End of the amateur expert?

Mark Solon examines the possible fallout of the abolition of expert witness immunity

The Supreme Court’s decision in Jones v Kaney [2011] UKSC 13, [2011] All ER (D) 346 (Mar) ends expert witness immunity. The majority of the court held that immunity from suit for breach of duty (whether in contract or in negligence) that expert witnesses have enjoyed in relation to their participation in legal proceedings should be abolished. Standards of expert evidence should improve now witnesses have the spur of potential litigation. All experts must make sure they do a thorough job and I hope this judgment marks the end of the amateur expert.

Lord Phillips
Lord Phillips concluded that no justification had been shown for continuing to hold expert witnesses immune from suit in relation to the evidence they give in court or for the views they express in anticipation of court proceedings.

He added: “It follows that I consider that the immunity from suit for breach of duty that expert witnesses have enjoyed in relation to their participation in legal proceedings should be abolished. I emphasise that this conclusion does not extend to the absolute privilege that they enjoy in respect of claims in defamation. Accordingly, I would allow this appeal.”

Lord Brown
Lord Brown said that expert witnesses clearly owe the party retaining them a contractual duty to exercise reasonable care and skill and he was persuaded that the gains to be derived from denying them immunity from suit for breach of that duty substantially exceed whatever loss might be thought likely to result from this.

The most likely broad consequence of denying expert witnesses the immunity accorded to them, he said, 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.”

He added: “I for one would welcome this 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).”

Lord Collins
According to Lord Collins, the appeal is concerned only with the liability of the so-called “friendly expert” to be sued by the client on whose behalf the expert was retained.

“Standards of expert evidence should improve now witnesses have the spur of potential litigation”

He said: “The facts raise directly only liability to be sued for out of court statements, but any immunity in relation to such statements is a necessary concomitant of the immunity for things said in court, and the same principles must apply equally to each.”

Conclusion
Professionals in all fields have always been open to be sued and we will have to wait to see if the removal of expert witness immunity will lead to a reduction in the number of experts ready to accept instructions and an increase in professional negligence claims.

Expert witnesses must be now be very careful to only accept instructions when they have the relevant qualifications, training.

Where do we go from here?
The expert has a duty to act with the reasonable skill and care of an expert from the relevant discipline. As long as the expert gives an independent and unbiased opinion which is within the range of reasonable expert opinions, s/he will have discharged their duty to the client and to the court.

- The jointly instructed expert (JIE) may be vulnerable. A JIE owes contractual duties to all instructing parties, but one party will inevitably be disappointed by the expert’s view. It is difficult to persuade the court to allow a further expert to be instructed to call that opinion into question, so it may be more straightforward to find an expert who is prepared to disagree with the JIE’s view to act as a foundation to an allegation of negligence. The issue will fall down to the reasonableness of the advice/opinion but this may represent an area of vulnerability that experts ought to consider.

- Limitation will need to be looked at carefully since the Supreme Court has not indicated when the abolition of the immunity should take effect. However, we would expect courts to follow Awoyomi v Radford where the court held that Hall v Simons was not prospective in effect. This meant immunity for advocates ceased to exist from the date of the negligent acts in Hall v Simons (ie, 1991). If Jones v Kaney is interpreted on the same basis, immunity for experts ceased to exist with effect from November 2005 when Kaney negligently signed.