



# EXPERT WITNESS INSTITUTE NEWSLETTER

Autumn/Winter 2005

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## Standing up for expert witnesses

*There has been considerable criticism of expert witnesses for some time. EWI Chairman, **James Badenoch QC**, took the opportunity at the Annual Conference in October to correct some of the general misconceptions amongst the public about the role of the Expert Witness.*

Times may seem hard these days for conscientious experts who are willing, or as some would now say who dare, to offer their services as witnesses in court. The Sally Clark case has ended with her conviction overturned, and public and press opprobrium heaped on Sir Roy Meadow, whose possibly unwise foray into statistics was not by the Court of Appeal considered central, or possibly even peripheral, to the real case against her on which she was convicted. Indeed the trial judge, in his summing up, had effectively told the jury not to give weight to the statistical evidence when deciding on their verdict. And yet, as we all know, Sir Roy stands convicted by the GMC, subject to his pending appeal, of Serious Professional Misconduct.

*Most importantly his evidence was evidence of an opinion which it appears that he genuinely held. There does not appear to have been any argument advanced that it was inadmissible,*

As to the Meadow case, some would say that it is not necessary to approve the precise way he deployed statistics in court, to feel unease at the fact that the GMC became involved, and/or at the sanction the GMC imposed upon him. He was called as an expert by the lawyers for the prosecution, who must be assumed to have known, both in general and in particular, what his evidence would be, and to have approved and desired its presentation. Most importantly his evidence was evidence of an opinion which it appears that he genuinely held. There does not appear to have been any argument advanced that it was inadmissible, and he was not prevented by the Judge from giving it, nor apparently was it successfully challenged by the Defence. That he turned out subsequently to have drawn conclusions from the statistics which were not justified, and which could or ought to have been exposed as wrong, did not alter the fact that at the time he gave evidence he was presenting and seeking to make intelligible an opinion which he honestly, albeit wrongly, held.

The right of the expert witness to be honestly wrong is important, but first I consider the very special function of the expert witness in our legal system. Our law permits an expert who is qualified and experienced in a given field to give evidence in court of his opinion on matters within that field. This is an exception to the general rule that a witness must confine his evidence to an account of facts within his direct knowledge and experience, so that where the allegations or issues to be tried involve complex matters of which the court are

inevitably ignorant, they shall receive assistance from those who are skilled in them.

Yet there is currently a real problem in the way in which expert witnesses are perceived by the public at large, and to some extent in how they are portrayed in the media, and this problem of perception really does matter. Recent experiences have suggested to me that there is a quite widespread misconception of what precisely an expert witness is, of what qualifies him, and how he is enlisted, and of how often and why an expert witness is needed as part of the justice process. There is in some quarters the perception that there is a generic group of people who style themselves 'expert witnesses' in order to ply the lucrative trade of appearing in court, who are ready, in return for fat fees, to deliver an opinion on any subject which the lawyers consider may help their client's cause. In my younger days at the bar there were the so-called 'hired guns'. The same distinguished looking doctor might for, example, give seemingly persuasive evidence on brain-surgery one week, and equally impressive sounding evidence on gynaecology the next.

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*His duty is owed to the court and to justice, and not to the partisan interests of one side, or of those who pay him.*

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I can say with confidence that the bad old days of the hired gun are thankfully long gone. What we now need emphatically to get across is that the expert witness of today is first an expert in his specialist field of practice, and becomes an expert witness second when the particular specialised knowledge which he possesses is needed and called upon to serve the interests of justice. His duty is owed to the court and to justice, and not to the partisan interests of one side, or of those who pay him. He may be a strong proponent of the opinion he believes to be correct, but he is not an advocate for a cause. This entirely independent role he must fulfil courageously, never fearing to give the opinion which he believes to be right, even where, as may often happen, he knows it is not what the lawyers or their client want to hear.

This detachment of the expert from the lawyers' adversarial combat is enshrined in the Civil Procedure Rules, and in the declaration fully and robustly emphasized in the new Code of Practice for expert witnesses endorsed by this Institute. It is that reality which underpins all the work of this Institute, and it is particularly important, that the public at large should be made aware of it.

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*There needs to be wider recognition of the extent to which the court process depends upon the willingness of specialists in a host of different fields to provide expert opinions,*

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Furthermore we intend to stimulate a greater awareness of how often and how importantly expert evidence is essential to justice. There needs to be wider recognition of the extent to which the court process depends upon the willingness of specialists in a host of different fields to provide expert opinions, and to go

into the witness box when called upon, to deliver and explain that opinion to those who must decide the issues before the court. Consider questions about the accuracy of a police radar gun when a speeding charge is challenged, or the significance of DNA evidence in a rape trial. Imagine that you are falsely accused of forging a cheque, or of having mistreated your child. These are but a few examples in which expert evidence is central to a just outcome and is given by specialists in so many subjects up and down the country every day.

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*there is a real risk that experts who have been willing hitherto to give their services to the courts, may feel reluctant or unwilling to do so again.*

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These messages are particularly important in the current climate of misunderstanding and distrust, a climate in which a few recent high profile cases have quite unfairly done great harm to the reputation of expert witnesses generally. If we do not succeed there is a real risk that experts who have been willing hitherto to give their services to the courts, may feel reluctant or unwilling to do so again.

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*Provided his opinion is honestly held, and impartially and carefully expressed, after all proper enquiries and research on his part, the expert witness has done his duty, and done it properly*

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To revert to recent high-profile professional disciplinary proceedings, there is a popular misconception that Sir Roy Meadow and Professor Southall were tried by the GMC and convicted of misconduct, purely and simply for having given evidence or information which was shown subsequently to be wrong. That is not so, nor could it or should it be so. It is not any offence on the part of an expert witness that in the view of the Judge or jury his opinion is not in the end persuasive, held to be wrong, is considered mistaken, or is for any reason disregarded or not preferred. Provided his opinion is honestly held, and impartially and carefully expressed, after all proper enquiries and research on his part, the expert witness has done his duty, and done it properly. That is a message which needs strongly to be conveyed. In the Meadow and Southall cases, whatever you may think of the decisions made against them, it seems the charges upon which they were convicted was that they put forward opinions without first having fully informed and validated them by reference to all available information and/or relevant learning.

Consider in this regard litigation involving an allegation of medical negligence. In every case of this kind which is contested there will be two opposing and often diametrically contrary opinions expressed by honest and experienced doctors on either side. Those opinions are quite often presented, entirely fairly and honestly, in terms which allow no middle ground, no compromise position whereby each is seen to represent part of the truth. In this context the judge must decide which of the two should prevail, "on the balance of probabilities". In effect he will be deciding

that one of them is most probably wrong, or at least not provenly right, about the significance of the facts, and/or about the justification for the decisions or actions of the defendant. Yet at the end of these cases we do not expect allegations that the expert whose opinion has been rejected has acted dishonestly, improperly or culpably. Particularly in medicine, but also in other specialist disciplines, there is often room for opposing views to be held by experts whose respective interpretations of the facts, differ markedly on grounds which are at least arguable, and are advanced with sincerity.

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*it is vital that experts should recognize the boundaries of their expertise, and avoid straying into areas which are not properly their field*

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To say this is not of, course, to excuse some of the more extreme errors of which the unwise expert can be guilty. It is important always to avoid lurid or inflammatory language in expressing an opinion. Similarly it is vital that experts should recognize the boundaries of their expertise, and avoid straying into areas which are not properly their field. Furthermore, if it should be that any theory or opinion expressed is speculative, by which I mean unsupported by direct personal experience, empirical observation, hard research data, or other established science or learning, that should be acknowledged.

There can be no doubt that the lawyers do owe a crucial duty, and must fully play their part, to ensure that the evidence of experts, both in writing and given orally in the courtroom, is well founded, fairly expressed, and appropriately directed, and the Governors of this Institute believe that there is scope, and a need, for work to be done in guiding and helping the legal profession towards discharging that duty.

Consider the now notorious Sally Clark trial, in which Sir Roy Meadow gave evidence. It is reasonable to ask what the lawyers who made the decision to call him, and who led the now tainted evidence from him in the witness box, had themselves done to test and to confirm to their own satisfaction the validity of his statistics, and the reliability of his opinion on their significance, before he laid them before the jury. Did they subject the statistics, or the conclusions which he asserted could be derived from them, to logical analysis in advance? Did they enlist expert statisticians to verify the contentions? Were the defence, as you would expect, forewarned of what he would say? Did the defence challenge what he did say in court, or marshal any reasoned case against it, with or without a statistician?

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*barristers and solicitors need to be keenly aware of the necessity to establish, to their own satisfaction and to a high standard, the strength and validity of expert opinion*

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In all litigation that involves expert evidence, barristers and solicitors need to be keenly aware of the necessity to establish, to their own satisfaction and to a high standard, the strength and validity of expert

opinion on which they wish to rely, and how well it withstands the case made against it. In some cases the opinion, and understanding of it, may not be simple, but unless that is clear, the lawyers must explore it in detail with the expert at the outset, and robustly test it against contrary views that may emerge in reports from experts on the other side. If the expert has strayed outside his field, this should be remedied by the lawyers. To the extent that the expert's opinion is weakened or even undermined by expert opinion on the other side, he should confront and recognize this,

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*it is no disgrace for an expert whose initial opinion has not withstood this process to change his mind*

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and consider revising or recasting the advice he is giving. It should be remembered that it is no disgrace for an expert whose initial opinion has not withstood this process to change his mind. On the contrary it is his duty to say so, and for everyone's sake the sooner the better. There are few less edifying experiences than that of an expert who comes belatedly, after the trial has begun, to the realization that the opinion he has given, and on which the lawyers have been proceeding all along, is erroneous, or substantially less supportable than he had hitherto believed it to be, and that he can no longer advance it with conviction before the judge or jury.

If matters are conducted in this way, the most dangerous pitfalls will be avoided, and it will be rarely if ever that an expert presents to the court an opinion or argument that is so unreasonable or unsupportable that his professional conduct impugned. Opinions which are excessively partisan, overly dogmatic, or are otherwise incapable of withstanding logical analysis will be exposed before trial begins, and reliance upon them avoided. And no expert witness should be called to give evidence in court unless and until this rigorous process has been followed.

Nothing in the process which I am here describing implies any impropriety or misconduct by the lawyers. To the contrary it is merely a statement of the duty that lawyers owe to their clients, and to the expert witnesses. What is more, if lawyers do their duty in this way a further huge benefit will be gained in the avoidance of the blow to the party whose unjustified claim collapses, or whose unsustainable defence is dismantled only after the matter has been taken to a trial.

So we intend to carry the message to the lawyers that it rests on their shoulders to ensure in advance of the trial by all means possible, including well prepared conferences, and as thorough and detailed a mastery of the relevant science as they can achieve, that every expert opinion presented is well-founded, has a logical basis, can survive the assaults of the opposing side, and is supported, or at least is not contradicted, by relevant published learning.

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*the EWT will continue to play a major role..... in the provision of training for experts*

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There is another important safeguard for the expert witness, in which the EWI will continue to play a major role, and which we see as its foremost task. That task is the provision of training for experts, both in the principles of law which govern the provision of expert evidence, and in the practical aspects of the relationship of the experts with the lawyers. If the lawyers get it right, and the experts are properly informed and trained, we can hope and we can expect

to avoid the kind of problems which beset Sir Roy Meadow, and which have sent a shiver down the spines of many experts, no matter how conscientious they may be. That way lies the best possible protection for the expert against allegations of misconduct, for the parties against potential injustice, and for the courts against the presentation of evidence which is later alleged to have tainted or undermined the trial process.

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## LETTER TO THE EDITOR

### *The Expert's Relationship with the Instructing Solicitor*

A practice is emerging with one or two solicitors whereby they attempt to distance themselves from the traditional formal relationship between expert and solicitor by refusing to accept responsibility for the expert's fees.

As any well experienced and seasoned expert will know, it is vital, in the interests of the expert, to obtain formal acceptance of the expert's terms of trade e.g. the Expert Witness Institute Model Terms, in writing, together with confirmation that the solicitor will accept responsibility for the expert's fees *before he or she starts work*.

Unless the expert has a formal contract for services with the person he is instructed to advise, he or she could find themselves in a weak position if the relationship deteriorates, especially if it becomes necessary to sue the solicitor for non-payment of fees.

The Law Society Guide to the Professional Code of Conduct of Solicitors states at Principle 20.01:

*A solicitor is personally responsible for paying the proper costs of any professional agent or other person whom he or she instructs on behalf of a client, whether or not the solicitor receives payment from the client, unless the solicitor and the person instructed make an express agreement to the contrary.*

Two points are worthy of emphasis: the *personal* responsibility of the instructing solicitor and the obligation to pay the expert *even if his/her client has not paid the solicitor*.

Of course, the wording of this Guide allows experts and solicitors to deviate from this advice by arrangement if they choose but in my view there would have to be exceptional reasons to do so. I cannot think of any. It is clear what the Law Society position is and the Expert Witness Institute rightly takes an uncompromising line on this issue.

Our association (of insurance experts) has had several experiences of a firm of solicitors asserting that being responsible for the expert's fees was "not their policy". The only response from the expert to this should be (and was with our experts) "It is not *my* policy to be engaged on this basis" and walk away.

I urge all experts to stand firm and resist the bullying tactics of those solicitors who think that they are too big to abide by the good practice recommended by their own professional body.

**Yours sincerely**

Geoffrey H. Lloyd FCII MAE MEWI  
Chartered Insurance Practitioner  
Principal, Associated Insurance Experts

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### 2nd Joint Conference: Expert Witnesses complying with the Courts' requirements

Following the very successful Joint conference with the Institute of Psychiatry in December 2004 a second joint conference has been arranged for early 2006. It will be held in the prestigious Gray's Inn, again offering the mixture of informed plenary sessions and practical workshops.

The expert witness scene continues to evolve. On the civil side we now have the new Experts' Protocol to observe; while in the Criminal Jurisdiction the new Criminal Procedure Rules are now in force. Coming to terms with these requirements is essential for anyone involved in expert witness work, but the conference will also provide the nuts and bolts for operating in

court effectively, providing a compliant report and discussing the issues with the expert on the other side.

**Date:** 22 February 2006

**Venue:** Honourable Society of Gray's Inn, London WC1R 5ET

**CPD points:** five hours

# Trends in the Personal Injury and Clinical Negligence Market

*The Civil Justice Council has organised two forums over the past 18 months to consider the role of the experts and their fees in RTA Fast Track cases generating serious concerns for some experts. However, it would seem that fewer of these cases are, in fact, now reaching the courts. John Bryant, a Fellow of EWI examines evidence for this.*

Information of the Department of Transport indicates that of 280,840 road casualties in Britain in 2004, 3221 people were killed, 31,130 seriously injured, and the rest only slightly injured. The number of serious road injuries continues to decline, and light injuries have also fallen, by more than 12% since 1997. Light injuries have increased in share, from 74% in 1980 to approaching 88% in 2004. (A serious injury is defined as one requiring a patient to be hospitalised or with any of the following injuries: fractures, concussion, internal injury, crushings, severe cuts, severe general shock, or injuries causing death +30 days after accident. A slight injury is one such as a sprain, bruise or cut not judged to be severe or requiring medical treatment.)

## Industrial Accidents

Provisional figures for 2003/04 indicate that major injuries to employees, the self employed and members of the public rose on average over 8% on 2002/03, whereas the rise for over 3-day injuries was under 1%. This has bucked the long-term downward trend. The rise in both major and over 3-day injuries reported to Enforcing Authorities in 2003/04 is owing to accidents at service industries, mostly to employees, now the largest reported group of accidents, but also to a lesser extent to members of the public at service industries. HSE figures for 2003/04 indicate that about 70% of major injuries involve broken limbs, and a further 10% is split between cuts and joint dislocations. Major injuries continue to be more likely among operators of process plant & machinery, elementary occupations and skilled trades, than other occupations.

## Industrial Diseases

Occupational ill health cannot be defined in such a straightforward way as industrial accidents, and there are a number of surveys of the effect, producing different estimates, including SWI (household survey of self-reported work-related illness), THOR (voluntary medical surveillance scheme in the Health & Occupation Reporting Network), RIDDOR (statutory reports by employers under HSE reporting) and IIS

(Industrial Injuries Scheme for compensation under the DWP). Incidence of pneumoconiosis (coal and asbestos), diffuse mesothelioma and carpal tunnel syndrome is increasing, while cases of vibration white finger have recently declined.

Other occupational disorders reported on by the Health & Safety Executive include musculoskeletal disorders (chiefly inflammation of hand and forearm tendons), and stress-related and psychological disorders. In respect of the latter, HSE report that the annual incidence of work-related health problems in Great Britain in 2003, as estimated from surveillance schemes (OPRA and SOSMI), was approximately 6,500 cases per year, although this almost certainly underestimated the true incidence.

## Compensation Recovery Unit

Comparison of claims notified to CRU with the data on road accidents and industrial accidents and diseases indicates that claims are received for most injuries, however slight, except perhaps for under-reporting of industrial diseases. Information of the Department of Health (Report on Road Traffic Act 1999 for the financial year ending 31.03.01) indicates that of 394,271 motor claims, 210,451 (53.4%) involved NHS care, but of these only 40,792 required admission to hospital (in-patient treatment). 178,940 (45.4%) claims did not involve NHS care. The trend of cases registered with CRU is upwards, although there was a small decline in 2004/05 over 2003/04.

### Cases Registered to CRU

	2003/04	2004/05
<i>Motor</i>	374761	402924
<i>Employer Accidents</i>	79286	77765
<i>Employer Disease</i>	211924	175737
<i>Public</i>	91453	87247
<i>Clinical Negligence</i>	7121	7205
<i>Other</i>	5698	4997
<i>Total</i>	770243	755875

In terms of the number of claims per annum, the

clinical negligence sector is relatively small—the current level of claims in 2004/05 of 7205 representing only 0.95% of all CRU claims. This is lower than the 1.3—1.7% range highlighted in the DOH consultation paper by the Chief Medical Officer entitled “Making Amends” (June 2003). In terms of value, however, average case size is high, and the sector is of course significantly affected by cases for cerebral palsy. The report of the CMO referred to above indicates that while these account for just over 5% of clinical negligence cases in which damages were paid, they incurred 60% of all expenditure on medical litigation.

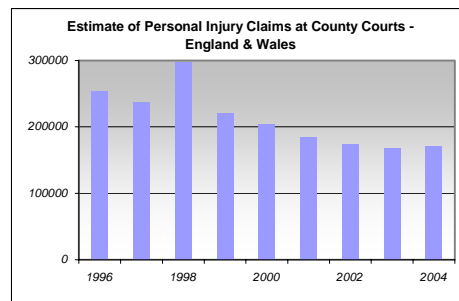
### Judicial Statistics

Data of personal injury proceedings started in the Queen’s Bench Division is currently published only for claims lodged with the Royal Courts of Justice and not with District Registries. It is not possible therefore to be precise about the trend of proceedings. However, currently about 29% of all Queen’s Bench Division claims (of whatever type) are lodged with RCJ. If this spread were applied to personal injury claims, then it might be expected that the 749 personal injury actions issued in 2004 at RCJ might translate to about 2590 claims for the whole of the High Court. There are no published statistics to back up this estimate however.

### County Court

No figures are published relating to personal injury claims issued at County Courts in England & Wales. In 1999 the writer enquired of the Court Service concerning summons issued in the three years 1996-1998, prior to the introduction of the Civil Procedure Rules. An average for the three years was about 12.5% of money claims. It is well-

known however that since the introduction of CPS claims have declined, and it would not be unreasonable to assume that personal injury claims have declined at least in proportion to money claims. The chart below is an estimate of personal injury claims issued at County Courts on the basis of samples for years 1996-1998 and 12.5% of money claims for 1999 onwards. The estimate of personal injury claims at County Court is however significantly below the level of claims notified to the Compensation Recovery Unit. Without the benefit of actual samples for the years 1999—2004, however, there are no means to determine the accuracy of the estimate, and additional research is to be welcomed in this area.



John Bryant BSc MSc CEng MIMechE FEWI  
Fellow Expert Witness Institute

A full copy of the report can be downloaded from [www.vocat.co.uk](http://www.vocat.co.uk).

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## Courses:

### Basic Law for Expert Witnesses

#### London

**Dates:** 2 May 2006 & 04

September 2006

**Venue:** The Diskus, Transport House, London WC1.

CPD points: five hours

#### Manchester

**Dates:** 12 June 2006

**Venue:** Hempsons Solicitors, Portland Tower, Portland Street Manchester M1 3LF

CPD points: five hours

You have been instructed by solicitors to provide expert evidence and you want to ensure that you can fully reflect your professional expertise in your evidence. But you’re not confident that you know enough about the law and you’re not familiar with the legal environment in which you’ll be operating.

The basic law course will equip you with what you need to know

about both civil and criminal law; the roles of judge, jury, barrister, solicitors, the police, and the Crown Prosecution Service; the law of evidence; hearsay and opinion; and disclosure. The University of Liverpool Law Faculty has compiled comprehensive course material which will form a permanent source of information for you.

# FROM THE SECRETARY'S DESK

## Annual Conference

I am penning these notes in the warm afterglow of probably the most successful conference we have organised. Over 200 attended Church House, Westminster to hear some challenging and thought provoking speakers. At a time when expert witnesses have a somewhat "tarnished image", to quote one of our members, it was encouraging to hear the top representatives of the judiciary express their support for an appreciation of the services provided by expert witnesses.

We are including in this issue the policy statement by EWI Chairman, James Badenoch QC, which he made at the conference. However, if you were unable to attend you need not feel left out. We recorded the whole day and will be happy to provide you with all the presentations on CD-ROM. We will let you know when they are available and the cost.

One very encouraging feature at the event was the number of non-members who booked. We hope that the exposure EWI received in this way and also from the extended report on the conference in the Law Gazette will enhance the standing of the Institute and attract new members.

## 2006

As the year draws to a close we look forward to exciting events next year. Firstly the year marks the tenth anniversary of EWI. The Institute was launched on 8 November 1996 by Lord Woolf and we are looking to mark the event by another major conference. Planning for this is already under way and at the moment we have it in mind to turn the tables and to have fewer papers from legal luminaries. Instead we feel it will make an interesting day to have the view of experts in differing specialisms to comment personally on how the Woolf reforms have affected them. So watch this space. The Governors are also considering how else we might mark the 10<sup>th</sup> Anniversary and have asked Mrs Susan Lloyd, a long standing Governor, to take charge of this. All ideas would be very welcome.

A second important development is the expiry of our lease at Africa House in February 2006. At the time of writing we have received no proposals from our landlords for a new lease, so we have

been investigating other alternatives. What we have seen so far is very exciting and will give us the opportunity for enhancing our services to the members. But nothing is yet decided so, again, it is a question of "watch this space".

A third event to look out for next year will be the publication of a major book on expert evidence. This will not be a successor volume to the compendium of expert witness cases which we had published in 2001. The approach for the new book, which is intended to mark the seventh anniversary of the Civil Procedure Rules, is that it will contain a collection of contributions on various aspects of expert witness work authored by a number of eminent contributors under the general editorship of Sir Louis Blom-Cooper QC. The book will be published by the Oxford University Press and, from draft chapters already seen, it will be an important addition to the corpus of published work on the provision of expert opinion evidence to the courts. So for a third time: watch this space.

Incidentally, we still have available copies of the compendium, which is not out of date because it features all the important cases in the first two years of CPR which are, by and large, still relevant, at the special price to EWI members at £15.

## More Books

This seems to be the season for books on expert witness work. We have received the following: [The Surveyor's Expert Witness Handbook: Valuation](#)

By Martin Farr published by EG books at £34 and available from [www.EGBooks.co.uk](http://www.EGBooks.co.uk) or by telephone on 01444 445335.

This is a comprehensive guide to all aspects of expert witness work, written by an experienced valuer and rent review surveyor who is a member of EWI. It includes the new Expert's Protocol but was in fact published before the 40<sup>th</sup> amendment of CPR which incorporated a reference to the Protocol in the Practice Direction to CPR Part 35. Nor does it include paragraph 6A, "orders" which was added previously to the Practice Direction.

### Successful Use of Expert Witnesses in Civil Disputes.

By Suzanne Burn, published by Shaw & Sons at £29.50, post free from [sales@shaws.co.uk](mailto:sales@shaws.co.uk) or by telephone on 01322 621111.

This book, written by an author and lecturer who will be familiar to many EWI members who have attended EWI events, is aimed principally at solicitors and others who instruct expert witnesses. Nevertheless there is much of interest to expert witnesses here, if only to enable them to keep instructing solicitors in the right track, as often still seems to be necessary. Suzanne is now a District Judge, sitting in the London county courts and it is useful for expert witnesses to be reminded of what the judge expects of them. This should be a useful work of reference from someone who really knows the field and is able to put the points across succinctly and clearly. Unfortunately although the Expert's Protocol is included as an appendix, the associated amendment to the Practice Direction to CPR Part 35 again is omitted.

### Expert Witness

By Ellis Baker and Anthony Lavers published by RICS Books. It may be purchased from [mailorder@rics.org](mailto:mailorder@rics.org) or by telephone on 0870 333 1600.

Again this is a book aimed at surveyors, with a forward by HH Judge Thornton QC, but it is to some extent a development of the compendium format adopted in the book EWI commissioned in

2001. As such it will repay attention from all those who undertake expert witness work, whatever their specialism. However, the authors, who are both solicitors, are careful to point out that while they have provided summaries of the relevant cases a digest version cannot always give the complete picture and reference to the full report is recommended. Surprisingly for a book produced by RICS books there is no reference to the RICS Practice Statement and Guidance Notes which is mandatory for all chartered surveyors who provide expert evidence. Again the exigencies of publishing procedure mean that, while the Experts Protocol is included as an appendix, the unamended version of the Practice Direction also appears.

### **Criminal Procedure Rules**

We have been invited to comment on the provisions of draft Part 33, Expert Evidence, by the Criminal Procedure Rules Committee. The consultation deadline is 7<sup>th</sup> December but we have been granted an extension by the Department of Constitutional Affairs. If any member feels they would like to participate in the consultation exercise please contact the office for a copy of the draft proposed rules or log on to the EWI website.

Brian Thompson  
Secretary

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## **EWI Seminars 2006**

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*Title: Policing expert reports Venue: London  
Date: 09 February 2006*

The new Experts' Protocol has set out in greater detail how the expert's report to the court should be put together. In this respect it amplifies the requirements of CPR Part 35 and its Practice Direction. The Protocol refers specifically with approval to the model forms of report produced by the Expert Witness Institute and the Academy of Experts. Yet judges are still critical of the performance of expert witnesses. Given that fewer and fewer experts now appear in court it is critical that the report meets the highest standards. How should such reports be monitored to ensure that they meet the requirements of the court without prejudicing the independence and impartiality of the expert?

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*Title: Experts Protocol Venue: London  
Date: 20 April 2006*

Lord Phillips, Master of the Rolls, launched the Experts protocol on 22 June 2005. Intended to replace the existing Code of Guidance on Expert Evidence it comes into force on 5 September this year. Drafted by Mr Justice Bean and HH Judge Nic Madge it follows very closely its predecessor

document in order and language, but importantly it reflects all the changes to the Civil Procedure Rules 1998 and the Practice Direction to Part 35 and therefore constitutes the most up-to-date statement of best practice for expert witnesses. We are delighted that one of the authors, Judge Nic Madge has agreed to speak.

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*Title: Rehabilitation - The new challenge for expert witnesses Venue: Salford Quays Date: 27 April 2006*

Rehabilitation is fast becoming recognised as being key and integral to the negotiation and successful completion of personal injury claims. While the NHS is excellent in attending to acute medical needs, post-acute care is still regrettably in short supply. How can rehabilitation be delivered as a non-adversarial component in an otherwise adversarial process. Will the "Rehabilitation Code of Best Practice" become an integral part of the pre-action protocols? How can expert witnesses play their part in the process?

This promises to be an important and essential seminar for all those involved in personal injury claims – both from the standpoint of the medical expert and for those experts instructed in the assessment of quantum.

## Case notes:

### Camilla Macpherson, Allen & Overy

#### **Liliana Montoya v Hackney London Borough Council SD204705 (15 July 2005)**

This case arose out of the Landlord and Tenant Act 1985, which provides that, in certain leases, there is an implied covenant that the lessor will, amongst other things, keep the structure, exterior and installations of the property in repair. It also states that in determining the standard of repair required, regard should be had to the age, character and prospective life of the dwelling house.

The tenant in this case claimed that the relevant provisions of the Landlord and Tenant Act had been breached. The defendant council denied disrepair. A single joint expert was appointed to inspect the property and report on it. The expert concluded that the various problems arose from the age of the property and not from disrepair. Notwithstanding this conclusion, the judge found in favour of the claimant. Although he reminded himself of the need to exercise caution when taking a different view from a single joint expert who had not been cross-examined on his report, he noted in his judgment that there was room for different experts to take different views, and he felt that the expert had taken "a rather severe view against the claimant."

The council appealed on the grounds that the judge had given no good reason for his decision to depart from the expert's opinion. The tenant argued that

the judge was entitled to depart from that opinion, and his reasons for doing so derived from the answers that the expert had given to written questions and from an article that the expert had appended to his report, the thrust of which was possibly contradictory to his conclusions on the issue of disrepair.

The Court of Appeal allowed the appeal, on the grounds that a judge had to have a basis for rejecting agreed evidence. Nevertheless, it was also made clear in the judgment that "the exercise of a judge's discretion will be interfered with only in exceptional circumstances." Such interference was permissible in this case because there was no evidential basis to justify the judge coming to a different conclusion to the conclusion come to by the joint expert.

#### **R (on the application of C) v Merton London Borough Council [2005] EWHC 1753 (Admin)**

In this case, Merton London Borough Council was found to have failed to express in sufficiently clear language why it had rejected expert evidence as to the age of an applicant for support under the Children Act 1989.

C, who had arrived in the UK and claimed asylum, applied to the defendant council for support on the grounds that she was only 17. A social worker who carried out an assessment of her concluded that she was not eligible for support, on the grounds that she appeared to be

over 18. The Refugee Legal Council therefore sent C to be reviewed by a paediatrician whose areas of expertise included age assessment. He concluded that C's estimated age was 17, and there was potential for error of plus or minus two years. Further interviews between C and representatives of the defendant council followed, the council ultimately refusing the application for support. C challenged this decision on various grounds, one of which was that the defendant had failed properly to assess the expert opinion.

The judge noted that in the second assessment carried out by the defendant, he could not find any explanation as to why the council had taken a different view from the expert. Although the groundwork for the reasoning could be found in the various documents available, he thought that the council should have expressed, in a clear and concise way, why the case was being rejected. As he said, "the point remains that this was a report of a highly experienced doctor who claims expertise in this area and the local authority does not explain why it disagrees with it." Consequently, and notwithstanding the fact that C's asylum claim had now been rejected, he held that the decision letter had been flawed and there should be a further decision on the case. The case was remitted for a retrial.

*Both these cases show the trend for tribunals to give increasing weight to single joint experts. This means as*

*such an expert you must remember that this view is likely to be taken. It is a very different role from that of a party appointed expert.*

### **Jakto Transport Ltd v Derek Hall [2005] EWCA Civ 1327**

This case for breach of statutory duty was brought by the claimant after he suffered injuries at work while using a torque wrench to tighten wheel nuts on a vehicle. The claimant claimed that the wrench must have malfunctioned because of a defect. The expert witness could find no such defect when he examined the wrench. Furthermore, he considered the claimant's suggested explanation of the accident, that it had malfunctioned due to dust in the ratchet, not to be a reasonable explanation for the malfunction. The judge at first instance said that he found the claimant to be "a truthful and convincing witness", and was inclined to believe him. He went on to make certain findings of fact *before* he turned to the expert's evidence in order to consider whether any of these findings required alteration in light of it. He found in favour of the claimant.

The defendant appealed on the grounds that the judge had considered the claimant's credibility in isolation from the expert's evidence (rather than in light of it), and when he did consider the expert's evidence, he did so simply to establish whether it would cause him to change his mind.

The Court of Appeal agreed that, where the expert evidence was relevant to the way in which an accident might have happened, "*it was incumbent upon the judge to consider it at the time*

*when he was reaching his conclusions on the credibility of the witnesses.*" The judge at first instance had failed to do so. Nevertheless, this did not mean that the judge had reached the wrong conclusion.

In answer to written questions asked by the claimant, the expert had concluded that there were two possible causes of the accident – either a defect in the wrench or a misjudgement on the part of the operator, both of which were very unlikely to occur. No further guidance was given by the expert as to which was more likely that the other, and the issue of the credibility of the lay witnesses therefore became critical, and the judge at first instance had found the claimant convincing. The Court of Appeal held that the claimant had therefore proven, on the balance of probabilities, that the accident was caused by malfunction of the wrench. Thus, although the judge at first instance had not approached the finding of facts as he should have done, even on a proper analysis, his decision would stand.

### **Montracon Ltd v Gregory Whalley [2005] EWCA Civ 1383**

This case on hand arm vibration syndrome (HAVS) has highlighted once more the difficulties in diagnosing the syndrome, and the consequent problems that arise for the courts when faced with personal injury claims.

The claimant, who claimed to be suffering from HAVS as a result of his work, was examined by two experts, one of whom concluded that he was suffering from HAVS, and the other of

who concluded that he was not. Diagnosis of HAVS is acknowledged to be particularly difficult because it is dependent on a patient's description of his symptoms.

At the hearing, the first expert heard the claimant give evidence under cross-examination about blotchiness he saw on his hands immediately before an attack of HAVS. The expert did not consider this to be consistent with HAVS, and for this reason decided that the claimant did not in fact have the syndrome. The two experts conferred and produced a joint agreed report which concluded that "*while recognizing that it is not a medical issue, we share concern about the apparent change in history as given in the oral evidence.*"

Despite this change in the evidence, the judge considered the claimant's evidence to be truthful and accurate, and awarded him damages. The judge considered that everything except the evidence as to blotchiness pointed to a conclusion that the claimant had HAVS, and the blotchiness itself could be explained on the basis that when the claimant looked down at his hands at the start of an attack he was simply seeing their usual blotchiness.

At appeal, it was argued (amongst other things) that the judge should not have rejected the medical evidence. However, the Court of Appeal noted that although it was clear from the conclusion to the joint expert report that the experts considered the claimant to be lying, this was a matter for the judge to decide. It was also open to the judge to interpret the claimant's evidence about blotchiness differently to the

experts. Furthermore, not only was blotchiness recognised by some to be a symptom of HAVS, but it may also have been the case that the claimant had been unable to describe the appearance of his hands clearly or accurately. The Court of Appeal therefore concluded that the judge was entitled to reject the expert evidence for the reasons he had given, and even if his reasons had been faulty, he had been entitled to find for the claimant on the balance of probabilities after consideration of "the totality of the evidence before him".

**Re W (a child) (non-accidental injury: expert evidence) [2005] EWCA Civ 1247**

This case concerned a child who had suffered injuries which, according to one doctor's opinion, based on an MRI scan, raised a possibility of NAI (non-accidental injury). The judge at first instance heard from a single expert in the key field of paediatric neuro-radiology, and rejected applications by the parents of the child that a

second such expert be instructed. After various applications had been made, the relevant papers were eventually released to a second expert, who came to a different conclusion to the first expert. Both parties to the action at this point agreed that a second expert should be appointed and the appeal arranged to consider the point was therefore allowed by consent

Wall LJ nevertheless took the opportunity to give a judgment, on the grounds that: the court is not a rubber stamp; the Bar had asked for assistance on this important point of practice; and the case demonstrated that "*even where there is a highly competent specialist representation, medical experts whose integrity and experience are not in doubt, and a judge who is both highly respected and a specialist in the field, a risk of injustice remains.*"

Wall agreed with the submission put to him that, although in many cases a clear picture will emerge from the evidence available, in some cases (such as cases involving NAI),

*"certain evidence may become pivotal and by its very nature not easily receptive to a challenge in the absence of any other expert opinion."* In this case, where the doctors involved had deferred to the opinion of another doctor (who was the only one capable of assessing the MRI scan), Wall felt that the parents were entitled to a second opinion. This was in accordance with the overriding objective set out in the Civil Procedure Rules for cases to be dealt with justly. A second opinion would not be allowed in every discipline, but should be permitted "*where the question to be addressed by the chosen expert goes to an issue of critical importance for the judge's decision in the case.*" Wall also pointed out that instructing a second expert would not necessarily increase costs, since it might be that agreement between the two would lead to the issues in the case being narrowed. He did however also note that this judgment should not be "*an encouragement to a disappointed party to challenge pre-final hearing case management decisions.*"



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On 14<sup>th</sup> October 2005 the EWI held its Annual Conference: “The Expert Witness System: Yesterday, Today, Tomorrow” at Church House, Westminster. Over 200 delegates attended which is one of the largest conferences the EWI has held for the last few years and it was good to see so many members and put faces to names. Feedback from the conference was very positive with 96% of delegates rating the overall conference as good to excellent, and 99% of delegates indicated they would be attending future courses run by the EWI. Many found the conference to be thought provoking and one delegate commented: “*quality speakers, quality content, controversially thought-provoking, it was one of the best days. It does not always have to be just learning. They drew a lot of trends together.*” Which is very satisfying for the conference sub-committee to hear and they have already started working on next

year’s conference to try and make sure it is as relevant and thought provoking as was this year’s. There were one or two very constructive criticisms from the feedback and the EWI is very grateful to those who took the time to return their critique forms and is looking to improve future events using this feedback. We had quite a few non-members attend the conference as well and many were impressed with what they heard: “*My first conference organised by EWI – very impressed; will attend in the future, and I am thinking of joining EWI.*”

This excellent conference was video recorded and is now available as a three DVD set for the special price of £12.50 for all members, and £15 for non-members. Due to the limited number of DVDs available, make sure you order your copy by **31 January 2006** to make sure you don’t miss out!

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