



EXPERT WITNESS INSTITUTE NEWSLETTER[©]

Autumn/Winter 2003

Features

| | |
|-------------------------------|---|
| Proceeds of Crime | 1 |
| Expert Witness in Court | 1 |
| SJE under the Spotlight..... | 2 |
| SJE: Achieving Justice | 4 |
| From the Secretary's Desk.. | 6 |
| From the RICS..... | 7 |
| Forensic Document Exam.. | 8 |
| Case notes | 9 |

PROCEEDS OF CRIME: QUESTIONS ABOUT THE ACT

Following discussion between the editor and EWI member Andrew Mainz, director of Forensic Accounting, it seems timely to formulate a number of questions about how the Act may impact on members' own practice. Andrew has suggested the following four:

1. Do you simply rely on those instructing you to carry out identity checks on new clients?
2. If not, what checks do you do?
3. Have you altered your letter of engagement to state that you rely on those instructing you for this purpose/or that you will carry out your own checks?
4. Would standard wording to cover this, from the Institute, for your letter of engagement be helpful?

To open a forum for debate the Newsletter will be grateful for responses to these questions from any affected professional practice, to be sent to the Editor. It is quite likely that further and consequential questions could be raised by respondents. Some may have had cause to report to NCIS, and may indeed have seen an increase in reports in the last few months. Do practitioners need to consider reporting every client, given that there is no 'de minimis' exemption?

The Expert Witness Institute is currently running a half-day conference on the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003 on 19 November 2003. For further information on the event or any other events go to www.ewi.org.uk

THE EXPERT WITNESS IN COURT: A SUITABLE CASE FOR TREATMENT

The Institute is running a seminar entitled 'Expert Witness – Frightened of Court' on Thursday 19 February 2004, at the London offices of Irwin Mitchell Solicitors. Jill Schmitt (TFT Practitioner), Mark Solon (Bond Solon Training) and Andrew Baillie QC (9 Gough Square) are the panellists.

Those who have been selected, or choose to become expert witnesses are aware of how exacting and demanding this can be. However, whilst confident of their expertise in their own field, many find the courtroom experience can readily become disorientating and unpleasant. Jill Schmitt provides some advice.

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As the evidence an expert witness gives is often instrumental in the outcome of the case, it is to be expected that counsel will do their best to unnerve the witness. Indeed, judges are well aware of the undue pressure that can be brought to bear and claim to be acting to try to reduce the 'gladiatorial' nature of court sessions.

Nevertheless, even though the expert witness has invariably made thorough preparation and has an outstanding reputation in their field, this deliberate intimidation can readily lead to nervousness and the frustration of not putting their evidence across to full satisfaction.

We have all experienced the mind 'freezing', the voice 'drying' and 'losing our thread'; all effects that produce an unsatisfactory response of which counsel can take full advantage. The result of such experiences

in the courtroom could well result in expert witnesses losing much of their authority and credibility. It is in these circumstances that reputations can be lost with colleagues and clients alike.

In a broader context, judges are concerned that this discourages expert witnesses from coming forward, particularly in the medical field where many doctors see the courtroom as a hostile environment. Some perceive the purpose of cross-examination as being an attack on their professional integrity. It is clear that any improvement in confidence benefits all concerned.

So can anything be done to help, or does one just accept the status quo?

The limitations that can be induced by fear are not recognised only in the courtroom. Dr. Roger Callahan PhD is a Californian clinical psychologist with over 40 years' experience. He suggested that, when fearful or anxious, we create our own inhibitions around ourselves which in turn can dominate our actions and overall capability. Removing this fear is fundamental to producing a fully-professional presentation. Dr. Callahan has developed a technique that he has termed Thought Field Therapy (TFT). This is best described as a natural, drug-free, non-invasive method to eliminate the causes of negative emotions.

Now in its 23rd year of development, TFT is available for the treatment of fears and phobias that can claim to offer an effective treatment. Two of the major advantages are that the techniques can be learnt quickly.

More information is available from the author, Jill Schmitt at www.jillschmitt.com.

THE SINGLE JOINT EXPERT UNDER THE SPOTLIGHT

The following researched article by Brian Thompson, EWI Secretary, was first published in The Personal and Medical Injuries Law Letter (publ.Informa plc) in May 2002. It seemed a pity to keep it from the readership closer to home!

The judgment of the Court of Appeal in *P v Mid Kent Healthcare NHS Trust* (2001) EWCA Civ 1703 appears to draw a distinction between medical and non-medical expert witnesses. The case concerned a claim for medical negligence following the birth of one of the twins who suffered from cerebral palsy. The defendant NHS Trust offered to pay 95% of the full liability quantum of damages, which was accepted.

So, putting the question of liability on one side, it was agreed that the expert evidence dealing with quantum should be provided by seven joint experts, namely an education psychologist, an employment consultant, a nursing specialist, an occupational therapist, a physiotherapist, an architect and a speech therapist, described collectively in the judgment as the non-medical experts. Each produced a report and the claimant's parents sought to have a conference with the experts without the defendant's solicitor being present. In the court of first instance, the Master took the view that this was inappropriate. He ordered that the application of the defendant's solicitor to be present be refused and second, that no conference be held by the claimant with the joint experts and those separately instructed by the claimant or, save with the written consent by any party, with any joint single expert.

It was this decision that was being appealed, but it is not entirely clear why the court sought to distinguish between medical and non-medical evidence. The point of principle which was being appealed has more to do with the procedure which is appropriate when a joint expert is appointed rather than the nature of the evidence. In this respect Lord Woolf's judgment carries the suggestion that the use of a single expert rather than of separate party experts is less likely to be ordered in respect of medical evidence rather than non-medical evidence:

'Although the amount of the claim can be significantly influenced by non-medical evidence, in my view in the great majority of cases where there is need of such non-medical evidence, that evidence should be given by a single joint expert rather than by experts called on behalf of the respective parties ... To have contested issues over the evidence given by those non-medical experts would make the litigation disproportionate.'

Significantly this ignores the nature of the evidence of some of these 'non-medical' experts. Each of the experts retained to assist in establishing quantum in the case would have had to consider a range of costs, which in some instances might well have been extreme. In arriving at their conclusion they would have been required to justify it. But establishing, for example, the cost of care required and the duration of disability is not an exact science, and necessarily it would involve a 'medical' evaluation. Moreover, it is equally open to another independent and objective expert to take a different view. Lord Woolf acknowledged this in *Daniels v Walker* (2000) 1 WLR 1382 where one party was

unhappy with the report of the single joint expert, in that case an occupational therapist. The appeal was allowed and a further care report from another expert was admitted.

The guidance provided by the Court of Appeal in *Daniels* was very helpful:

- In the majority of cases the sensible approach will not be to ask the court straightaway to allow the dissatisfied party to call a second expert.
- Where only a modest amount is involved, the court may take a more robust approach since it would be disproportionate to obtain a second report.
- The dissatisfied party should first consider whether their concerns could be satisfied by asking questions on the joint report.
- If either or both parties obtain their own expert reports, the decision as to what evidence should be called at trial should not be taken until a meeting between the experts has been held.

In *P*, the matter was complicated by the number of experts and the differing specialisms involved. The child's father, acting as the litigant's friend, expressed his deep concern in a letter to his solicitor, which was quoted by Lord Woolf in his judgment, explaining why he felt it essential for he and his wife to discuss the case with the experts:

'a crucial part of such conferences is our ability to express ourselves freely, without fear that any of our comments might be used or taken up by 'the other side', in what is still an adversarial process of deciding the final quantum. The presence of the defendant's solicitors' representative would severely inhibit this. Indeed we would find such a presence intimidating and distressing.'

Of course there is no reason why the experts themselves should not, in carrying out their duties, seek to meet with the claimant. Lord Woolf said as much:

'There can be no objection to that. A single expert is perfectly entitled to interview the parents for the purpose of preparing a satisfactory report.'

What Lord Woolf said was not permissible was 'the idea of one side [testing] the views of an expert in the absence of the other party'. Clearly it would ordinarily be expected that this would be done by way of questions to the expert which together with the answers would be made available to the other side. However, again the number of experts involved would have made this a cumbersome and somewhat expensive exercise.

It is interesting that despite the number of experts involved no recourse was made to the Part 35,

Practice Direction, paragraph 6: which states where *'there are a number of disciplines relevant to [the] issue, a leading expert in the dominant discipline should be identified as the single expert. He should prepare the general part of the report and be responsible for annexing or incorporating the contents of any reports from experts in other disciplines'*.

However, that issue was never raised and it may help to throw light on the Court of Appeal judgment by referring to the *Code of Guidance on Expert Evidence*, the publication of which was authorised by the Master of the Rolls on 20 December 2001. This was after the date of the hearing so it was not available to the court at the time. Paragraph 40 on the Code states:

'The single joint expert covers the same duties of professional competence as does an expert instructed by one of the parties, and the same overriding duty to the court. The conduct of the single joint expert should be determined by the principles of fairness and transparency. The expert should not communicate with or meet either party independently of the others.'

Given that the Code is aimed not just at the experts but also, specifically, at those instructing them, this might have allayed some of the fears of the parents. It is not that the process ceases to be adversarial, but it emphasizes that the single joint expert stands outside the adversarial process. His duty is to help the court, and in observing the principles of fairness and transparency both parties are able to raise issues with the expert on his report.

This leads in to the second issue arising out of this case, namely, the cross-examination of the single joint expert. Reference was made in the course of the appeal to the Supreme Court Practice (volume 1 of 2001) and to the parties having the opportunity to cross-examine the expert witness if called to give oral evidence at trial. Lord Woolf accepted that it may be appropriate in some cases — and indeed some members of the Expert Witness Institute have confirmed that they have been cross-examined when acting as a single joint expert — but he felt that this should not be the norm:

'The starting point is: unless there is reason for not having a single expert, there should be only a single expert. If there is no reason which justifies more evidence than that from a single expert on any particular topic, then again in the normal way the report prepared by the single expert should be the evidence in the case on the issues covered by that expert's report. In the normal way, therefore, there should be no need for that report to be amplified or tested by cross-examination. If it needs amplification, or if it should be subject to cross-examination, the court has a discretion to allow that to happen. The court may permit that to happen either prior to the

hearing or at the hearing. But the assumption should be that the single joint expert's report is the evidence. Any amplification or cross-examination should be restricted as far as possible'.

This was quoted with approval by Lord Justice Dyson in *Popek v National Westminster Bank plc* [2002] EWCA Civ 42 with the additional recommendation that if the single joint expert is 'to be subject to cross-examination then he or she should know in advance what topics are to be covered, and where fresh material is to be adduced for his or her consideration ... this should be done in advance of the hearing.' In both the *P* case and the *Popek* case the view was taken that clarification of the experts' report should ordinarily be by way of questions under CPR Part 35.6 and there was no justification for cross-examination.

This was no doubt very disappointing for the parents in the *P* case, and one might imagine although this was not raised, that they entertained thoughts of suggesting that the right to a fair trial under article 6 of the European Convention of Human Rights had been infringed. This argument was, in fact, run in the case of *Daniels v Walker* and Lord Woolf made short shrift of it. He held that it had no possible relevance to the appeal and it was undesirable that consideration of case management issues be made more complex by the injection of article 6 arguments. Indeed he expressed the hope that judges would be robust in resisting any attempt to introduce such arguments.

Nevertheless, the effect of CPR Part 35 is to give the court total control over the use of expert evidence and to limit that evidence to what it regards as necessary to resolve the matter justly. Any arbitrary use of this power could suggest to a party that such evidential restriction may have denied that party a fair trial. Second, if the court insists that a single expert be appointed, how is it able to assess the objectivity and fairness of the expert in carrying out his responsibilities? It has been said that if the single joint expert carries out his duties conscientiously one party will be satisfied, and one disappointed, but there is always the possibility that neither party will be happy. It will not be surprising if sometime in the near future this issue is tested in the court.

Certainly the thrust of the Civil Procedure Rules is more towards proportionality and the elimination of delay, and a disappointed litigant may well view the speeding up of the process and the paring down of cost as prejudicial to his right to a fair trial. It is not enough that justice is done; justice must be seen to have been done.

Brian Thompson,
Secretary,
Expert Witness Institute

SINGLE JOINT EXPERTS: ACHIEVING JUSTICE

Bill Braithwaite QC provides a barrister's view of the use of the Single Joint Expert

I feel occasionally that some courts dealing with catastrophic personal injury litigation have lost sight of the concept of justice. They seem to be intent on imposing single joint experts on litigants, regardless of the wishes of the parties, and blind to the obvious problems which such an appointment is likely to cause.

I have seen two clients in the last week who have suffered in this way. They were both respectable women before the accident, both earning good salaries. They both sustained non-paralysing spinal injuries, both producing complicated symptoms and poor outcomes. In each case the court imposed single joint experts, and in both cases the experts have taken against the claimant. The result is that the claimants are faced with the prospect of having to go to trial knowing that they cannot rely on the experts. If they cannot persuade the courts to change the order for single joint experts, they may well have to accept an offer which is lower than they are entitled to expect. Both cases are complicated by video surveillance evidence, purportedly showing

either that the claimants are dishonest, or that they are less disabled than they think. Both claimants maintain their assertion that they are honest, and that they really are as disabled as they say.

I find it interesting to analyse the thinking behind single joint experts. I accept that, in areas unlikely to be contentious, a single joint expert may represent a small saving in cost, in that only one expert is instructed instead of two. However, that same saving could be made if the other side agreed such non-contentious reports, which has always been possible, and which was part of our usual practice before Lord Woolf's changes. If the area is probably contentious, it may well be *more* expensive to go down the single joint expert route, because all that will happen is that one side or the other will disavow the single expert, and obtain their own report.

That happened to me recently in quite an amusing way. The expert appointed was known to be defence-orientated, but made a point (knowing that I was representing the claimant) of reporting fairly, thus producing high figures for the claimant. This produced howls of anger from the defence, who then

attacked the expert's reasoning, and said that they were going to cross-examine her at trial. In my opinion, they would have been entitled to instruct their own expert had they chosen to do so, because it just is not fair to decide issues of substance (that particular point involved over £5 million) in the knowledge that the single joint expert is challenged.

Why the insistence on the single joint experts?

This question of assessing the strength of your own case is an important element of the single joint experts controversy. I find, again and again, that it is helpful to discuss matters with an expert, so that one can see precisely what his or her opinion really is. It is often not sufficient to read a report, or a joint statement prepared by experts, because one cannot be confident that they have considered all aspects of the problem in the correct way. Only recently I had a consultation with an expert in a case in which there are four brain injury 'experts', all discussing how best to manage the claimant's treatment. Of those four (two for the claimant and two for the defendant), three are truly expert in the topic of long-term management and outcome following traumatic brain injury, but the fourth is not. Even the knowledgeable defence expert has to distance himself from the opinions being expressed by the fourth. And yet, that fourth expert is precisely the type of expert whom the courts would consider to be a suitable single joint expert. If he were, he would give the most ignorant opinion, and would cause a significant injustice.

The position is complicated further by the fact that not all experts are reliably fair, or even honest. This is a quote from a recent judgment: "His evidence on this matter had been given with conviction and authority, he stating that he had a clear recollection of the wording. When he had to admit that he was wrong and to accept that he had been misleading the court, he stated that he had made an assumption. This conduct can only be castigated as both disgraceful and dishonest. It clearly casts doubt upon the remainder of his evidence and the independence of his opinions." That man might have been a single joint expert.

Continuing the analysis, I often wonder what a court would do if, having ordered single joint experts, the party dissatisfied with the resulting opinion were to obtain his own report from an alternative, reputable expert. If that opinion conflicted with the single joint expert's opinion and assuming that it seemed to be a respectable difference of opinion, what order would a court make when confronted with the new report? Would it really take a stand, and refuse permission for that fresh expert to be called, knowing full well that there was a respectable expert taking a significantly different view and that responsible lawyers felt it appropriate to call him or her to

challenge the single joint expert? I find it difficult to imagine that any court would do that, but I frequently meet practitioners who positively expect precisely that decision from the courts which they know. I travel all round the country, and ask solicitors and barristers about this problem, and they are universally despondent about the prospects of getting a fair hearing on this point; they seem to find that judges just won't listen.

I must emphasise that these worries are related to catastrophic personal injury litigation. I acknowledge that different considerations may apply when damages are small, so that the cost becomes an overwhelming burden. But in cases where damages are measured in millions, and experts' reports cost about a thousand, the scales are tipped the other way.

Where to from here?

This is a problem which affects both sides equally, and therefore I wonder if it might be one topic on which both claimants' and defendants' lawyers could unite. I saw a very sensible letter recently from a major defence firm, suggesting separate experts in the areas of importance, and joint ones in the uncontroversial matters; in fact, they positively refused to have joint experts in the important areas. Perhaps the time has come when senior practitioners on both sides should recognize that this has become a major problem, and should start the process of modifying the system so that catastrophic personal injury litigation can be managed fairly to both sides, and the courts can do their duty to achieve justice.

Bill Braithwaite QC, who specialises in catastrophic brain and spine injury.

Membership numbers

| | |
|---|-------------|
| Founding sponsors | 10 |
| Professional body / association members | 12 |
| Corporate members | 28 |
| Individual members | 1009 |
| Retired | 35 |
| Sabbatical | 0 |
| Applicants | 12 |
| Total members & applicants | 1106 |

From the Secretary's Desk.....

Having been out of circulation for some two months it is good to be back. One disadvantage of post-operative convalescence coinciding with an extended heatwave is that you look as if you have just returned from safari or an extended sojourn on the Cote of d'Azur and the expected sympathy does not materialise. However, thank you to all those of you who expressed their good wishes for my speedy recovery.

Being away from the office does offer the opportunity for reflecting on the state of the world, or at least on that of the expert witness, and for being able for once to assess the wood rather than being overwhelmed by all those trees. It does, however, mean that one's reflections are somewhat random, but I hope none the worse for that.

Accreditation

The idea of an expert having to jump through various validation hoops before the court will grant him or her audience is something that most experts view with distaste. Bear in mind that the experts who have had to endure public castigation for their part in the Sally Clark and Trupti Patel cases would count amongst the most eminent in their professions and, if they had to, would expect to be accredited with no problems. To err is human .. but unfortunately when the eminent err the consequences can be disastrous. Could any system of accreditation have prevented what happened in those cases?

However, in this PC world it is looking increasingly as though accreditation is something we shall have to accept. The Council for the Registration of Forensic Practitioners is spreading its wings and already has around 1000 experts registered, mostly scientists. They held a meeting recently to canvas the views of the various expert witness organisations and certainly they will have gained the knowledge that, whilst we all share the desire to enhance the competence of experts as expert witnesses, accreditation per se is not the answer. There is a need for the individual to keep up-to-date in his or her specialism and the importance of the educational and training role of the expert witness organisations cannot be underestimated. A further meeting is planned to which a number of judges are to be invited. This will hopefully will get the discussion onto a co-operative and constructive basis.

Nevertheless, it is important to be aware of the views of the Lord Chief Justice on this subject. He spoke recently in the House of Lords, in the debate on the Criminal Justice Bill, to convey the concerns of the legal profession. These were too extensive to include in full in a twenty-minute speech, which it seems was all he was permitted. Accordingly he deposited a twelve-page memorandum in the House of Lords library. His views on, inter alia, experts are significant. The Bill requires the identity of experts to be disclosed, including any expert who has only been instructed, and information must be supplied on 'unused' experts. Lord

Woolf commented that this procedure should not be used as a backdoor way of obtaining privileged information and if the objective was to eliminate 'duff' experts it would be far better to pursue the accreditation route. Be warned!

Talks about talks

Mention of Lord Woolf reminds me of the address he gave at the Bond Solon conference some two years ago when he expressed the hope that EWI and the Academy of Experts would be able to get together, and indeed Lord Justice Auld commented in his report on the Criminal Courts that the various expert witness organisations should seek to combine. Of course those of you who drive presumably chose whether to join the AA or the RAC or even Green Flag (that is unless it comes as part of your insurance package). So what is wrong with expert witnesses having freedom of choice?

Nonetheless before the wind of change becomes a gale it has seemed sensible to the EWI Governors and the Academy's Executive to at least explore the ground. Accordingly a joint working party has been set up with three representatives from each of us – Alex Brown, John Cowan and Michael Renshall from EWI and Professor Gordon Stirrat, Andrew Mainz and Philip Newman from the Academy. It is interesting that at least two on both sides have or have had membership of the other organisation and perhaps that has been helpful in ensuring that the discussions have got off to a very amicable and positive start.

This is not something that will be resolved quickly, but the signs are encouraging and all experts who support our objective of enhancing the administration of justice will wish the joint working group well in their endeavours.

EWI events

Regrettably, we had to take the decision to postpone our Annual Conference. It will now be held on Friday, 30 January 2004. Please make a note in your 2004 diaries. In conjunction with the British Institute of International and Comparative Law we have put together a very interesting programme. I have had the comment from some members that it is not entirely relevant to their day-to-day work; but that overlooks the increase in the use of UK experts in overseas jurisdictions, because they do not have a big enough pool of their own home-grown experts. As we strive to raise the status of British expert witnesses the demand for their services internationally will become greater.

The programme is also attractive to the legal profession (who have their own CPD points to earn). So this gives experts the opportunity to network with lawyers, always useful when you are

looking for more instructions. We look forward to seeing you all at the Royal College of Physicians on 30 January 2004.

Meanwhile our seminar programme goes from strength to strength. In London, regrettably, we shall cease to be able to use the outstanding facilities of Denton Wilde Sapte at the end of this year. We are most grateful for their support up to now. However, Irwin Mitchell have stepped into the breach and our 2004 programme will be run from their offices at 150 High Holborn. Outside London we are expanding our programme too. We have had two excellent seminars in Leeds and Newcastle-upon-Tyne. Next year we will be adding Liverpool and Bristol to the list. If you cannot get to London, see if you can get to one of these. We realise how busy you are, but an evening with a chance to have your say and to

From the RICS

The Dispute Resolution Faculty

The RICS Dispute Resolution Faculty which currently has 19,000 members has been established to promote and develop surveyors who operate in the field of dispute avoidance, management and resolution. A key topic of discussion is the role of the expert witness and how to enforce/maintain standards in this high profile arena.

One initiative set up to try and promote the role of the expert witness is the introduction of a voluntary Expert Witness Registration Scheme. With the introduction of this scheme members minds have been focused on such issues as:

- What is the distinction between the role of the Expert Witness and Advocate?
- When does one role finish and the other begin?
- What constitutes an Expert Witness Report?
- What is the correct wording of the mandatory Statement of Truth?
- What other declarations should I include on my Report?

The reality is that the launch of this scheme has highlighted some key issues which are probably common to all professions. In 1997 RICS published the mandatory RICS Expert Witness Practice Statement and accompanying Guidance Notes. This core document lays down minimum standards and, as such, should be essential reading for any surveyor who acts in the role of expert witness. Not only does it clarify the duties of the expert witness, what should be contained in the expert witness report and the wording of mandatory declarations; it also provides best practice guidance on such issues as terms of engagement, fees policy and contingency fees.

Contingency fees

On the issue of contingency fees there is much controversy. Contingency fees are a common fee

network is too good to miss.

Before closing I should mention the conference we are running on 19 November on the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003. We ran a seminar on this subject earlier this year and it was clear there was too much to cover in 1½ hours – hence the half-day conference. This is an important event. The legislation is likely to catch expert witnesses as much as lawyers and other professionals. The sanctions are intimidating, and remember ignorance of the law is no excuse! It would be well worth your while to spend an afternoon with us on 19 November to avoid the difficulties you will undoubtedly suffer if you happen to run foul of the regulations.

Brian Thompson
Secretary

arrangement for surveyors acting as negotiators. The problem arises when the role changes to that of expert witness, a change that can be categorised by a change in duties. As a negotiator, the surveyor's duty is to the client. As an expert witness the overriding duty is to the tribunal by being truthful as to fact, honest and correct as to opinion and complete as to coverage of relevant matters. RICS is strongly of the opinion that this duty to be independent and impartial is incompatible with contingency fees. Best practice guidance recommends that a surveyor notify his client that contingency fee arrangements may jeopardise the credibility of his evidence. The Practice Statement also requires surveyors to notify the judicial body of all issues that could affect the validity of his opinion, for contingency fees can be seen to affect the perceived validity of expert opinion.

Raising awareness

As well as trying to raise awareness of the RICS Expert Witness Practice Statement and Guidance Note among members, the dispute resolution faculty is now also seeking to raise awareness among the legal profession and judicial and quasi-judicial bodies. By emphasising the importance of the practice statement it is hoped that standards will be raised and the credibility of chartered surveyor expert witnesses will be enhanced and some of the pitfalls that other professionals have encountered can be avoided.

Yvonne Hanly LLB Barrister
Director, Faculties and Forums
The Royal Institution of Chartered Surveyors

The Expert Witness Institute has been working with RICS to establish their Registration Scheme and congratulates the Institution on the success this initiative has enjoyed.

Correspondence

ERRATUM

The not-so-simple joint expert

The Editor is grateful to EWI member Mr L Miles Pickering for the following example of unerring patience.

Dear Sir,

Re: Yorke v Katra (EWI Newsletter case report, Summer 2003 issue)

I am always interested to receive the Newsletter and the various comments and casenotes. I act as an expert witness and single joint expert in relation to numerous building and property valuation disputes.

In the final paragraph of the report on the above case mention is made of "... a simple joint expert...". I sometimes think that I must be simple in view of the poor quality of instructions, received from many solicitors, but I presume that the Court of Appeal was really referring to a "single" joint expert?

L Miles Pickering,
The Venmore Partnership,
Liverpool and the North West

Indeed it was Mr Pickering. The Editor can no longer read properly, but his memory continues to serve him well. Remember that lovely song from South Pacific when Mary Martin trills to Rossano Brazzi: "I'm only a cockeyed optometrist." Those were the days. – Ed.

FORENSIC DOCUMENT EXAMINATION

The National Association of Document Examiners (NADE) was founded in the USA in 1979 by two American forensic document experts, Phyllis Z Cook & Rene C Martin, who wished to promote, educate and extend the interests of existing and prospective forensic document examiners. Many EWI members are also NADE members).

NADE is officially registered in the USA as a non-sectarian, non-partisan and non-profit-making organization. Membership is open to all appropriately educated and ethical individuals who, having met stringent and verified requirements, wish to train properly to qualify by formal written and oral examinations to become worthy of Certified Document Examiner (CDE) proficiency status.

There are currently over 130 international members of whom 47 have attained CDE status, and of whom six have earned the highest honour, 'Diplomate', since NADE was launched.

Thorough training is maintained through correspondence courses and a mentor system supported by a daily internet on-line forum serving a range of issues from trainee queries to complex current- case issues. A newsletter is published monthly and a comprehensive journal tri-annually, through which relevant information on new laws and forensic apparatus innovations are made known. NADE encourages friendly liaison with other fields of expertise, worldwide.

Week-long conferences are organized annually throughout the USA at which experienced NADE experts and other field professionals present research papers and/or demonstrate the latest forensic apparatus. Lectures are enhanced by a variety of relevant educational tours making each

conference interesting and beneficial.

NADE is at present the only internationally-known document examiner organization which specializes in formal oral examinations. A formal written examination is followed by formal oral appraisal for successful candidates. This oral examination is the culmination of extensive training, made realistic by holding a mock trial, with a real judge and counsel, where candidates present their evidence from past forensic cases in a formal court setting.

In 2001 NADE's 21st Conference was held for the first time outside USA, and was open to all fields of expertise. Maureen Ward-Gandy, a founder and Fellow of the EWI and Diplomate of NADE, hosted NADE's 2001 Conference in UK at the George Hotel, Crawley, assisted by her husband, Michael, EWI and NADE member). At the mock trial Sir Michael Davies, formerly a High Court judge and EWI founding chairman, was the judge and two eminent barristers, Mr Steve Hadley and Mr Jonathan Wyatt, were counsel. Other 2001 highlights were visits to the Royal Courts of Justice and the Old Bailey. New members were recruited for both EWI and NADE and, reflecting our conference theme, "Bond Across the Pond" - promoting better liaison between US and UK experts.

The author, Maureen Ward-Gandy, has been honoured with the NADE Award Document Examiner of Year. This award recognises distinctions in formal examinations, constant excellence and ethics in the profession, service to NADE as a mentor, lecturer, writer and conference organiser. She was the fourth member to receive 'Diplomate' award after the two founders and the President.

EWI Course Dates 2003/04

Basic Law for Expert Witnesses

(Cost to EWI members £225)
26 November 2003 (**London**)
14 January 2004 (**Leeds**)
10 May 2004 (**London**)
08 September 2004 (**London**)

EWI Approved Training

Excellence in Report Writing

(Cost to EWI members £310 + VAT)
11 November 2003

The Courtroom Skills Training

(Cost to EWI Members £355 + VAT)

12 November 2003
10 December 2003

Please contact the EWI office for booking forms or further details

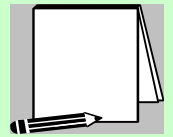
Dates for your diary

EWI Events (in London unless specified)

- 19 Nov 2003** Conference: Money Laundering – The Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003
- 27 Jan 2004** Seminar: Brain Damage at Birth – Challenges for the Expert Witness (Liverpool)
- 30 Jan 2004** Annual Conference: "Expert Evidence at home and abroad"
- 19 Feb 2004** Seminar: Expert Witness – Frightened of Court?
- 03 Mar 2004** Seminar: Expert Contribution to Quantifying a Psychological or Physical Injury (Bristol)
- 29 April 2004** AGM: Seventh Sir Michael Davies Lecture & Annual Dinner at Gray's Inn

Please contact the EWI office for details or booking forms for any of the events above

Case notes: Camilla Macpherson, Allen & Overy



A window of opportunity for experts, not judges

Deveron Joinery Company Limited v Perkins

This case, decided by the Court of Appeal on 30 July 2003 concerned a claim and counterclaim relating to the supply of windows in a new house. The Court of Appeal was asked to consider whether a county court judge had erred in preferring the opinion of one expert to that of another and whether the judge had, in consequence, wrongly decided the amount of damages to be awarded.

In respect of one faulty window in particular, the claimant's expert had stated that repairs could be carried out in situ, whereas the defendant's expert had said that the window should be replaced altogether. Although the claimant's expert later accepted that his suggested repairs did not tally in every respect with the features of the window in question (see further below), the county court judge said that he considered him more expert than the defendant's expert.

Giving the principal judgment Lord Justice Mance said that, in coming to this conclusion, "*the judge was not, in fact, adopting or approving any evidence or*

recommendation which [the claimant's expert] had made. The judge was, in reality, developing his own theory." He should have recalled the expert to hear how he proposed to deal with the problems which had been raised when he gave evidence. The judge could also be criticised for preferring the opinion of the claimant's expert as to the cost of repairs, particularly since the claimant's expert had himself down-played his expertise in this area and the defendant's expert appeared to be the more experienced. The issue of the windows was therefore to be remitted for retrial before another judge.

This case raised a further point of particular pertinence to expert witnesses. The claimant's expert was cross-examined on the question of whether a particular window sill was in two pieces (as he had stated in his report) or in one (as was in fact the case). He admitted that he had noticed that the sill was in one piece and not two the day before, but had not thought it made a great deal of difference. The expert was criticised by Lord Justice Mance, who said on this point that "*he should clearly have corrected his witness statement before that point in time, indeed, before he went into the box, or at latest in chief."*

Disclosure of privileged information

Two recent cases involving experts have considered the circumstances in which privileged information in the hands of experts may have to be disclosed.

CPR r.31.14 (2) states that a party “*may apply for an order for inspection of any document mentioned in an expert’s report which has not already been disclosed*”. By contrast, CPR rr.35.10(3) and (4) state that “*the expert’s report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written*” and that although these instructions “*shall not be privileged against disclosure*” the court “*will not, in relation to those instructions, order disclosure of any specific document...unless it is satisfied that there are reasonable grounds to consider the statement of instructions ...to be inaccurate or incomplete*”. The position seems confused: A party may apply for inspection of a document mentioned in **an expert’s report**, and the expert himself has to set out his instructions in his report - yet the court will not usually order disclosure of a specific document referred to by an expert if it forms part of his **instructions**.

In *Lucas v Barking, Havering & Redbridge NHS Trust* (23 July, 2003), an appeal in a personal injury claim, the court considered whether a wide or narrow construction should be given to the word “instructions” and concluded that the construction should be wide. Lord Justice Waller said “*under CPR 35.10(3) there is a compulsion on experts to set out their material instructions...CPR 35.10(3) compels disclosure of what would otherwise be privileged material*”. He added that the intention behind CPR 35.10(4) was “*to give protection to a party who would otherwise have waived privilege by being compelled to set out matters in an expert’s report*”. Therefore where, as in this instance, an instructing party had supplied an expert with specific documents to be used as the basis for advice, and that expert had then listed or referred to these documents in his report, they formed part of his instructions and the court would not order that these documents be disclosed, unless there were reasonable grounds for considering the instructions themselves to be inaccurate or incomplete. CPR r.31.14(2) could not be used to force disclosure of such documents.

Dunlop Slazenger International Limited v Joe Bloggs Sports Limited (11 June, 2003) concerned an application made by a party to allow further evidence to be put before the court. A witness statement in support of this application referred to communications between an expert and the instructing party. These communications were otherwise privileged. The court held that where a person “deployed” in court, rather than simply referred to, material that would otherwise be privileged, then privilege in such material had been waived and it must be disclosed. Moreover, Lord Justice Waller said that “*a party is not entitled to cherry pick, and a party to whom privileged information is provided is entitled to see the full contents*”, therefore

although the waiver had only been partial, the other side were in this case entitled to see all the documents relating to the communications from around the time of those communications.

Comment

These cases provide helpful clarification on the relationship between the common law rules on waiver of privilege, CPR r.31.14 and CPR rr.35.10(3) and (4) in the context of an expert’s report. Where an expert’s report refers to a document which forms part of his instructions, the court will only order disclosure of the document in the limited circumstances set out in CPR r.35.10(4). By contrast, where a witness statement refers to a document, considerations as to waiver of privilege and cherry-picking apply and the document may well have to be disclosed in full.

Conflict between expert opinion and witness of fact

In *Coopers Payen Limited and Anor v Southampton Container Limited* (11 July 2003), the Court of Appeal considered how best to approach the situation where a witness of fact and a single joint expert have given opposing evidence.

The case concerned a heavy press which toppled off a trailer whilst being towed by a tug at the Southampton Container Terminal. The appellants argued that this had happened because the tug had been turning too quickly and/or too tightly. According to the joint expert, the press could *only* have toppled in these circumstances, in particular if the tug had been travelling at around 9 kilometres per hour. But according to a witness of fact, it had not been travelling any faster than walking pace, that is, around 4 kilometres per hour. At first instance, the judge, on the basis of the evidence of the witness of fact and contrary to the conclusions of the expert, held that the tug had been travelling at the slower speed.

The Court of Appeal took a different view. Lord Justice Clarke, giving the leading judgment, stated that whilst a judge should always consider all the evidence in a case, it will be unusual to disregard the evidence of a single expert. In this case the judge at first instance considered the evidence of the witness of fact in isolation, when she should have considered it in light of the expert’s evidence. When all the evidence was considered together the only fair conclusion was that which the expert had also come to, namely that the tug was travelling too quickly or at too tight a turn.

In addition, Mr Justice Lightman gave the following useful guidance:

- Where a single expert gives evidence on an issue of fact on which no other direct evidence is

called, then “subject to the need to evaluate his evidence in the light of his answers in cross-examination, his evidence is likely to prove compelling.”

- Where direct evidence is also given on an issue, and a witness is credible, then “the judge must consider whether he can reconcile the evidence of the expert witness with that of the witness of fact. If he cannot do so, he must consider whether there may be an explanation for the conflict of evidence or for a possible error by either witness, and in the light of all the circumstances make a considered choice which evidence to accept.”

The expert in this case had also been asked to consider further questions at a late stage in the proceedings. Lord Justice Clarke made the following practical point for all parties to bear in mind, that “*if at all possible all relevant questions should be put to experts, including a joint expert, together with all relevant assumptions of fact long before the trial in order to afford the parties the best chance of settlement and, failing settlement, the fairest and most efficient trial.*”

Correct approach to clinical breach of duty

The case of Christopher William Morris v Blackpool Victoria Hospital NHS Trust (16 July 2003) will be of interest to experts in all fields of clinical practice.

This case confirmed that the correct approach to a claim in negligence against a doctor remains that set out in Lord Scarman’s judgment in *Maynard v West Midlands Regional Health Authority* (1984): “*It is not enough to show that there is a body of competent professional opinion which considers that theirs was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances.*”

In considering the claim, the judge must ask first whether there is a body of opinion which considers that the treatment/management by the doctor in question was reasonable and secondly whether such body of opinion is (in the words of Lord Browne-Wilkinson in *Bolitho v City and Hackney Health Authority*) ‘reasonable and responsible’. Mr Justice Silber said that it would be difficult for any claimant to persuade the court that the views of distinguished medical experts were *not* reasonable and responsible. A claimant would have to demonstrate that the professional opinion was “not capable of withstanding legal analysis” (again the words of Lord Browne-Wilkinson in the *Bolitho* case).

Allegation of Obstetric Negligence

How many experts to balance opinion?

ES v Chesterfield, North Derbyshire Royal Hospital NHS Trust

ES (by her mother and litigation friend DS) v Chesterfield, North Derbyshire Royal Hospital NHS Trust (25 July 2003) concerned an appeal from an order which had directed that expert evidence in this clinical negligence action should be limited to no more than one expert in the field at issue (obstetrics) on each side.

The claimant argued that she should be allowed to call two expert obstetric witnesses. This was on the grounds that the defendant, as well as calling its own expert, would also be calling two consultant obstetricians who, although technically giving evidence of fact, would have expertise and experience which could not simply be ignored by the court. In determining liability the court would have to consider the *Bolam* test principles of whether the hospital’s care failed to meet the standard reasonably to be expected. In giving evidence, the witnesses of fact were likely to be questioned about why they had acted as they had and, in answering, were likely to say that what they had done was consistent with the appropriate standard of care of an obstetrician. With three consultants appearing for the defence, and only one for the claimant, the result would clearly be an imbalance.

This was a complex and high-value case, and Brooke LJ, giving the leading judgment, summarised the issue as follows: “*Anybody watching the trial would be bound to be impressed by the fact that there was only one consultant obstetrician giving evidence for the claimant, while there would be three giving evidence for the defendant hospital trust, and those three would cover a much wider spectrum of personal experience than the single expert permitted to the claimant.*”

The court first considered rule 35.1, which states that “expert evidence shall be restricted to that which is reasonably required to resolve the proceedings”. The overriding objective set out in rule 1.1, one principle of which is to ensure that “the parties are on an equal footing”, was also considered. The court held that, in applying rule 35.1, what is reasonable should be decided on a case-by-case basis, and in any case the principles set out in rule 1.1 should be taken into account.

In this case, because it was not disproportionate to do so and was also necessary to achieve justice, the court exercised its discretion to allow the claimant to call another expert, and the appeal was allowed. All of the judges agreed that a party should be allowed to call two experts in one discipline only in a minority of cases, those, for example, which (in the words of Brooke LJ) have “*exceptional features*”. Holman J noted further that a court should limit this principle to cases concerning professional negligence, where the *Bolam* test will apply.

Substituting experts; expert shopping

Beck v Ministry of Defence

The Court of Appeal decision in *Beck v Ministry of Defence* (11 June 2003) is illustrative of the issues which arise where one party seeks to instruct a new expert witness. The central question in this case was, in the words of Lord Justice Simon Brown, “*whether it can ever be appropriate to allow a party to substitute one expert for another, without, at some stage at least, being required to disclose the first expert’s report.*”

The claimant brought a personal injury claim against the defendants. The defendants’ chosen expert examined the claimant and produced the requisite psychiatric report. The defendants then lost confidence in their expert because, it was said, he lacked sufficient knowledge on the workings of the Ministry of Defence psychiatric referral system, and because his report had not been produced in satisfactory form.

The court was asked to consider (i) whether they should grant an application for a new expert to be appointed and (ii) if so, on what terms.

On the first issue, the court considered Lord Justice Sachs’ leading judgment in *Lane v Willis* [1972] 1 WLR 326, which made the following points:

- An order for a medical examination of any party to an action is an invasion of personal liberty.
- Such an order should be granted only when it is reasonable in the interests of justice.
- Where refusal to submit to a medical examination is alleged to be unreasonable, it is for the party who makes the allegation to prove, on the facts of the case, that he cannot properly prepare a claim without such examination.

On the first point the court concluded that, notwithstanding the defendants’ late application to change their expert, and the fact the claimant’s personal liberty would be invaded to a certain extent by a second examination, there was no need to re-consider the decision of Langan J in the High Court that a new expert could be instructed, such decision being at his discretion. Lord Justice Simon Brown noted further that because this was a high-value case and one which involved allegations of professional negligence against the defendants’ doctors, it was particularly important that they should have confidence in their expert.

On the second point, the Court of Appeal considered whether the condition for allowing a new expert to be instructed should be the disclosure of the first expert’s report. The defendants argued that to have to disclose the report before they knew if their application for instructing a new expert had succeeded would prejudice later cross-examination of the first expert in the event that the application was in fact unsuccessful. However, once the decision to allow a new expert to be instructed had been made (as was the case here), Lord Justice Simon Brown said that he could “*see no reason for continuing to withhold disclosure of the original report which is now to be discarded, and every possible reason why such disclosure should be made.*”

The two major reasons for requiring that the report be disclosed at this stage were: first, to satisfy the concern expressed by Lord Justice Sachs in *Lane v Willis*, that “*No room should be left for a plaintiff [claimant] to wonder whether the application is really due to the reports of a defendants’ medical expert being favourable to the plaintiff*”; secondly, and a point made by all the judges, to discourage the practice of ‘expert shopping’.

Comment:

It should be made clear that expert shopping has, for present purposes, nothing to do with Joanna Lumley et al.

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