

# Expert questions

The judgement in *Jones v Kaney* shouldn't stop surveyors acting as expert witnesses, says Vivien King, but they should check their professional indemnity insurance cover first

“The rational expert witness who has performed his duty is unlikely to fear being sued by the rational client. But unsuccessful litigants do not always behave rationally.” So said Lord Phillips in giving judgement in *Jones v Kaney* [2011] UKSC 13.

Lord Phillips' words may reflect the fears of some following this Supreme Court majority decision. It held that expert witness immunity from liability to clients for breach of duty (whether in contract or negligence) can no longer be justified and should be abolished. But are such fears justified?

The expert witness, Ms Kaney, was a medical expert instructed with the court's authority on behalf of the claimant, Mr Jones. The court ordered that Kaney meet with the relevant expert witness for the defendant and that they prepare a joint statement – a common court order for expert witnesses. Unfortunately, the joint statement did not reflect Kaney's expressed opinion and had, she claimed, been signed under pressure.

Naturally concerned, the claimant's solicitors sought the court's authority to instruct another expert witness: the court refused. In consequence, Jones issued proceedings against Kaney claiming his solicitors had been constrained to settle for significantly less than the settlement that would have been achieved had Kaney not signed the joint statement. Kaney pleaded immunity from suit.

## Onwards and upwards

The judge felt constrained by the law regarding immunity as it stood and held that the Court of Appeal would be equally constrained. He therefore took the unusual step of referring the case directly to the Supreme Court. Lord Phillips, giving judgement, identified four potential justifications for expert witness immunity from suit:

1. A reluctance for expert witnesses to testify
2. Ensuring expert witnesses give full and frank evidence to the court

## *Jones v Kaney* – the expert witness's view

Paragraph 2.1 of RICS practice statement *Surveyors acting as expert witnesses* states: “Your overriding duty as an expert witness surveyor is to the tribunal to whom the expert evidence is given. This duty overrides the contractual duty to your client. The duty to the tribunal is to set out the facts fully and give truthful, impartial and independent opinions, covering all relevant matters, whether or not they favour your client.”

An expert witness surveyor who complies with this duty should not be concerned that an unsuccessful litigant will have an actionable claim in negligence against them. This is supported by Lord Kerr, who said that “If an expert expresses an honestly held view, even if it differs from that which he may have originally expressed, provided it is an opinion which is tenable, he has nothing to fear from a disgruntled party.”

The removal of the immunity may actually have the effect of improving the quality of expert witness evidence – the possibility of a negligence action should make experts think more carefully about what they say, and ensure a greater degree of care when preparing reports.

This was recognised by Lord Brown, who said that the consequence of removing the immunity would be: “...a sharpened awareness of the risk 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.”

However, there are two possible downsides to the removal of immunity:

- while there is no reason why PII premiums for expert witness surveyors should increase, the general consensus is that this is likely because insurers will see the lack of immunity as increasing the risk of a claim. Any such increase to a professional's overheads will inevitably be passed on to their clients as part of their fee, thereby increasing the overall cost of litigation
- an unsuccessful litigant may use the possibility of raising a claim as a bargaining tool to reduce the fees payable to the expert. Even though the unsuccessful litigant realistically has no actionable claim, the expert may nevertheless feel pressured to reduce their fees rather than go to the expense of instructing solicitors, etc.

Only time will tell what the true impact of the removal of immunity might be, but if it is anything like the impact caused by the removal of immunity from barristers then it may be very little.

**Jonathan Cope is a Chartered Surveyor and Barrister, and is a Director of MCMS Limited. He is Chairman-elect of the Dispute Resolution Professional Group UK Board and regularly acts as an adjudicator and expert witness**  
[jonathan.cope@mcms.co.uk](mailto:jonathan.cope@mcms.co.uk)