

It is almost a year since the landmark judgment in Jones v Kaney was handed down by the Supreme Court, but while barristers and solicitors report there has been little impact in practice so far, behind the scenes there has been a marked increase in enquiries from disgruntled litigants and there are signs that change may yet be to come. **Mark Solon** reports.

It was always unlikely that *Jones v Kaney* [2011] would be a catalyst for immediate change in the expert witness world, for a number of very different reasons. For one, the high calibre and commitment of a large majority of expert witnesses means they have confidence that they will not be found to be negligent, a high bar indeed.

However, inertia is undoubtedly playing its own part, and expert witnesses are guilty of the very human trait of believing that law suits are something that will happen to others, not to them. Roger ter Haar QC, who successfully led for the appellant Jones against Kaney, observed: "It's a bit like in America everyone believes in heaven and hell, but no-one believes they are going to hell."

At the most recent Expert Witness Institute (EWI) conference the subject of *Jones v Kaney* dominated discussion and there is no question that the Supreme Court's decision to strip expert witnesses of their immunity still plays on experts minds. The decision came

five years after the Court of Appeal found that experts should no longer enjoy immunity from disciplinary action by their professional body, following the case of Sir Roy Meadow, whose evidence in Sally Clark's trial for murdering her two children was later discredited. EWI chairman James Badenoch QC observed: "A lot of expert witnesses are scared by the professional disrepute Sir Roy suffered."

Despite these underlying fears, barristers and solicitors alike say experts have remained undeterred in practice. According to Daniel Shapiro of Crown Office Chambers, who was led by ter Haar in *Jones v Kaney*, the experts he has worked with in the past year have not been affected by the landmark judgment: "They were and are all professional, honest people who were good and experienced in their fields. They have carried on trying to assist the Court by giving careful and accurate opinions," he said.

Ter Haar QC added: "In commercial law it is not making any difference at all."

Fears among personal injury lawyers

that experts would not be willing to reach consensus for a joint report for fear of emulating Kaney, have so far proved unfounded. Richard Powell, joint head of the personal injury department at JMW solicitors in Manchester said: "My fear was that we would get the experts coming together to do a joint report but make no progress for fear of a Kaney situation." However he added: "It seems experts are getting on and doing their job as they always did."

Instead *Jones v Kaney* seems to have focussed experts' minds on the need to give more measured advice at the outset, to avoid needing to make concessions at a later stage when their views are found to be unsupportable. Shapiro said: "The real impact of *Jones v Kaney* is in experts being more careful to get their reports right in the first place."

Imran Mahmood, a criminal defence barrister at 5 Pump Court added: "I think in time they will learn not to be so robust in their earlier reports."

While experts who do give a measured opinion at the outset will have less to fear when meeting an opposing

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expert for the purposes of a joint report, Jones v Kaney flags up the very real need for experts to be fully prepared for this exercise. Ter Haar QC said: "Every practitioner will have stories of their expert going into a meeting and being bullied or writing it down in the wrong way.

"It causes tremendous trouble undoing that damage. You can't cross examine about what happened in the meeting and in 90% of cases it all goes very smoothly but in 10% of cases it just turns into a nightmare."

Despite Jones v Kaney being widely viewed in the expert community as an extreme case, there are signs that it may be a matter of time before further cases ensue. Shapiro said: "Obviously, since Jones v Kaney there has been an increase in enquiries, presumably because more clients and solicitors know that their expert can be sued than did before and because the risks inherent in challenging the law are no longer an issue for such claims."

Mahmood, meanwhile, has received around four such enquiries in the past few months, whereas before that the figure was one in five years. He said: "I have definitely seen more direct access clients, otherwise litigants in person, say 'I've been badly advised by my expert and had I not been badly advised I would not have embarked on litigation.'

For these litigants in person, the cost of pursuing a claim has so far acted as a deterrent. However, there is more of a question mark hanging over claims where funding is available, such as personal injury and medical negligence

claims where insurers are footing the bill. "That is where there will be movement if there is any," Mahmood predicts.

Clearly, most experts will be reassured by the fact that, if things do go terribly wrong, they will be covered by insurance.

Shapiro said: "Most expert witnesses already had professional indemnity insurance already, as indeed, Dr Kaney had: the damages and costs were paid by her insurers."

Professional indemnity insurance is now more critical than ever and Shapiro added: "Experts recognise that it is possible to make mistakes and, as there is now liability for such mistakes, are taking out appropriate cover."

This is echoed by professional indemnity insurer Ntegrity, which works closely with Bond Solon to give a substantial discount to expert witnesses who have trained with Bond Solon. Managing Director Gary Horswell said: "We have noticed more visitors to our website and have had more calls from experts interested in the Bond Solon scheme."

However, in a sign that more experts need to convert their best intentions into action Horswell added: "This hasn't yet translated into a big increase in policyholders but the signs are encouraging."

Jones v Kaney may have been dismissed by experts as something that would never happen to them but if further cases do arise there are fears in some quarters that this will shake the confidence of the expert witness community and even their willingness to act. There is no question that if experts are highly

qualified, appropriately trained in what is expected of them by the court, and fully insured they will continue to have little to fear, but the path to hell is paved with good intentions and worrying is no longer enough.

Author

Mark Solon

Managing Director of Bond Solon and Solicitor

Bond Solon

Paulton House,

8 Shepherdess Walk,

London N1 7LB

Office: +44(0)20 7549 2549

marks@bondsolon.com

Website: www.bondsolon.com