Neutral Citation Number: [2010] EWHC 61 (QB)

Case No: 9LV03061

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TRANSFERRED FROM THE LIVERPOOL COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 January 2010

Before:

THE HONOURABLE MR JUSTICE BLAKE

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Between:

PAUL WYNNE JONES	**Claimant**
- and -	
SUE KANEY	**Defendant**

- -
- -

ROGER TER HAAR QC & DANIEL SHAPIRO (instructed by **Hill Dickinson LLT**) for the **Claimant**
PATRICK LAWRENCE QC (instructed by **Berrymans Lace Mawer LLP**) for the **Defendant**

Hearing dates: 10 December 2009

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Approved Judgment

THE HON. MR JUSTICE BLAKE:

INTRODUCTION

1. This is an application by the Defendant for summary judgment striking out proceedings that were instituted by the Claimant against her for negligence. The Defendant was, at all material times, a Consultant Clinical Psychologist who acted as a forensic expert in Psychology. In May 2003 solicitors acting for the Claimant instructed the Defendant to advise on psychological aspects of a psychiatric injury for which he was seeking damages in a previous personal injury claim arising out of a road traffic accident in March 2001.

2. Following initial reports prepared by the Defendant, there was an issue in the litigation as to whether the Claimant was indeed suffering from post traumatic stress disorder (PTSD) or was consciously or unconsciously exaggerating his injuries. Whilst the Defendant had initially reported that the Claimant had symptoms that suggested a diagnosis of PTSD, the Consultant Psychiatrist, instructed by the Defendant's insurance company in the road traffic claim, concluded that he was exaggerating his physical symptoms.

3. In October 2004 the District Judge ordered that the experts hold discussions and prepare a joint statement. There was some delay in the respective experts meeting and lodging such a joint statement but on 14 November 2005 there was a telephone discussion that resulted in a draft of a joint statement being sent to the Defendant for consideration on the same day. It appears that the Defendant signed the joint statement without comment or amendment. Two extracts from that joint statement indicate that it was very damaging to the Claimant's prospects of success in recovering damages for his head injury in the road traffic claim. At paragraph 4, under the heading 'Diagnosis' it is recorded:

> "Both experts agree that Mr Jones' psychological reaction, after the accident, was no more than an adjustment reaction that did not reach the level of a psychiatric disorder of either a depressive disorder, or post traumatic stress disorder."

At paragraph 5 it is recorded:

> "Dr Kaney has found Mr Wynne Jones to be very deceptive and deceitful in his reporting. He denied any previous psychological trouble or past accidents, which is inconsistent with the records or other reports. Despite enquiry he did not report to her the other road traffic accident of 28.02.2001. We therefore agree that such inconsistencies would be suggestive of conscious mechanisms and would raise doubts of whether his subjective reporting was genuine."

4. The Claimant's solicitors investigated with the Defendant why she had apparently changed her opinion so radically and on what basis she had found the Claimant to be very deceptive and deceitful in his reporting. The Defendant's answers in correspondence and telephone conversations pleaded in the particulars of claim, suggest an unhappy picture of how that joint statement came to be signed. They may be summarised as follows:

   i) She had not seen the reports of the opposing expert at the time of the telephone conference;

   ii) The Joint Statement, as drafted by the opposing expert, did not reflect what she had agreed in the telephone conversation, but she had felt under some pressure in agreeing it;

   iii) Her true view was that the Claimant had been evasive rather than deceptive;

   iv) It was her view that the Claimant did suffer PTSD which was now resolved.

   v) She was happy for the Claimant's then solicitors to amend the joint statement.

   Further, the particulars of claim allege that the Defendant had been made aware of the previous accident and other matters in his personal life in her instructions that she appears to have forgotten about when drawing the conclusion of either deceptiveness or evasiveness.

5. As a result of the damaging nature of the Joint Statement, and the inability of the Claimant's then solicitors to persuade the District Judge that she should no longer act as an expert in the RTA proceedings, the matter was settled for a sum that was considerably less than would have been the case if the Defendant had not signed the Joint Statement in the terms that she did.

6. After the road traffic litigation had been settled, the Claimant brought the present proceedings in April 2009. It was by that stage apparent that the Defendant's proposed response to any claim against her was a plea of witness immunity pursuant to the decision of the Court of Appeal in *Stanton v Callaghan* [2000] QB 75.

7. No defence has been entered on the merits. In any event as this is an application to strike-out the Defendant accepts for the purpose of this application, the Claimant's statement of facts must be assumed to be true. The defendant did not dispute that if admitted or proved these facts could constitute evidence of a failure to adhere to the duty of care to expected of a professional person holding herself out as a forensic expert in the field of psychology.

8. For his part, the Claimant, in both the pleadings and the skeleton argument, filed in response to the Defendant's application, recognised that in this case, as in *Stanton v Callaghan* he seeks to sue an expert retained by him to both advise and appear as a witness in litigation. Further, as in the Court of Appeal decision, the occasion of the negligence alleged is in respect of the revised position communicated by the Defendant in the Joint Expert report. If *Stanton v Callaghan* remained good law, it was accordingly binding upon this court and there would be no defence to the application to strike-out.

THE CORE SUBMISSIONS

9. Mr Ter Haar QC for the Claimant made the primary submission that *Stanton v Callaghan* was no longer binding law for two reasons. First, the reasons given by the Court of Appeal for applying the principle of absolute immunity to expert witnesses retained by a party in litigation relied substantially on the advocate immunity principle as then articulated in the cases of *Rondel v Worsley* [1969] 1AC 191 and *Saif Ali v Sidney Mitchell and Co* [1980] AC 198. Those decisions have been subsequently overturned by the Appellate Committee of the House of Lords in the case of *Arthur J S Hall v Simons* [2002] 1AC 615, and reliance on their reasoning and policy was undermined.

10. Second, the decision in *Stanton v Callaghan* preceded the coming into force of the Human Rights Act 1998 on 2 October 2000. By Section 6 of that Act, public authorities, including courts, are required to act compatibly with a Convention Right as defined in Schedule 1, including Article 6 of the European Convention on Human Rights – the right to a fair trial. Further, a court determining a question which has risen in connection with a Convention Right, must take into account any judgment of the European Court of Human Rights (see Section 2 (1)(a) HRA 1998). It was plain from the decision of European Court of Human Rights in *Osman v The United Kingdom* (28 October 1998) and [1999] 1FLR 193, that blanket immunities preventing claimants seeking damages in tort may be contrary to Article 6 if they are disproportionate having particular regard to its scope and application to the case at issue. Although the decision in *Osman* was not itself without some controversy (see the observations of Lord Brown-Wilkinson in *Barratt v London Borough of Enfield* [2001] 2 AC at 550 and p.558 C-560 D), it has subsequently become clear that domestic rules on restrictions on tortious liability, that were previously considered as a class of immunity, may have to be re-examined categorised as public policy reasons why no duty of care is held by the law of England and Wales to exist (see the case of *Brooks v Commissioner of Police for the Metropolis* [2005] UK HL 24, [2005] 1WLR 1495 and *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UK HL 50, [2009] 1AC 225 per Lord Hope at paragraphs 72-74, when dealing with the associated case of *Smith*).

11. Alternatively, Mr Ter Haar submitted that if I were to conclude that *Stanton v Callaghan* remained an authority binding upon this court, it would also be binding upon the Court of Appeal, but there is good reason to believe that it would no longer be followed by a court that had the capacity to overrule it, namely the Supreme Court. I should therefore grant a certificate under Section 12 of the Administration of Justice Act 1969, as amended, to enable the Supreme Court to determine whether they would wish to grant leave to appeal to it in the present case.

12. Mr Lawrence QC responded to these submissions by contending that:

    i) Although the policy basis for the decision in *Stanton v Callaghan* may have narrowed since the case was decided, none of the factors relied upon by the Claimant serves to deprive it of the status of binding authority.

    ii) The decision has never been criticised by the Court of Appeal or the House of Lords. It was cited in the very case that the Claimant relies upon to undermine

it, namely *Arthur Hall v Simons*, where Lord Hoffmann at 698 D-F assumed it to be correct.

iii) Further when the question of expert witness immunity from professional sanction was considered by the Court of Appeal in the case of *Meadow v The General Medical Council* [2006] EWCA (Civ) 1390, [2007] QB 462, it was common grounds that *Stanton* remained good law (see per Sir Anthony Clarke MR at paragraphs 11 to 16).

iv) The immunity is a long standing one of the common law, and has itself not been subject to any critical comment by the European Court of Human Rights. Any implied undermining by reason of the observations of that court in *Osman v The United Kingdom* is too indirect and remote to deprive the decision of the status of binding authority.

v) However, in the event that I concluded *Stanton v Callaghan* remained binding, the Defendant would consent to this court granting a certificate pursuant to Section 12(1) of the Administration of Justice Act.

STANTON v CALLAGHAN

13. The decision in *Stanton* was given on 8 July 1998. It was a successful appeal by a defendant against the refusal of the Deputy High Court Judge to strike out a claim against him. The defendant was a Structural Engineer who had been retained to advise in an insurance claim as to the propriety of previous partial underpinning work that had been performed upon the plaintiff's house. The defendant had advised that total underpinning was required. The insurance company's expert concluded that a suitable and cheaper alternative remedy was available, namely infilling with polystyrene. At a joint expert's meeting the defendant changed the view that he had previously intimated and accepted that polystyrene infilling was a suitable alternative. In the circumstances the case settled for less than the claimants had originally been advised was appropriate. A number of alternative claims were made against the Defendant in the proceedings that he faced, including that it had been his original advice that was flawed, and/or that he should not have amended his position without consultation with the plaintiff retaining him. The factual basis for the assertion that his final amended view was negligent was uncertain, but as this was a strike out claim it proceeded upon the basis that it was true.

14. Chadwick LJ reviewed the authorities on witness immunity in an extensive judgment between pages 88B and 102C. It is pertinent to observe that at the start of that review, however, he said the following:

> "The proposition that the defendants can escape liability for negligence on the ground that Mr Callaghan's advice as to the feasibility of the gap solution as a remedy for subsidence was given in the context of litigation requires careful scrutiny. Mr Callaghan was a professional man who undertook, for reward, to provide advice within his expertise. The expectation of those who engaged him must have been that he would exercise the care and attention appropriate to what he was engaged to

> do. I would find it difficult to accept that Mr Callaghan did not share that expectation. But for the fact that he was a potential witness in pending proceedings, there could be no doubt that the law would provide a remedy, if that expectation was not fulfilled. But, equally, there can be no doubt that the law does recognise immunity from suit in relation to certain things done, or omitted to be done, in the course of preparing for or taking part in a trial. It does so, on the basis of a supervening public interest, which transcends the need to provide a remedy in the individual case."

15. A similar view as to the primary liability in negligence of an expert retained by a party in litigation was taken both by Mr Simon Tuckey QC when sitting as a Deputy Judge of the Queen's Bench Division in the case of *Palmer v Durnford Ford* [1992] QB 483 and Bingham LJ (as he then was) in *Hughes v Lloyd's Bank* [1998] PIQR 98. In both these cases, however, the judges concluded that the negligence was in respect of defects in the initial report and advice and had not taken place at a later stage of the case where it could be said to be akin to challenge of court testimony of a witness.

16. In the review that Chadwick LJ then conducted, reliance was placed on the long line of authorities reviewed by Simon Brown LJ (as he then was) in *Silcott v Commissioner of Police for the Metropolis* (1996) 8 Admin LR 633 where the immunity of a witness from suit in respect of evidence given in court was described as a fundamental rule of law. Where it exists, the immunity is absolute and will not even be defeated by evidence of malice. It extends to witness statements and expert reports made in contemplation of criminal or civil proceedings. These principles are not weakened by the fact that *Silcott*, concerning the position of a police witness who is alleged to have lied, was itself subsequently overruled by *Darker v Commissioner of Police for the Metropolis* [2001] 1 AC 435 itself decided a week after *Arthur Hall.*

17. However, in contra-distinction to the issue in *Stanton*, I observe that many of the authorities cited were dealing with the situation where a party seeks to sue a witness or expert called by an *opposing* party in proceedings brought against him or her. Thus, in *Watson v Jones* (1905) AC 480, the suit was for slander brought by a litigant in separation proceedings for what the witness is alleged to have told the opposing parties' solicitor before he went in to the witness box. In *Evans v The London Hospital's Medical College (University of London)* [1981] 1WLR 184, Drake J struck out proceedings brought against a pathologist for negligent preparation of a report that led to criminal proceedings being brought against the claimant. In *Taylor v The Serious Fraud Office* (1999) 2AC 177, the claimants sought to sue in defamation an employee of the SFO in respect of correspondence written whilst investigating allegations of fraud by a client of the claimants. Upholding the immunity from suit in that case, Lord Hoffmann observed at 215E:

> "Actions for defamation and for conspiracy to give false evidence plainly fall within the policy of the immunity and actions for malicious prosecution fall outside it. In between there is some disputed ground. In *Evans v London Hospital Medical College*, Drake J held that a contributory reliance on a statement in an action for negligence in which it was alleged

> that a carelessly prepared post mortem had led to the plaintiff being unjustifiably arrested and charged with murder. I express no view on this case, *which I think might nowadays have been decided on the ground that the Defendants owed the plaintiff no duty of care*." (Emphasis supplied).

Such considerations do not apply where the person to be sued for negligence is retained by the Claimant under a contract for reward in which there is generally an actionable duty of care.

18. Chadwick LJ in *Stanton* recognised that other grounds mentioned in the authorities as the basis for an immunity, including the need to ensure that potential witnesses are not deterred from coming forward and the need to avoid a multiplicity of actions, appear to have little or no relevance in the present context (101B). He, therefore, concluded:

> "In my view the only ground of public policy that can be relied upon as the foundation for immunity in respect of the content of an expert's report, in circumstances where no trial takes place and the Expert does not give evidence is that identified by Lord Morris of Borth-Y-Gest in *Rondell v Worsley* [1969] 1AC 191 and referred to by Lord Diplock in *Saif Ali v Sidney Mitchell and Co* [1980] AC 198 222B: 'It has always been the policy of the law to ensure that trials are conducted without avoidable strains, intentions of alarm and fear'."

19. In his concurring judgment Otton LJ(at 102G – 104C, 107E – 108F) also relied on the principles in *Saif Ali v Sidney Mitchell and Co* and the public policy reasons for upholding advocates' immunity from suit for negligence. Such reliance was both to identify a good reason for the immunity at all in respect of expert witnesses and to identify the dividing line between pre-trial and trial work as the limit to the scope of that immunity.

20. It is of course the case that the result in *Saif Ali* no longer represents the state of the law in the light of *Arthur Hall v Simons*. It is relevant to note that Lord Hoffmann addressed the very same observation of Lord Diplock in *Saif Ali* on which Chadwick LJ had relied in identifying the sole public policy reason for the immunity. He said at 698A:

> "It is not sufficient, therefore, to explain any immunity relating to core proceedings by saying that the people involved to be free from "avoidable stress and tensions". That merely suggests that everybody would find litigation more agreeable if no awkward consequences could follow from anything which the participants did. It is another version of a vexation argument which I have already rejected. It is necessary to go further and explain *why* the public interest requires that a particular participant should be free from the stress created by the possibility that he might be sued. How would he otherwise behave differently in a way which was contrary to the public interest?"

21. That observation was made in a part of his judgment headed 'The Witness Analogy'. *Stanton* had been cited in favour of retention of the advocate's immunity to which Lord Hoffmann responded:

> "...but that seems to me to fall succinctly within the traditional witness immunity. The alleged cause of action was a statement of the evidence which the witness proposed to give to the court. A witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth. There seems to be no analogy with the position of a lawyer who owes a duty of care to his client. Nor is there, in my opinion, any analogy with the position of the judge. The judge owes no duty of care to either of the parties. He has only a public duty to administer justice in accordance with his oath. The fact that the advocate is the only person involved in the trial process who is liable to be sued for negligence is because he is the only person who has undertaken a duty of care to his client."

Lord Hoffmann for the majority was there comparing the expert witness and the advocate in order to distinguish their positions. Lord Hobhouse in the minority made the same comparison in order to demonstrate that like considerations applied to both (page 740H – 741D). Mr Ter Haar QC for hos part observes that it is ironic in the light of the disappearance of advocates' immunity, that the advocate was once considered the paradigm case for immunity, by comparison with the position of judge, let alone the witness (see *Munster v Lamb*(1883) QB 588 at 603 – 604).

22. The Court of Appeal in *Stanton v Callaghan* identified the particular public policy as facilitating full and frank discussion between experts before trial as requiring that each should be free to make proper concessions, without fear that any departure from advice previously given to the party who has retained him, will be seen as evidence of negligence.

> "The immunity is needed in order to avoid the tension between a desire to assist the court and fear of the consequences of a departure from advice."

Per Chadwick LJ at 101H – 102A (see also Lord Justice Otton at 108G-H.

23. Lord Justice Nourse concurring saw no justification for distinguishing an expert and a lay witness either on the ground that the expert is usually remunerated for his services or that he would be less likely to be deterred from giving evidence.

> "An immunity founded on the requirement of public policy that witnesses should not be inhibited from giving frank and fearless evidence cannot afford to make distinctions such as these. If they were allowed, it could never be certain that the public policy would not sometimes be put at risk." (109C)

SUBSEQUENT DEVELOPMENTS WITH RESPECT TO EXPERT WITNESSES

24. Mr Ter Haar draws attention to two further developments in the law since *Stanton* that erode the basis for the immunity in tort. First in *Phillips v Symes No 2* (2004) EWHC 2330 (Ch), [2005] 1WLR 2043, Smith J held that an expert psychiatrist who had caused proceedings to be brought or continued by a defective examination of a party with a view to informing the court as to whether that party had mental capacity to conduct litigation and manage his own affairs, was vulnerable to an order for costs under CPR Part 35. The test was whether his evidence causes significant expense to be incurred and does so in flagrant, reckless, disregard of his duties to the court. Consideration was given to expert immunity in *Stanton v Callaghan.* Although this was a first instance decision, it has never been doubted and is cited in the standard textbooks. It may be noted that a similar decision with respect to an advocate's liability for costs had preceded the decision in *Arthur Hall*. (See *Ridehalgh v Horsefield* [1994] Ch 205.)

25. The second development was in the field of professional sanctions. In *Meadow v General Medical Council* (2006) EWCA (Civ) 1390 [2007] QB 462, it was concluded that professional disciplinary proceedings did not infringe the principle of witness immunity. Sir Anthony Clarke observed at paragraph 11:

> "The immunity with which this appeal is concerned is entirely a common law concept. It is a common ground and it applies to all witnesses including expert witnesses and I do not think that there is any more significant dispute about its nature and extent as explained in cases before the decision of the judge in this case."

As noted above, the decision made reference to *Stanton and Callaghan* without disapproval but the court concluded that the immunity should not be extended to fitness to practice proceedings.

26. Mr Ter Haar submits that the threat of erasure from the professional register for fitness to practice by reason of evidence that a professional witness either should or should not have given in the witness box at a criminal trial, is likely to have a considerably more chilling effect upon witnesses than the insurable risk of civil proceedings for negligent advice and reports lodged with the court in contemplation of use in civil proceedings. He submits it makes no sense for an expert retained by a party to be liable for negligent advice given in an initial report where a clear duty of care exists, but to be relieved from the consequences of a breach of such a duty when preparing a subsequent report, after discussion with the opposing expert. If the expert obstinately adheres to incorrect views initially expressed, he may be liable in civil damages to the client who commissioned the report for the initial misstatement subsequently maintained. He may be liable in an extreme case in costs for having caused proceedings to have been prolonged on a false basis; and may be liable to disciplinary sanction, including erasure for the register, for having advanced or maintained an opinion that it was not open to a competent professional to maintain.

27. An expert who negligently prepares for a joint conference, fails to carefully scrutinise the proposed joint statement before signing it, or is persuaded to record entirely unfounded imputations against his instructing party based upon a failure to remember or record the instructions, can cause great damage to a party in civil proceedings. The policy of the CPR, and expedition and economy in the resolution of disputes means that the courts will not lightly permit a party to find another expert to replace one in which he has lost confidence. The Claimant was not so permitted in the present case. Once the damage is done in a careless concession in a joint report, it cannot be undone. The injured party is left with a wrong without a remedy.

28. Consequent to the above, the claimant submits that the continuing blanket immunity for negligence at the stage of the joint report and thereafter, is an isolated island of immunity amidst the oncoming flood of general liability. None of the arguments that justify the general immunity to witnesses of fact, who do not sell their skills and advice for reward, can apply to expert witnesses on whom a party relies in litigation.

29. Further to incur a blanket or wide ranging immunity to a broad class of cases where it is not truly required for some overriding public policy is precisely disproportionate, and therefore vulnerable to attack on Human Rights grounds applying the approach in *Osman v The United Kingdom* and the subsequent decisions of the House of Lords. Is a general immunity strictly necessary for professional experts to promote their duty of candour to the court, when other sanctions promote the same aim without leaving a party without a remedy for breach of the recognised standards of care?

30. Mr Ter Haar seeks support for his submission in the views of commentators. In *'Professional Negligence and Liability' Ed Mark Simpson* at 24.83 it is observed :

> "Public policy (including the impact on the supply of experts in a field where exposure to liability can actually, rather than intuitively, be shown to have made experts reluctant to act) will be taken into account in determining whether experts owe a duty of care in criminal or child abuse cases. It is, therefore, arguably superfluous (and disproportionate) to have recourse to witness immunity as the guardian of the public interest in such cases. The argument that immunity is needed to ensure that the duty owed to a client is not (even subconsciously) given precedence over the duty to the court has been rejected in the case of advocates and is not stronger in the case of expert witnesses. It would be open to the House of Lords, as happened in *Hall v Simons* to rule that public interest no longer requires that expert witnesses be immune from suit, either across the board or at least in respect of civil proceedings. The difficulties in drawing a coherent boundary between what is and what is not covered by immunity, in respect of those expert witnesses who also act as advisers or investigators, would be a further argument against continued recognition of the immunity (again as happened in *Hall v Simons*)."

31. In an article in 'Professional Negligence' 2007, the commentators Sue Carr QC and Helen Evans reviewed these developments and conclude:

> "we remain of the view that it cannot be long before the immunity from civil damages presently enjoyed by expert witnesses is examined fully by the courts".

32. A similar approach is taken in the same journal by Patricia Robertson QC in an article 'Expert Witnesses Professionally Immune?' 2007, that concludes:

> "Retaining witness immunity for experts throws up far more troubling anomalies. An expert's behaviour is so egregious that it causes his client to lose the opportunity to call any expert evidence can now be made liable to the opposing party for the costs thrown away (in accordance with *Phillips v Symes*) why should he not also be liable to his own client, not just for wasted costs, but, in a proper case, for damages for loss of chance? It is becoming increasingly difficult to justify the answer which the courts have hitherto given to that question."

33. Following the conclusion of the argument, at the court's request some further authorities were supplied including an extract from "Tort Law and Economic Interests" 2nd Edition (1996) Oxford by Peter Kane. This was an author that Lord Steyn considered to helpful in considering (in effect) the proportionality of the claim for advocate's immunity in his speech in *Arthur Hall* at 679 A-C. The comparison with the strength of the case for witness immunity was noted. Cane at p237 addressed the justification for removing advocate's immunity whilst retaining it for others in the following terms:

> "Secondly, advocates as opposed to non-expert witnesses and parties, are professional participants in the judicial process and ought to be answerable to their clients for the ways they perform their professional duties; and thirdly, if advocates were liable to be sued for negligence, this might strengthen the case for removing the immunity from (query, paid) expert witnesses."

IS *STANTON v CALLAGHAN* BINDING?

34. Despite the able submissions of Mr Ter Haar QC I am satisfied that the decision of the Court of Appeal remains an accurate statement of the law as it presently stands and is binding upon me. The fact that human rights considerations may question some of the policy assumptions behind a previous decision of a superior court is no basis for concluding that the decision is no longer authoritative. There is no judgment of the European Court of Human Rights on the issue. A direct challenge to the decision or principle in play would be needed before a court could rely upon the passage of the Human Rights Act as a sufficient statutory change in the law to revisit a proposition spelt out a binding judgment in a superior court.

35. A related problem was addressed in the case of *Kay and others v Lambeth London Borough Council* [2006] UKHL 10 reported [2006] 2AC 465. Lord Bingham at p40-45 considered the question of s*tare decisis* where the higher court had considered the Convention question and subsequent Strasbourg case law threw that decision into doubt. At [43] he noted:

> "It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg

> authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leapfrog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again, the Court of Appeal did here."

36. The fact that subsequent developments in purely domestic jurisprudence have narrowed or undermined the policy basis for expert witness immunity again does not deprive the decision of its binding effect. It is fairly acknowledged that the decision has not been criticised by any of the courts subsequently examining different aspects of witness immunity. Indeed it was cited without dissent in *Hall v Simons* by Lord Hoffmann, and in *Darker v Commissioner of Police for the Metropolis* by Lord Hope. None of the exceptions to the principle of *stare decisis* apply. The decision in *Stanton v Callaghan* cannot be distinguished on the basis of the different factual allegations relating to negligence at the pre-experts' meeting, I therefore conclude it is binding upon me. The Defendant is therefore correct that it requires this application to strike-out to succeed.

THE NEED FOR APPELLATE REVIEW

37. However, although I conclude that it remains good law, I have doubts as to whether it will continue to remain so for the reasons canvassed by the Claimant and the discussion summarised above. I conclude that there is a substantial likelihood that on re-examination by a superior court, with the power to do so, it will emerge that the public policy justification for the rule cannot support it.

38. In my judgment a policy of blanket immunity for all witnesses, indiscriminately protecting witnesses as to fact and witnesses on the opposing side from expert witnesses retained by a party to advise them before and during the proceedings as to a pertinent issue in those proceedings, may well prove to be too broad to be sustainable and therefore disproportionate. The public benefit of truthful, accurate, reliable and frank evidence to the court is unlikely to need such a broad immunity. It can be enforced by the court of its own motion, or by professional bodies supervising the professional activities of the expert in question, including the activity of giving evidence to the court.

39. Although Lord Hoffmann observed in *Hall v Simons* that there was no duty of care owed by an expert to his client in the truth of the evidence, that was a statement made to distinguish the position of witnesses generally from advocates. The review of the authorities demonstrates that at the starting point there is such a duty of care to give accurate and reliable advice that is accurately and reliably reflected in reports that will be relied upon by a party in the subsequent litigation. It is not so much that the duty evaporates or disappears after a certain point as trial approaches, but on the law as hitherto expressed, there is precisely a blanket immunity from the injured party being to rely on the consequences of that breach of duty. An overbroad immunity from suit to apparently privileged parties does raise important questions of right of access to a court under Article 6, whereas a carefully reasoned and judicial conclusion of whether it is fair just and equitable to impose a duty of care does not, so long as it updated from time to time in the light of changing perceptions as to public policy.

Proportionality is an important tool in the future assessment of the strength of the public interest in maintaining any rule, or its reach.

40. Mr Ter Haar indicated that he would be prepared to argue elsewhere that there was no justification for such a rule, even if the negligent fresh opinion first emerged in oral evidence at trial. He does not need to go that far to resist the present application. In my judgment, at the least, it is very difficult to see, why an expert who owes a duty of care to a claimant when first advising and preparing reports, should not continue to owe that duty when signing a joint statement which ordinary principles of professional competence would suggest that she needed to prepare for, read, and ensure herself that it reflected her true opinion, and was based upon proper facts or professional judgment.

41. If there is a case for the continued immunity in its present shape, then the fact that it gives rise to hard cases is not a sufficient basis to depart from it. However, if the Claimant's allegations are right, he has suffered a particularly striking injustice on which the first call on public policy is that there should be a remedy, subject to some weighty and compelling particular reason why he should be deprived of it in the greater public interest.

SECTION 12 CERTIFICATE

42. If *Stanton v Callaghan* is binding on me, as I conclude that it is, the parties recognise that it is equally binding on the Court of Appeal. Neither submit that there is any benefit in the Court of Appeal re-examining the decision on strike-out in the light of the present state of the law. Neither does the resolution of the present debate require a trial on the facts.

43. Before I can grant a certificate under section 12 sub-section 1, I have to be satisfied

    a) that relevant conditions are fulfilled and

    b) that there is a sufficient case for an appeal to the Supreme Court has been made out to justify an application for leave to bring such an appeal; and

    c) that all the parties in the proceedings consent to the grant of the certificate.

44. As the first requirement, the relevant conditions are those in Section 12(2) and 12(3). These proceedings having been transferred from the Liverpool County Court are now civil proceedings in the High Court which are before a single judge of the High Court. Further, I am satisfied that the point of law raised in this strike-out application is one of general public importance and that the point of law is one in respect of which I am bound by a fully considered decision of the Court of Appeal.

45. As to the second, I consider that a sufficient case for an appeal to the Supreme Court has been made out for the reasons I have briefly summarised above. It is, of course, entirely a matter for the Supreme Court whether they will grant leave to appeal to entertain this case and the re-consideration of this particular area of law that the application gives rise to.

46. The third condition is met as the Defendant consents to this course.

CONCLUSION

47. I will therefore grant the Defendant's application to strike-out this claim. I will grant a certificate that I am satisfied the conditions in Section 12(1) Administration of Justice Act 1969 are made out.