

Jones v Kaney: Does it matter?

Immunity of Experts lifted in Court proceedings

Introduction

Expert immunity from claims is no more. This is the effect of the recent Supreme Court decision in Jones v Kaney. But does it really matter? Is it a decision that will have a major impact on the legal market and the conduct of litigation or is it really only of academic interest? Was Lady Hale right to consider that it was “irresponsible” to make a decision such as this one “on an experimental basis”?

The Decision

The expert in a personal injury claim signed a joint report, following a telephone conversation with the opposing party’s expert, which did not accord with her earlier advice or her views at the time of signing. As a result, the claimant recovered significantly less than anticipated. When he tried to bring an action for damages resulting from the expert’s negligent conduct, the expert claimed immunity from suit.

The expert gave evidence that she had not read the opposing expert’s report before the telephone conversation and did not believe that the draft joint statement reflected their discussion, but felt under pressure to sign it anyway. She proceeded to endorse the statement notwithstanding that it did not reflect her views.

The question before the Supreme Court was whether the immunity should continue. The majority held that it should not. Lord Phillips, in the leading judgment, relies on the fundamental principle that every wrong should have a remedy. In light of that, the public policy arguments support the abolition of the immunity.

Implications

It is important first to clarify what this judgment does not mean. Expert witnesses are still immune from suit for defamation regarding the evidence given in legal proceedings (as are advocates, following Medcalf v Mardell). There is no impact on the position between a party and the opposing expert (as per Lord Collins). It does not affect the liability of an expert for advice given to a party other than in his role as an expert; No immunity existed for this even where the advisor also acted as an expert.

Better advice?

Although the Supreme Court recognised that this is a significant decision, the majority do not consider there will be any serious ramifications. Lord Brown states that the most likely consequence would be a “sharpened awareness of the risks of pitching their initial views of the merits of the client’s case too high or too inflexibly, lest those views come to expose and embarrass them”. Lord Collins concurs; “the threat of liability for negligence may encourage more careful and reliable evaluation of the case”.

James Badenoch QC, Chairman of the Expert Witness Institute, says that the conscientious expert, who researches the issue thoroughly and diligently, reaches a view that is honestly held and presents it impartially, will have nothing to fear from this decision. It may serve rather to improve standards and so to have a salutary effect on any “maverick” experts.

Graham Hain, Director, Forensic Accounting at RSM Tenon, and Marcus McCaffrey, Partner in Forensic Services at Baker Tilly, take similar views. Neither consider that the lifting of expert immunity will worry many forensic accountants.

Graham Hain adds “most of the mainstream players regularly act as expert witnesses, understand their obligations to the court and on the whole do a decent job. The decision should encourage “dabblers” to think twice about whether they are properly equipped to perform this sort of role.”

Reduced independence?

The Supreme Court considered whether abolition would mean experts cease to give evidence contrary to their client’s interests, but the majority decided it would not. Lord Phillips states that the witness of integrity will concede if he has changed his view; there is no conflict between an expert’s duty to his client and that to the court. Lord Hope, for the minority, points to the very immunity from suit of witnesses of fact as evidence that fear of suit must exist. There is a real danger that the majority approached the issue with rose tinted spectacles. It seems likely that the possibility of a legal claim will on occasion play upon the mind of an expert in the witness box or in an expert meeting. In the worst case the loss of immunity may result in a refusal to resile from their initial opinion when they would otherwise have done so.

More claims?

The majority in the Supreme Court do not believe that the decision will increase claims against experts, because it will be difficult to bring such a claim. It will require the evidence of another expert. An unsuccessful litigant will often lack sufficient resources and will struggle to obtain a conditional fee agreement (not least following the Government’s recent proposals on the recoverability of success fees). A competent solicitor simply will not take an unmeritorious claim and a litigant in person will be susceptible to strike-out.

Commercial Dispute Resolution Group

If you would like more information on FSI’s services, please visit fsilaw.com where you will find all our latest news, publications and events. Alternatively, contact Andrew Wigston, partner, litigation, +44 (0)20 7323 4000.

Lord Phillips also adds that he is not aware of a “flood” of claims against barristers since the removal of their immunity in *Hall v Simons* in 2000. Bar Mutual, providers of professional indemnity insurance for self-employed barristers, have confirmed that Lord Phillips’ view is correct.

However, there will now be more circumstances when a claim is theoretically possible. There may not be a flood of claims, but any increase causes additional expense and inconvenience. A bad claim can still cost the defendant as much as a good claim, as the insurance excess may be devoured by costs. This is exacerbated if the merits cannot be properly evaluated until the exchange of expert evidence, shortly before trial, or examination of the factual evidence at the trial itself.

Fewer experts?

Lord Phillips considers that all who provide professional services which involve a duty of care are at risk of suit, so there should be no exception for expert witnesses. He points to the fact that barristers still practice, *Hall* notwithstanding, and that medical practitioners are also liable to their clients for negligent conduct but they continue to treat patients.

James Badenoch QC of the EWI suggests that the real problem lies in the perceived impact of this decision, particularly in vulnerable areas such as children’s proceedings. Paediatricians and other doctors who give evidence in child protection cases are already known sometimes to face a targeted campaign of complaints to the General Medical Council from parents whose children have been taken into care. Following a complaint, a doctor may be suspended and subjected to lengthy investigation, with the attendant anxiety and impact on scarce resources, even if the allegation is groundless. The perception within the profession is that these experts are exposed to multiple avenues of attack, in an area where there is no-one else to speak out for children at risk. The decision may prove yet another

disincentive to these experts giving vital opinion evidence where it is desperately needed.

The decision also fails to recognise that an expert witness is often first and foremost a specialist in their chosen field, and, second, prepared to give evidence in court (albeit for remuneration). For a barrister or a surgeon to cease acting as such is to change career. For a geo-physicist to cease giving expert evidence is to remove just one string from his bow. It is the part-time expert that is most likely to be affected by this decision.

Will insurance cover help?

Both Lord Collins and Lord Dyson thought the matter could be dealt with by insurance cover, suggesting that most expert witnesses are professionals who can obtain insurance readily. Graham Hain notes that insurance premiums might increase, but that “most firms of a certain size will be able to absorb the increase. It may impact on the smaller firms or sole practitioners, who might struggle to cope with increased insurance costs”.

The insurance point highlights the problem with this judgment: the majority’s reasoning may only apply to the habitual expert witness supported by a large organisation.

Necessary changes for experts

The decision may not change much for many. Often the instruction to give opinion evidence will be preceded by an advisory relationship, which forms the basis for a party’s position in legal proceedings and where a suit for negligence has always been a possibility.

However, expert witnesses should now consider:

- joining a professional body, such as the Expert Witness Institute or the Academy of Experts, who can assist an expert in understanding their duties and fulfilling their obligations

- reviewing their terms and conditions and including limitations on liability (and keeping the levels under review)
- obtaining, or checking the scope of, insurance cover. It must include an action in negligence arising from opinion evidence given in legal proceedings
- establishing clearly in which capacity they act. Lady Hale emphasises that a witness of fact has immunity, while a witness giving opinion evidence now does not. Where there is potential for overlap, such as in family proceedings, the distinction is important.

Conclusion

The majority in the Supreme Court discounted the effect of their decision and it may be that they have underestimated its impact. There is a real risk that it will influence experts, whether this is due to fear of liability itself, or, more likely, increased insurance premiums and the perception that collateral attacks from disappointed litigants will escalate. Opinion evidence in accounting or medicine will still be widely available, but in relation to the protection of children and with part-time experts in obscure areas of expertise this decision may have a real negative influence.

Andrew Wigston is a partner and Fiona Hinds is an associate at Finers Stephens Innocent LLP

Andrew Wigston
Partner, litigation
T: +44 (0)20 7344 5623
E: andrew.wigston@fsilaw.com

Fiona Hinds
Solicitor, litigation
T: +44 (0)20 7344 5620
E: fiona.hinds@fsilaw.com

Commercial Dispute Resolution Group

If you would like more information on FSI’s services, please visit fsilaw.com where you will find all our latest news, publications and events. Alternatively, contact Andrew Wigston, partner, litigation, +44 (0)20 7323 4000.