, on the basis that CPR Part 35 emphasised the paramount importance of the duty of an expert to give frank and objective advice to the Court (837D-E). This was Dr Kaney's main point to

support the immunity. However, that argument was also rejected. Lord Phillips, in particular, said that:

- (a) There is no conflict between the duty that the expert owes to his client and the duty that he owes to the court (839H). This is because CPR Part 35.3 “states that it is the duty of experts to help the court with matters within their expertise and that this duty overrides any obligation to the person from whom the experts have received their instructions or by whom they are paid” (839A).
  - (b) This point was not made out as “an expert will be well aware of his duty to the court and that if he frankly accepts that he has changed his view it will be apparent that he is performing that duty. I do not see why he should be concerned that this will result in his being sued for breach of that duty” (842A-G).
  - (c) 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” (842C).
- (3) Expose expert witnesses to vexatious claims. The Supreme Court did not perceive this to be a real problem. Lord Phillips said that “I doubt whether removal of expert witness immunity will lead to a proliferation of vexatious claims. I am not aware that since Arthur J S Hall & Co v Simons [2002] 1 AC 615 barristers have experienced a flood of such claims from disappointed litigants” (842G-H).
- (4) It would lead to multiplicity of suits. That point was also rejected (see, for example, Lord Phillips at 842H-843B)

19. The Supreme Court’s decision is perhaps not as surprising given that:

- (1) Expert witnesses do not have any immunity against disciplinary proceedings before professional tribunals where fitness to practice is an issue: Meadow v General Medical Council [2007] QB 462, CA. The potential effects of this are, of course, more serious than the effects of civil proceedings by a dissatisfied client.

(2) This is because an expert may lose his livelihood and entire reputation as a result of an adverse ruling by a professional disciplinary body.

(3) Expert witnesses can be liable to wasted costs orders: Phillips v Symes (No. 2) [2005] 1 WLR 2043, Smith Peter J.

**(c) Practical points to note from the decision itself**

20. Which experts can be sued: The decision applies to an expert witness who has been instructed, and paid by a party to litigation for his expertise and permitted on that account to give opinion evidence in the dispute (a “friendly expert”). It does not permit a party to litigation to make a claim against the other side’s expert.

21. The decision does not apply, for example, to a professional expert such as treating doctor or forensic pathologist, either of whom may be called to give factual evidence in a case as well as being asked for their professional opinions upon it without their having being initially retained by either party to the dispute (per Lord Brown at 843E-F).

22. It is unclear whether the abolition of the immunity extends to single joint experts or to court appointed experts. Only Lord Hope and Baroness Hale dealt with this topic. They were in the minority and, in their judgments, drew attention to the difficulty there is in defining the experts to whom the abolition of the rule applies. In principle there is no reason why such experts should not be liable. The basis of potential liability is a duty of care arising out of a contract/retainer. In the case of a single joint expert there will be one contract with three parties; in the case of a court appointed expert there will similarly be one contract between the expert nominated by the court and the two parties with the court having the power to adjudicate on the terms if the parties cannot agree: we return to this point later. In each case the joint or court appointed expert will owe duties to the court and a duty of care to both parties. There is no reason in principle why a breach of that duty cannot result in a claim in appropriate circumstances.

23. Practical reality: The practical reality of the removal of immunity is to “ensure a greater degree of care in the preparation of the initial report or the joint report”. Lord Collins then observed that “it is almost certain to be one of those reports, rather than evidence in the witness box, which will be the focus of any attack, since it is very hard to envisage circumstances in which performance in the witness box could be the subject of even an arguable case” (at 848C-D).
24. Another consequence for experts will be that there will be a “sharpened awareness of the risks of pitching their initial views of the merits of their client’s case too high or too inflexibly lest these views come to expose and embarrass them at a later date” (per Lord Brown at 844B). Lord Brown thought that this was to be welcomed as a “healthy development in the approach of expert witnesses to their ultimate task (their sole rationale) of assisting the court to a fair outcome of the dispute (or, indeed, assisting the parties to a reasonable pre-trial settlement)” (at 844B-D).
25. Negligence by an expert will be rare: Cases in which an expert witness behaves in the “egregious manner” which was alleged in Jones v Kaney or otherwise causes loss by adopting or adhering to an opinion outside the permissible range of reasonable expert opinions is likely to be “rare” or “highly exceptional” (per Lord Brown at 844C-D; see also Lord Phillips at 842F-G). Rather, the great majority of expert witnesses are “trying to do a professional job and are well aware of their duties to the court” (per Baroness Hale at 877E; see Lord Dyson at 865D).
26. Property disputes: The Supreme Court was alert to experts operating in the field of property. For example, Baroness Hale (although dissenting), specially mentioned “proceedings between landlord and tenant in leasehold valuation, service charge, rent assessment and other such disputes” (at 875A-B).
27. What approach should the Courts take to a claim: The Courts are urged to “be alert to protect expert witnesses against specious claims by disappointed litigants not to mention to stamp vigorously upon any sort of attempt to pressurise experts to adopt or alter opinions other than those genuinely held” (per Lord Brown at 844D).

## **NEGLIGENT EXPERTS: WHAT SHOULD YOU DO?**

28. There are essentially two options: (1) sue your expert; or (2) seek to replace your expert.

29. We deal with each of these options in turn.

**SUING THE EXPERT****(a) Preliminary**

30. The first practical issue to consider occurs much earlier: establishing the terms of the appointment. Parties and their legal teams often devote insufficient care to establishing the basis and terms of appointment. Inevitably, emphasis has tended to focus on cost and on whether the solicitor or the client has the obligation to meet the bill. Prudently that should now change. Furthermore, there is often a lack of clarity as to when an expert is retained to provide his expert opinion and when he is retained to provide expert opinion to the court under the CPR on behalf of a party.

31. It must now be part of every legal team's brief to advise not only on the suitability of an expert in terms of experience and so on but also in terms of whether he is good for any damages in the event of negligence. Many experts are semi-retired professionals operating from home; many trade through small limited companies though they are likely to retain personal liability (at least in theory) if they sign an expert report or a joint statement. The following issues might need to be considered:

- (1) Is the retainer with the individual or a corporation of some kind (company or LLP)? Does the corporation or the individual have any assets from which to satisfy a judgment?
- (2) Does the corporation or the individual have the benefit of professional indemnity insurance and if so in what sum? Bear in mind that such cover is almost in every case going to be claims made cover and the existence of a policy upon appointment is no guarantee of continuing cover in following years of practice or of run-off cover after cessation of practice. Despite the confidence of the Supreme Court that an expert can insure against liability when acting as an expert, we have yet to see whether the insurance market agrees with that optimism and it is quite possible that many semi-retired professionals (especially those practicing alone) offering themselves as experts will find indemnity insurance harder to find at acceptable premiums. We may find that in large

cases experts offer their services at one rate with a clear exclusion of liability and at a higher rate without such an exclusion (see further below). Bear in mind also that the insurance needs to provide cover for the work undertaken by the professional in the capacity in which he is retained: this is unlikely to be an issue when the professional is retained to advise but it cannot be assumed that all professional indemnity policies will automatically cover activities as an expert witness.

(3) Exclusions of liability are likely to become more common. On the basis that freedom to contract is the starting point then in principle there can be no objection to such a course though experts and their insurers will be looking closely at the Unfair Contract Terms Act. A full analysis of that Act is outside the scope of this talk but we can envisage all sorts of arguments arising that may depend on the size of the pool of available experts and any difficulty in obtaining insurance cover (which can change from year to year as the insurance market develops). More difficult questions may arise here if the court is called upon to determine the terms of a court nominated expert.

(4) Might it be sensible to establish express terms for the standard of work expected of the expert?

32. Having located the expert it is necessary to define his terms of reference and the issues that he is required to investigate and on which he must express an opinion.

33. It is also worth mentioning here that if there is going to be a greater risk of later dispute between client and expert then legal teams need perhaps to be more pedantic about when an expert is acting as adviser and when he is acting as court expert. As we will consider below, while the “headline” test for breach may be the same (breach of duty to use reasonable care and skill) the application of that test to an expert acting in these two different categories is likely to be very different. Furthermore, once a case is underway it is commonplace for the expert to become a part of the forensic team: he is often present throughout pre- and post-court conferences and will be heavily engaged in evaluating factual evidence that impinges on expert issues and in providing assistance with cross-examination and

so on. In addition to that, they may be present while matters privileged to the client are discussed, weaknesses in the case explored and terms of settlement debated. These are matters of judgement for the lawyers in each case but it may be appropriate to exercise greater care about these matters if the removal of immunity might bring about a greater risk of later dispute.

**(b) Has he been negligent at all: what is the standard of care and has it been breached**

34. It is important to bear in mind that Jones v Kaney dealt with the principle of immunity and did not purport to lay down the more detailed principles of how any liability might be judged. Unfortunately the Supreme Court thought it necessary to address the normal “floodgates” arguments when considering the wisdom of removing the previous immunity. That has left a number of expressions (referred to earlier) such as “egregious”, “rare” and “highly exceptional”. It is possible that the use of the description “egregious” emanates from the Canadian courts which have held that litigants will only have a remedy against an expert who has committed an “egregious error”: De Marco v Ungaro (1979) 95 DLR (3d) 385.

35. However, it is submitted that while this language may assist subsequent courts to apply a test it is unhelpful for the purposes of establishing what the test may be. The basic test is surely straightforward: the parties have entered a contract under which the expert expressly or impliedly undertakes to use reasonable skill and care in and about the work he undertakes and that will involve his advice to the litigant, the investigations he advises are necessary for him to come to a concluded view, his analysis of documents and evidence to inform his view, his knowledge of current and earlier “state of the art” standards and expectations, his knowledge and research of relevant legislation and comparables (obvious examples for property lawyers might include rent reviews and long leasehold extensions and for development/construction lawyers might include British Standards etc), the opinions he forms and expresses in writing, the way he handles joint expert meetings and the concessions he makes (or fails to secure from his opposite number) and how he performs in the witness box. In this regard, some of the ways in which the Supreme Court has expressed the nature of restrictions on liability are broadly stated:

- (1) The court saw no reason for an expert to be sued because he changes his mind: see paragraph 18 above. But potential liability (and the calculation of any loss) will crucially depend on *why* he has changed his mind. If he done so because his opponent was better researched and persuaded him that his opinion was wrong because it failed to take account the correct material then the expert may well be liable if failing to take account of the correct material was a failure to use reasonable skill and care.
- (2) Lord Collins expressed the view that it was hard to envisage circumstances in which performance in the witness box could be the subject of even an arguable case: see paragraph 23 above. But Jones v Kaney itself was one in which under pressure the expert had departed from a previously expressed opinion because of a lack of preparation. It is difficult to see why that could not equally apply to witness box performance.
36. On the other hand, it is quite clear that if an expert has studied the correct papers and evaluated them and come to an opinion which he changes following debate or under cross examination then a claim will be very difficult to maintain. What is clear is that, as in the case of the expression of any professional opinion, the court's starting point will be that there is no *single* answer and that in one form or another the court will apply the Bolam test and see whether the opinion complained was outside the range of permissible opinions.
37. It may be that an expert will have an easier answer if he has changed his mind at a joint meeting or at trial but it will still be appropriate for the litigant to explore why that has happened. It may mean that all the correct papers were studied and evaluated and all that has changed is an expression of opinion within a range of permissible opinions available to experts: like a lawyer changing his mind about the construction of a clause. However, material differences between written opinions and a subsequent change in a joint meeting or the witness box raise questions as to which is the correct view and why there has been a change. This will have a material bearing on the question of the loss that has been occasioned and we return to this below.

**(c) When: timing of a claim**

38. This issue raises considerable difficulty. We consider further below the question of how and in what circumstances a litigant may be able to change experts and the question of when to threaten proceedings is inextricably bound up with that analysis. If for example the case is at an early stage and the change can be made without seeking approval then there is no difficulty: one expert will be sacked and can be put on notice of a claim if appropriate immediately. If that is not the position then it remains a matter of judgment for the lawyers and client. There is no *duty* on a litigant to put an expert on notice of a possible future claim though the lawyers will have to be careful not to waive any rights and/or create any estoppels. It may however be quite obvious if a fully-justified application to change an expert is required (see analysis below).

39. However, there are possible advantages to tackling this earlier rather than later and those concern insurance. It must be remembered that the pool of possible expert disciplines is large and the terms of their insurance will be very varied: very few will be on anything like solicitors' minimum terms. Accordingly, knowing that your expert carries insurance for the policy year in which he is first instructed says nothing about whether he will be covered in subsequent years or whether he has complied with the terms of his cover and or whether indemnity might be at risk for failure to comply with conditions precedent or reporting and disclosure obligations. Some of these risks can be reduced by an early threat.

**(d) Logistics of any proceedings**

40. It stands to reason that no lawyer is going to advise lightly about bringing a claim against an expert. The nature of the litigation will be a more than usually difficult professional negligence case and in general they should be undertaken by experienced professional negligence litigators. A number of the experts providing services in the property field may be dealing with lawyers who are largely non-contentious and it is crucial that they seek insight from professional negligence litigators.

41. We have addressed above the wisdom of some clear definition of an expert's role during any trial and trial preparation but bear in mind that if a litigant is going to allege what action he would have taken (for example if the expert had provided the correct advice earlier) then such a claim may carry an inevitable waiver of at least some privilege in relation to the conduct of the dispute.
42. Significantly, the case against the expert may require the services of a further expert. This will depend crucially on the nature of the complaint and the nature of the alleged quantum. In the Jones v Kaney situation where the expert effectively provides the material for the basis of the complaint it may not be necessary to call a expert to deal with liability. If however the nature of the complaint is that the expert's opinion was outside the range of permissible opinions then it may be necessary to call a new expert. In some cases, the answer may be found in the court's judgment in the original case but there may be circumstances in which the defendant expert can challenge that if he can say that he is not bound by the result.

**(e) Damages: Loss of chance - Allied Maples v Simmonds v Simmonds**

43. The analysis of what losses will be recoverable will depend entirely on the nature of the complaint made against the expert. As considered above, there will be two general categories of complaint: that the expert expressed opinions to begin with that were wrong (and was forced to accept the other side's arguments as correct) or that the expert's original views were correct but he was incompetent in his handling of the joint meetings/statements and/or in the giving of evidence.
44. The first category is largely an exercise in the recovery of wasted costs: these might be in relation to the entire trial or in relation to the decision to maintain certain arguments at the trial. Assuming a sound case for breach of the duty of care the claimant will have to show a good case on causation (that he would have acted differently) and be able to isolate and prove the costs wasted. These costs could include both sides' costs.
45. The second category is more difficult. If the complaint is put on the basis that the expert failed to stick to his original (correct) opinion and thus lost the case then the whole issue of causation and quantum is necessarily bound up with the decision that

could would have taken in different circumstances and it will be a rare case indeed where the judgment of the court would state clearly that it would have been a different decision if the expert evidence had been different. Accordingly, the claim will be for damages for loss of a chance and will be governed by the principles established in Allied Maples Group Ltd v Simmons & Simmons [1995] WLR 1602, CA. The establishment of the percentage chance lost will be a matter for factual, legal and expert evidence much as it will in any professional negligence case of this kind. Plainly, making an early and robust appraisal of that chance is essential to evaluate the commercial risk/benefit analysis of the proposed claim against the expert.

**(f) Contributory Negligence**

46. Of course all the normal defences and third party actions will be available: these will include contributory negligence and claims for contribution under the Civil Liability (Contribution) Act 1978 (very possibly against solicitors).

47. This means in practice that legal teams will need to be careful when instructing experts, drawing up their terms of reference, ensuring that experts are kept informed of all issues on which they need to report and provided with sufficient funding to carry out their tasks. Caveats expressed in reports will have to be carefully scrutinised and ways of resolving the caveats explored.

**TRY AND REPLACE YOUR EXPERT**

48. It is only if something has gone seriously wrong with your original expert, that you will find yourself considering whether to replace that expert and rely on the evidence of a further expert. If, however, you consider that your expert has been negligent, the issue as to whether you are able to replace him with a second expert will depend on when the negligence of the first expert has occurred, and (so far as you can ascertain) the reasons for it.

49. In addition to that, you will need to ensure that any such replacement cannot be characterised as “expert shopping” which is “undesirable and, wherever possible,

the court will use its powers to prevent it” (see Vasiliou v Hajigeorgiou [2005] 1WLR 2195, CA per Dyson LJ at 2205B-C).

**(a) Before service of expert reports**

50. In any litigation requiring expert evidence, it will usually be desirable to secure the services of your client’s expert of choice at an early stage.

51. If it has not arisen before, the issue of expert evidence will arise at the first case management conference, when the parties will need to seek permission from the court to call expert evidence (CPR Part 35.4(1)), to identify the field in which expert evidence is required (CPR Part 35.4(2)(a)), and to identify the name of the proposed expert “where practicable” (CPR Part 35.4(2)(b)).

52. Once the court has given permission for expert evidence to be called (and a report to be filed), the court will set a timetable for the exchange of experts’ reports, a meeting of experts (for the purpose of (i) identifying the issues, if any, between them, and (ii) where possible, reaching agreement on those issues); and the preparation and filing by a joint statement for the court showing (i) those issues on which the experts are agreed, and (ii) those issues on which the experts disagree and a summary of their reasons for disagreeing.

53. If:

- (1) The negligence emerges before expert reports are exchanged;
- (2) Your expert has not been named in the order made at the case management conference (or identified elsewhere) (see Vasiliou); and
- (3) There is sufficient time to instruct a second expert prior to the exchange of expert reports,

then there should then there may be no difficulty in instructing a second expert on behalf of your client. In these circumstances, no permission is required from the court to instruct a second expert, and the court cannot require you to serve the first expert's report on the other side (see Vasiliou). This is because that report will be subject to litigation privilege (Jackson v Marley Davenport Ltd [2004] 1 WLR 2926, per Longmore LJ at paras 13-14).

54. However, if the expert has been named in the order made at the case management order (or has otherwise been identified), permission will be required from the court to rely on the evidence of a second expert. In these circumstances:

- (1) The application to rely on the evidence of a second expert will need to be made by application notice under CPR Part 23, and be supported by evidence (either in a witness statement, or in Part C of the application notice). The evidence will need to explain why, and for what reasons, confidence has been lost in the first expert (something that will need to be done with considerable care, particularly to show that it is not a case of "expert shopping").
- (2) It will usually be condition of the grant of such permission that the first expert's report be disclosed: Beck v Ministry of Defence [2005] 1 WLR 2206; Vasiliou; and, more recently, Edwards-Tubb v J D Wetherspoon Plc [2011] 1 WLR 1373, CA (all these cases arise in the context of personal injuries litigation). Disclosure of the first expert's report may well cause problems at trial.

**(b) After service of expert reports or the meeting of experts**

55. There are two cases which are relevant: Stallwood v David [2007] 1 All ER 206, Teare J and Singh v C S O'Shea & Co Ltd [2009] EWHC 1251, Macduff J. It is also to be noted that, in Jones v Kaney, the Mr Jones made an application to replace Dr Kaney as his expert, but that application failed.

56. In Stallwood the court had to consider whether there are any circumstances in which a party, dissatisfied with the opinion of his expert after the expert's discussion, can

obtain permission to rely on additional expert evidence. The following points emerge from the decision:

- (1) Where a court is asked by a party for permission to adduce expert evidence from a second (replacement) expert in circumstances where that party is dissatisfied with the opinion of his own (first) expert following the experts' discussion it should only do so where there is good reason to suppose that the first expert has agreed with the expert instructed by the other side, or has modified his opinion, for reasons which cannot properly or fairly support his revised opinion (para 21). Good reasons might be that the first expert clearly stepped outside his expertise or brief, or has otherwise shown himself to be incompetent (paras 18 and 19). Where good reason is shown "the court will have to consider whether, having regard to all the circumstances of the case and the overriding objective to deal with cases justly, it can properly be said that the further expert evidence is "reasonably required to resolve the proceedings"" (para 21).
- (2) The expert must be asked why he has changed his opinion (see para 9.8 of the Practice Direction to CPR Part 35; cf what happened in Stallwood itself). Teare J said that "a party to a claim cannot usually be afforded a second expert merely because his or her first expert has altered his opinion after having discussed in with the opponent's expert" (paras 14, 17, 28 to 30). This is because the expert may have modified his opinion for sound reasons and if "a party wishes the court to take the exceptional step of allowing additional expert evidence after his or her expert has changed his opinion the party will usually have to make appropriate enquiries of the expert in order to provide the material for his application to the court" (para 30; cf the "unhappy picture" which emerged from the enquiries made in Jones v Kaney).
- (3) It is necessary to consider whether the trial date will be jeopardised (para 23).
- (4) In considering the overall justice of the case whether (i) if the applicant was not entitled to call the additional evidence sought and lost the case would he have an understandable sense of grievance judged objectively, and (ii) if the applicant was entitled to call the additional evidence and won the case would the respondent have an understandable sense of grievance judged objectively

(paras 32 and 33; following Cosgrove v Pattinson [2001] CP Rep 68, Neuberger J).

(5) It will be a rare case where it will be appropriate to call a further expert once this stage has been reached (paras 19 and 21). In the “very special circumstances” of Stallwood (which arose out of the claimant’s grievance from the first instance judge’s conduct of the hearing which gave rise to the appeal) Teare J allowed the claimant to rely on the expert evidence of a second expert.

57. The principle identified at paragraph 21 of Smallwood was not something that Macduff J was prepared to agree with in Singh. Rather, he took a much broader approach and said that there was “no one single principle which is to be given the strength of statute or a statutory instrument” and that “if an expert does change his opinion for no good reason or for bad reason, that may be a matter to feed into the discretion enabling the judge to reach a different decision” (para 12). Macduff J did not explain in any detail why he considered the principles set out in Smallwood to be too narrow. This, of course, leaves uncertainty as to which approach is correct.

58. In determining an application to replace an expert, the court will no doubt now also wish to take into account the possibility that the dissatisfied party can sue his expert. However, this will be but one consideration as, in general, the courts often regard resort to professional negligence claims as less satisfactory than allowing a party to pursue his original claim (but the later in the day the application is made, the more relevant this consideration may become).

**NIGEL JONES QC**

**AMANDA TIPPLES QC**

**20 October 2011**