Supreme Court experts?

Chris Pamplin reflects on the decision in Jones v Kaney & predicts some unintended consequences

Photo: © RexFeatures

For many expert witnesses, the decision of the Supreme Court in *Jones v Kaney* [2011] UKSC 13, [2011] All ER (D) 346 (Mar) will make little immediate difference. Most expert witnesses, being conscientious professionals, will feel themselves unlikely to be found negligent and will carry professional indemnity insurance just in case. Indeed, they will view existing professional disciplinary risks as a greater concern.

The majority in the Supreme Court is dismissive of the risk that their decision will have a "chilling effect" on the supply of willing experts. But exposing expert witnesses to the potential distractions of vexatious suits from disgruntled litigants is never likely to encourage involvement in forensic work. It is the unquantifiable nature of this risk that so concerned Lord Hope and Lady Hale, as it should trouble anyone interested in the proper administration of justice.

> "Another unfortunate consequence of this decision lies in the impetus it gives to the further development of a professional class of expert witness"

A chill wind

For all the effort put into drawing an analogy between expert witnesses and advocates, and into seeking to learn from the experience of the removal of advocate immunity a decade ago, the majority in the Supreme Court ignored the fundamental difference between these two players.

Experts have busy professional lives away from the legal system and can readily choose *not* to take on forensic work, but advocates have no such easy choice. Whatever the experience of advocates, there is a greater risk of vexatious litigation against expert witnesses. Disgruntled litigants could pursue their expert witness on the basis that, being unaccustomed to such attacks, the expert may well view the onslaught with sufficient distaste as to settle unmeritorious claims quickly.

In short, an advocate faced with the removal of immunity has always been much less likely to leave legal practice, or be put off by the threat of being sued, than will be, say, a surveyor or paediatrician to abandon forensic work.

So how will experts view the risk? Only time will tell. But taken together with the current efforts at the Ministry of Justice to cap expert witness fees and the potentially serious consequences to an expert's livelihood of a professional disciplinary hearing arising from his occasional forensic work, loss of immunity can only act as a pressure to reduce the supply of expert witnesses as experts seek to use their time for better paid and less contentious work.

Professional class of expert witness

Another unfortunate consequence of this decision lies in the impetus it gives to the further development of a professional class of expert witness. By restricting the scope for an expert to offer just occasional assistance to the court, the decision will concentrate instructions upon those experts who have made a commercial choice to build a forensic practice. This is a double-edged sword. While the greater understanding of their role and duties should ensure the "professional" expert witness will create fewer procedural problems, by excluding the occasional expert witness the freshness and challenge to dogma that comes with diversity is lost.

Decision-making process

This Supreme Court decision is disturbing for the lack of challenge from the majority on the views expressed by the minority, and for having the president and his deputy split over the issue. But the way in which the majority arrived at their decision is the most troubling aspect of all.

As Lady Hale put it: "The lack of a secure principled basis for removing the immunity from expert witnesses, the lack of a clear dividing line between what is to be affected by the removal and what is not, the uncertainties that this would cause and the lack of reliable evidence to indicate what the effects might be suggest that the wiser course would be to leave matters as they stand." She highlights serious flaws indeed.

So what has led the court to behave in this way? One element may be the rather anachronistic view of expert witness practice revealed by the president of the Supreme Court.

Lord Phillips's judgment is notable for his pre-Woolf characterisation of the conduct of expert witnesses. He views expert witnesses as being partisan creatures of those who instruct them, almost as if the Civil Procedure Rules (CPR) had never been written.

When he says "an expert's initial advice is likely to be for the benefit of his client alone" he is not describing an expert witness, but an expert adviser (who has never had the protection of witness

immunity). No expert witness instructed under CPR 35 could ever write a report that was "for the benefit of his client alone".

To say "the expert witness must give his evidence honestly, even if this involves concessions that are contrary to his client's interests" seems to portray experts as being bound in loyalty to the party paying them and only reluctantly observing their duty to the court. This is not a description of expert witnesses that I recognise in 2011. It feels as if Lord Phillips thinks the world of the hired gun is alive and well a decade after Lord Woolf rode them out of town. Does a decade or more in the rarefied air at the top of the judicial ladder put one out of touch with the reality on the ground?

Slippery slope

Perhaps this explains why the majority set the issue before them in the context of what to do with a negligent expert witness. This is a myopic view of witness immunity. In putting a single expert witness centre stage, it encourages the creation of a remedy for a wrong done. But witness immunity has never been about protecting the negligent but about protecting the public. In focusing so intently on what to do about the very rare example of an expert witness who has been negligent, the Supreme Court has handed down a decision that threatens the very foundation of witness immunity.

There have always been exceptions to the immunity rule: perjury and contempt have a long lineage; wasted costs orders and professional disciplinary actions are recent additions. As Lady Hale pointed out, these exceptions are there to oblige the witness to perform his duty to the court. But the Supreme Court decision is a radical departure from these existing exceptions—it has been made to protect the interests of the client. To do this on no "secure principled basis" is all the more troubling.

When the Court of Appeal removed immunity from advocates a decade ago it could not have foreseen its actions being used to justify the removal of immunity from expert witnesses today. As Lord Hope has said: "One thing leads to another. Removing just one brick from the wall that sustains the witness immunity may have unforeseen consequences."

Having myself worked with the Law Commission on its careful deliberations on the admissibility of expert evidence in criminal proceedings, I am perhaps predisposed to see value in that body's approach to tackling difficult questions.

If this unprincipled decision from the Supreme Court does, in practice, result in a serious chilling effect on the availability of expert witnesses, we may end up in another decade with the Law Commission looking at how to change the law to encourage a ready supply of expert witnesses back into court. How much better if we had instead asked them today how best to provide a remedy for the rare wrong perpetrated by a negligent expert witness. NLJ

> **"It feels as if Lord Phillips thinks the world of the hired gun is alive and well a decade after Lord Woolf rode them out of town"**

Chris Pamplin, editor, UK Register of Expert Witnesses. Website: *www.ukregisterofexpertwitnesses.co.uk*