

Contents

Editorial	.....01
New EWI Directors	.....01
EWI Annual Conference	.....02
Sir Michael Davies Lecture <i>Dr Hugh Montgomery</i>	.....03
BOA Conference <i>Janette Gulleford, Chief Executive</i>	.....04
The Coroner – Part 1 <i>Dr Roy Palmer</i>	.....05
On becoming an Insurance Expert Witness – Part II <i>Geoffrey Lloyd</i>	.....07
How the expert can help in mediation <i>Chris Makin</i>	.....09
Joint Response: Review of Part 35 of the CPR <i>The Academy and EWI</i>	.....10
Case Notes <i>Camilla Macpherson</i>	.....11

Editor-in-Chief
Professor Max Sussman

Editorial Board

Roger Clements

The Hon Mrs Justice Dobbs

Geoffrey Lloyd

James Carne

Chairman
James Badenoch QC

Company Secretary
Kay Linnell FCAMBA FCI Arb

Chief Executive
Janette Gulleford

Office Manager
Caroline Van Tonder

Administration Officer
Ronald Male

EDITORIAL

We would like EWIN to include news of its members and officers and below we welcome two new Governors. It would be widely appreciated if members would tell us their news, so that this can be published from time to time. In 2008 we will appear quarterly, which will provide more space than hitherto to keep members informed. We hope that you will exploit the opportunities thus afforded by sending us items of interest. In this number we publish Hugh Montgomery's Sir Michael Davies Lecture on an important, sometimes controversial, subject that is gaining increasing public attention. It is with special delight that we publish the first part of an account of the Coroners' courts by Roy Palmer an erstwhile Governor of the Institute. In this number we complete Chris Makin's series on mediation and Geoffrey Lloyd's on the insurance world. We also have a brief note of the joint response of EWI and the Academy of Experts to the Civil Justice Council review of CPR Part 35.

New Directors (Governors) of EWI

On 27 June 2007 Penny Cooper and Ian Walker were elected Directors (Governors) of the EWI.



Penny Cooper is a barrister and Associate Dean, Director of CPD at the Inns of Court School of Law and Director of Knowledge Transfer at The City Law. After graduating in 1989, she trained as a barrister on the Inns of Court School of Law Bar Vocational Course and was called to the Bar in 1990. Penny Cooper was awarded scholarships by the Inner Temple and as a Pegasus scholar in 1992 she travelled to Bermuda and Dallas where she worked in commercial law firms. She was in chambers at 3 Paper Buildings and 4 Brick Court practicing general common law and later specialising in childcare law. Penny also spent five years in local government and headed the social services legal section at the London Borough of Wandsworth. She is a keen advocate of "Knowledge Transfer".

As a cross-examiner the Solicitors Journal recently described her as

"charmingly ferocious". She writes for legal journals and appears frequently on the media. She is the author of *Reporting to Court* (TSO, 2006) and a co-author of *Experts in the Civil Courts* (OUP, 2006).



Ian Walker is a retired solicitor and from 1977 – 2007 was a partner in the Personal Injury department of Russell Jones & Walker, where he was head of the Maximum Severity Litigation Group. He qualified in 1974 and specialised in personal injury claims for victims of accidents and of violent crime. He obtained record damages in a number of claims and was lead solicitor for claimants after the Kings Cross fire disaster 1987/8. He has also acted for

those with acquired brain and spinal cord injury and in fatal accident claims. Since 2000 he has been an accredited Mediator.

Ian is a member of the Criminal Injuries Compensation Appeals Panel and of the International Underwriting Association Rehabilitation Working Party for which he co-authored the Rehabilitation Code. He is an Executive Board member and Trustee of the Royal Society for the Prevention of Accidents and a Senior Fellow and Honorary Life Member of the Association of Personal Injury Lawyers.

Among his many appointments, Ian Walker was Founding Editor of the Journal of Personal Injury Law (1992 –1995), President of the Association of Personal Injury Law (1998-2000), Vice President of the Bodily Injury Claims Management Association (2000 - 2003), and a member of the Board of Governors of the American Trial Lawyers Association (1999-2004). He is a regular lecturer for APIL and EWI and regular broadcaster on TV and radio on personal injury law.

Information on all EWI Governors visit <http://www.ewi.org.uk/about/directors.asp>

EWI Annual Conference - Topical Issues for Expert Witnesses

To the right of Westminster Abbey through an archway lies Dean's Yard, akin to other cathedral closes of England. At its far end is Church House, a listed modern looking building dating from the 1930s. This was the venue of the 2007 EWI Conference on 18 September. The Hoare Memorial Hall in which the conference took place was where on occasion Parliament met after the Palace of Westminster had been damaged early in World War II. It was here that Winston Churchill in 1941 informed MPs that the German battleship Bismarck had been sunk by the Royal Navy.

After registration and coffee in the Assembly Hall, Dr Harry Brünjes, the conference chairman, opened the meeting and invited Dr Anthony Seldon, Headmaster of Wellington College, to describe *A decade of Tony Blair*. Dr Seldon, the biographer of Mr Blair had sketched a broad-brush portrait of the recent Prime Minister, "warts and all". Tony Blair has masterfully acquired power but had less skill in using it. Perhaps his greatest achievement had been settlement of the Ulster conflict.

The *Keynote Speech* by Lord Goldsmith was billed as by the Attorney General but on the day he made clear that this was no longer the case. At the outset he stressed the importance of expert witnesses for the effective operation of the law. Evidence is the business of justice but there is a potential danger that it becomes a business itself. The danger is exemplified in the Meadow's case, of which Lord Goldsmith summarised and discussed some of the essentials. He referred in passing to the problem of "shaken baby cases" and emphasised the importance for expert evidence of independence, integrity and impartiality.

James Badenoch QC, Chairman of EWI, speaking on *Experts after*



The Rt Hon Lord Goldsmith QC

Meadow - Fall out from the case, began by pointing out that after the Meadow case and a number of others there had been demonisation of experts, which was in part due to failure to understand the issues and a consequent lack of balance in reporting. It was the aim of EWI to help dispel these misunderstandings but in this individual experts, by the quality of their evidence, had a crucial part to play. After mentioning a number of cases that had recently come to public attention, Mr Badenoch emphasised that it was inherent to the adversarial system that differing opinions would be expressed on either side. This did not mean that the rejected opinion was necessarily dishonest.

After morning coffee, Mark Smith of Deloitte & Touche LLP considered the vexed matter of VAT. He discussed the reasons for the 1 May 2007 change that made the supply of medical evidence, as opposed to medical treatment, subject to VAT at 17.5%. He went on to consider whether in individual cases VAT registration is mandatory or optional. Mark Smith then discussed a number of matters in relation to the operation of VAT, including

determination of whether particular classes of income are subject to VAT, the advantages and disadvantages of VAT registration and the costs and risks. The lively and detailed questions that followed served to underline the practical importance of the subject.

The morning came to a conclusion with three Workshops. The first of these, led by Dr Brian Marien, dealt with the influence of personality on pain, how cognitive therapy can affect pain and how these aspects are significant for experts. The second Workshop, led by Mr Martin Gargan an orthopaedic surgeon, also discussed pain and personality with a surgical emphasis. The third Workshop led by Kay Linnell, Robert Maas and Francesca Lagerberg, was concerned with Inland Revenue investigations and matters of disclosure.

Lunch was followed by Paul Bowden's presentation on *Experts - Expectations and Ethics*. With reference to illustrative examples, this dealt with expectations determined by the expert's various relationships, including to those paying him, his counsel, the experts on "the other side" and his professional body. The Assistant Editor of *The Guardian* gave a lively account of Experts and the Media in which the asides were as telling as the text. The short *EWI Question Time*, which allowed conference participants to clarify some unresolved problems and to express their opinions, brought the business part of the day to a lively conclusion.

After tea there remained only the much anticipated appearance of the distinguished actor, Sir Donald Sinden, in *A Touch of the Memoirs and Judge John Deed* to bring the day to an exciting end. After a series of well told stories, the audience departed for home amidst cascades of laughter.

More pictures of the conference can be seen at www.ewi.org.uk/events/gallery.asp

The Sir Michael Davies Lecture 2007

CLIMATE CHANGE AND SURVIVAL

Hugh Montgomery BSc MB BS MD MRCP FRGS
Consultant Intensivist; Director, UCL Institute for Human Health and Performance

Anthropogenic Climate Change

The earth's atmosphere is wafer thin; half of it lies in a layer less than three miles above us. Within it, apart from its major components, nitrogen and oxygen, is a variety of atmospheric gases, chiefly carbon dioxide (CO₂) and water vapour that allow short-wave solar radiation to pass, but prevent long-wave radiant heat from escaping. They act like 'greenhouse glass' keeping the earth 30°C or so warmer than it would otherwise be.

During the course of 350 million years, vast amounts of atmospheric CO₂ were preserved as fossil fuels- oil, coal and natural gas- whose use has caused their CO₂ to be progressively released. Only one hundred years after the first mass-market car appeared, there are more than 600 million motor vehicles worldwide. Only fifty years after the first commercial jet air ticket was sold, more than four *billion* passenger flights are made each year. 'Standby' options on consumer electronic equipment have only recently appeared, but annually they are now responsible for the release of 1.6 million tonnes of CO₂ from stereos and 1.54 million tonnes from television equipment. A hundred metric tonnes of coal, 155,000 litres of oil, and 3 million litres of gas are burned per second. All this has been done while half the world's forests have been destroyed in only 50 years, and while enough is chopped down and burned each year enough to release 2 billion tonnes of carbon dioxide. Meanwhile, the role of forests as natural 'carbon sinks' is depleted. Overall, 293 Megatonnes of CO₂ are added to the atmosphere each year - and its concentrations is rising fast; it is already higher than at any time in the last 650,000 years.

Greenhouse gas is like greenhouse glass. Given that the insulation is increasing, the greenhouse is getting hotter. The sea has so far absorbed more than 80% of the heat added to the system, warming it to a depth of more than 3km. Yet global surface temperatures are still rising by 0.1-0.16°C per decade. Eleven of the last twelve years were the hottest on earth since records began in 1860. As a result, 89,000 km³ of Arctic ice have melted in 40 years, and summer Arctic sea ice has melted at a rate of 9.8% per decade since 1978¹. Mountain glaciers have lost 3,700km³ ice in the thirty years to 1993². Climate change drives weather change: Hurricane Katrina (2005) caused \$250 billion of damage. The inflation-adjusted costs of extreme weather events - some \$10,000 million in 1950 - had risen six-fold by 2000.

This is but the beginning. Global CO₂ production is still accelerating and, if unchecked, temperatures will rise more than 1.5°C per decade (6.5°C overall) during the lifetimes of our children³.

HUMAN SURVIVAL

All this bodes badly for the survival of the next generation. The Intergovernmental Panel on Climate Change (IPCC) predicts 'increased deaths...and injury due to heat waves, floods, storms, fires and droughts'³. Flooding and drought will also have an effect on human disease. By 2002, in some areas, 2.4% of cases of diarrhoea were attributable to climate change⁴. By 2050, decline in water availability will affect 250 million people in Africa and more than 1 *billion* people in Asia as mountain glacier melt waters diminish. Crop yields will fall by more than 50% in some areas, because changes in temperature or rainfall will alter growing seasons and cause ecosystem collapse. The result will be 'increases in malnutrition and consequent disorders, with implications for child growth and development'¹. Hunger may also be driven by economic collapse similar in scale to that associated with world wars⁵.

Can we adapt? Seventy thousand years ago, there were only 10,000 humans in the world. Five thousand years ago, there were 5 million, living in mobile small groups. Now, there are seven *billion*, many anchored to major cities. Major weather events such as Katrina, changing water and food availability, disease, and economic pressure are likely to cause mass migration and war. Indeed, at the 2003 Third World Water Conference, ex-Soviet president Gorbachev attributed 21 recent armed disputes to lack of water. Meanwhile, a rise of 1m in sea level would flood 17.5% of Bangladesh - a possible reason why the Indian Government recently constructed a 4,500km fence along the entire border with Bangladesh. Such problems will also affect Europe, as the IPCC warns of the whole of North Africa and Southern Europe becoming uninhabitable.

Six mass-extinction events have occurred in the 540 million years since multi-celled life first appeared on earth, each event killing 40-92% of species then on the planet. We face the same now: the 'mid-range risk' is that one in three species, and possibly one in two, are committed to extinction in the next forty years⁶. Sitting, as we are, at the top of this ecosystem, we should fear our fall as it starts to collapse beneath us.

Climate change is upon us, and we are driving it. About this, there is no dispute, as the national scientific bodies of most major countries, including the USA, China and the UK, have recently affirmed. Its impacts will soon be felt, and may be devastating. There is little time to act. We all have a practical, as well as a moral imperative to respond. Failure to do so means that we may yet become the only species to have documented its own extinction.

REFERENCES

1. Levitus S *et al.* (2001) Anthropogenic Warming of Earth's Climate System. *Science*: **292**: 267 – 270
2. Barnett T.P., Pierce D.W., Schur R. (2001) Detection of Anthropogenic Climate Change in the World's Oceans. *Science* **192**, 270-274

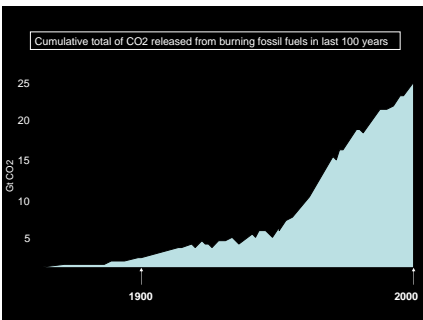


Figure: Data Source: World Resources Institute; Climate Analysis Indicators Tool, CAIT (www.wri.org/)

3. Intergovernmental Panel on Climate Change (2007) Summary for Policymakers <http://www.ipcc.ch/SPM6avr07.pdf>.

4. World Health Organisation (2002). World Health Report: Reducing risks, promoting healthy life. WHO: Geneva

5. Stern, J (2007) *The Economics of Climate Change: The Stern Review*. Cambridge University Press, UK

6. Thomas, C.D. *et al.* (2004) Extinction risk from climate change. *Nature*; **427**, 145-148

Additional reading

Leggett, J (2001) *The Carbon Wars*. Routledge, London, UK.

Monbiot, G (2007) <http://www.monbiot.com/archives/2007/03/13/channel-4s-problem-with-science/>



Janette Gulleford at the EWI Stand with a delegate

Visitors to the EWI Stand at the British Orthopaedic Association Conference Manchester 25 -28 September 2007

The EWI stand at the British Orthopaedic Association Conference generated considerable interest from consultants and other stand holders. It was visited by 33 consultants and a number of SHO's who chatted about doing expert work in the future. Members who visited the stand congratulated the EWI on its presence at the event.

Having a stand at the conference was a very interesting experience as we were able to chat informally to consultants about medico-legal work. The overwhelming problems identified by those who visited the stand were associated with working through the agencies. Many of the consultants had lost money when agencies went out of business.

Other more senior specialist consultants spoke about the pressure being put on them by solicitors to change their reports if these were not favourable to the claimant. One consultant said he had stopped doing so many claimant reports and was now doing defence work because of the pressure.

The stand was an interesting opportunity to talk to consultants and the Institute's Marketing Committee has agreed to make this an annual event. The next conference is to be held in Liverpool in 2008.

Janette Gulleford

The Coroner - Part I

Roy Palmer LLB MB BS FFLLM Barrister-at-Law
H.M. Coroner, Greater London (Southern District), Deputy Coroner, City of London

“The law relating to coroners is antiquated. Much of it dates from the thirteenth century, and is of great historical interest, but it is not well suited to the changed conditions of modern life. On the whole we have been astonished at the good work done by coroners with out-of-date and imperfect machinery But we think that the performance of their duties would be made easier, and the system in general rendered more efficient, if the law relating to coroners was amended and brought more into line with modern requirements”.

This quotation from the report in 1910⁽¹⁾ of a Committee chaired by Sir Mackenzie Chalmers is as relevant today as it was then. It was the first public examination of the coroner arrangements since the Coroners Act 1887. I will return to proposals for reform later, but first the origins of the coroner system will be considered and how it operates today.

Origins:

No-one is quite sure of the origins of the ancient office of coroner. That is the view of Professor Paul Matthews, HM Coroner to the City of London in *Jervis on Coroners*, which he edited. In the first edition, by Sir John Jervis, Lord Chief Justice of the Court of Common Pleas, he writes *“the office is of such great antiquity that its commencement is not known”*. Coroners probably existed before 1194 but it was in Article 20 of the Articles of Eyre of that year that they are first mentioned. Three knights and clerks were to be elected in every county as “keepers of the pleas of the Crown” (*custos placitorum coronae*) to look after the records of cases in which the Crown was interested and to have regard to the financial interests of the king. The Crown was interested not only in the administration of criminal justice but also in revenue derived from that administration. Revenues then included the forfeiture of sureties, the seizure of the possessions of felons, which was only abolished in 1870, and the confiscation of deodands (any instrument used to kill a person, found by the coroner’s jury to have been so used – and hence a source of armaments for the king). For example, if you were killed by someone’s horse and cart, these were forfeit to the Crown. In passing, one is inclined to wonder whether some good might be done today if coroners could seize the cars that cause deaths on our roads! Wrecks and treasure trove also formed part of the revenues. Originally, coroners had to be from the landed gentry, presumably so that if they failed in their duties, such failure could be made good from their personal possessions.

In the 13th and 14th centuries coroners were the principal agents of the crown in bringing criminals to justice – long before the commercial policing arrangements on the river Thames, or the formation of ‘Peelers’, the origins of the modern police service. Indeed, coroners were leading figures in the county until the 15th or 16th centuries and, according to some sources, even now rank immediately after sheriffs in

order of precedence on civic occasions. With the development of the police services, however, the justices of the peace and the extension of the role of the county courts, the role of the coroner became more circumscribed and their main duty became the holding of inquests into violent or unnatural deaths.

Coroners never held office directly under a royal warrant, as did the sheriffs. From 1194 county coroners were elected by the freeholders of the county until 1888 when the Local Government Act of 1888 made coroners’ appointments the responsibility of the local authority. Coroners still hold office under the Crown; it is a freehold office, which means that local authorities may appoint coroners but they cannot get rid of them. Indeed, an attempt in 2003 by a local authority to get rid of a coroner on his 75th birthday was met with a legal challenge by the coroner and the local authority backed down¹! The office of coroner today continues to reflect executive powers as well as judicial functions and, of course, the procedures in coroners’ courts are inquisitorial, not adversarial.

Functions today:

Coroners are appointed by the local authority, who must pay all properly incurred fees and expenses, but they are not answerable to anyone but the Lord Chancellor. What then do coroners do? Where a coroner is informed of a dead body lying in his or her jurisdiction, he or she must inquire into the death if the circumstances give reasonable cause to suspect that the death was violent or unnatural, or sudden and the cause is unknown, or if the death occurred in prison or in certain other circumstances set out in the Coroners Act 1988. Coroners also have jurisdiction over treasure, but this will not be considered here.

Coroners conduct fact-finding inquiries, not trials, to establish answers to four questions – *who* died, *when* did they die, *where* did they die and *how* did they die. It is *how*, not *why*, an individual died and an attempt to establish “by what means” and, in cases where the Human Rights Act applies, “in what circumstances” the death arose. The inquiry is inquisitorial. There are – or should be – no litigants. Everyone should see it as their duty to assist the coroner with the facts, not to obfuscate or to hide relevant evidence. Of course, human beings, and especially lawyers used to an adversarial system, do not always quite see it that way. In our modern, managed NHS, some medical managers and Chief Executives do not always quite understand their obligations to assist with

This is the first part of an article based on the Lettsomian lecture to the Medical Society of London, delivered in March 2007. The second part of the article will appear in March 2008.

¹ Londonderry and North Tyrone Coroner’s Application for Judicial Review

all the relevant facts. It is sometimes necessary to be quite firm and to remind them of the guidance of the General Medical Council,² “*You must co-operate fully with any formal inquiry into the treatment of a patient... You must disclose to anyone entitled to it any information relevant to an investigation into your own or a colleague’s conduct, performance or health. You must assist the coroner ... in an inquest or inquiry into a patient’s death by offering all relevant information. You are entitled to remain silent only when your evidence may lead to criminal proceedings being taken against you.*”

In 2006 about 500,000 deaths were registered in England and Wales of which about 45% were referred to coroners³. The remaining deaths are, of course, ‘signed up’ by the attending doctor on a Medical Certificate of Cause of Death. The proportion of referred deaths has risen sharply in recent years; only 5 years ago about one-third of deaths were referred but the referral rate has risen for several reasons. Three of these are, the “Shipman effect”, the alteration to general practitioners’ contracts so that they no longer have to provide personal out-of-hours cover and changes to working hours. So, after a death no-one may be available to issue the Medical Certificate of Cause of Death and the case has to be referred to the coroner, who has to be available at all times, personally or by his deputy, to deal with any duties in connection with post-mortem examinations and inquests.

To deal with the cases there are about 110 coronial jurisdictions, of which about 30 are held by full-time coroners and the remainder by part-time coroners, mostly solicitors in private practice. Briefly, deaths reported to a coroner may be dealt with in one of three ways. First, the coroner or his officer may make inquiries of the doctors in attendance during the final illness, and with relatives or others who have a claim to be regarded as interested persons. If satisfied that all is explicable and satisfactory, and nothing ‘unnatural’ appears to require further inquiry, the coroner may issue ‘*Pink Form A*’, which allows the death to be registered without the need for a post-mortem examination or inquest. Most of the discussion takes place with coroners’ officers rather than the coroner him or herself.

Second, if a coroner is informed of a death and has reasonable cause to suspect it was sudden and of unknown cause and believes that a post-mortem examination may prove an inquest to be unnecessary, he may direct a post-mortem examination to be performed by a ‘legally qualified medical practitioner’. If the result of the post-mortem examination indicates that an inquest is unnecessary, because nothing ‘unnatural’ about the death is found, the coroner may issue ‘*Pink Form B*’ to allow the death to be registered.

The third course is where the circumstances of a death are violent or unnatural, or the medical cause of death is not clear after post-mortem examination. Since there is no statutory

definition of ‘unnatural’, considerable discretion rests with coroners as to how the term is interpreted. In such a case, neither of the Pink Form procedures is appropriate and an inquest will be opened. This is usually done within a few days of the death. The inquest is then adjourned and the body is released. Further inquiries will then be put in hand and, in due course, the inquest will be resumed and concluded.

Nationally, about 12% of deaths reported to coroners result in an inquest. At an inquest a coroner must only deal with the four statutory questions – who, when, where and how⁴. Coroners must not express an opinion on any other matter⁵ and may not determine, or appear to determine, criminal liability on the part of a named individual or civil liability⁶. The coroner may, however, make use of the Rule 43 procedure to alert authorities to the desirability of taking action to prevent the recurrence of further similar deaths.

Faults:

Although the statute governing the coroner’s function is the Coroners Act 1988, it should not be thought that it is a modern statute. The 1988 Act was a consolidating Act, with amendments to give effect to recommendations of the Law Commission but it did not change the meaning of the Acts that it consolidated. The main Act was that of 1887, which itself consolidated a number of exceedingly ancient Acts passed mainly in the reigns of Edward I, Edward III and Henry VIII. This, in 1887, put into one statute the main legislation affecting coroners and implemented some of the recommendations of Select Committees of 1860 and 1879. As a result, the essential ingredients of the modern coroner service date back centuries, to a time before the days of Queen Victoria and the statute of 1877. Just about everyone, especially those who work within the system, agrees that the system is much in need of reform. Though much is wrong, most of the time the system creaks along thanks to the ingenuity and good will of those working within it, who are determined for the sake of the bereaved to make the system work despite its many imperfections. Coroners want reform as much as – or perhaps more than – anyone else!

Changes to EWI staff

Hello to Caroline Van Tonder – New Office Manager



Caroline joined the Institute on 8th November, as an experienced administrator. We welcome her to the team. She impressed the appointments committee with her enthusiasm for the position and her desire to seek a challenging position in which to develop her considerable skills. Born in South Africa she has been working in the UK for the past 3 years.

² *Good Medical Practice*, paragraphs 68 & 69; GMC, November 2006

³ Department of Constitutional Affairs; Coroners: Annual Statistical Returns 2006

⁴ The Coroners Rules 1984 (as amended); rule 36(1)

⁵ Ditto, rule 36(2)

⁶ Ditto, rule 42

On becoming an Insurance Expert Witness - Part II

Geoffrey H. Lloyd

In my earlier article (EWIN 11 No. 2 Summer 2007) I referred to the type of dispute that insurance underwriting experts most commonly encounter: allegations of non-disclosure or misrepresentation, either at the inception or the renewal of a policy. Such disputes are common across the whole spectrum of insurance.

My field of interest is general insurance and most people will be familiar with householder's, motor and travel insurance. For commercial and industrial customers the range is much wider and covers such risks as business interruption after a fire or other catastrophe, employer's and public liability and the insurance of large fleets of vehicles. Added to these are the more esoteric worlds of marine and aviation insurance where, in many cases, the magnitude of the exposure to possible loss means that the risk has directly to be shared by different underwriters. For example, the value of the hull alone of a 747 airliner is about \$100 million, but even this figure is eclipsed by the potential passenger liabilities to be insured if the aircraft flies to the USA where limits of indemnity can run into billions.

In the reinsurance world, companies and syndicates will lay off with other insurers (insurance companies and Lloyds) layers of risk beyond their own capacity. All of these branches of insurance produce disputes and, once again, non-disclosure or misrepresentation are more often than not the problem. The numbers of reinsurance disputes between insurers has risen exponentially in the past twenty five years.

Insurers compete, sometimes fiercely; but, unlike most other businesses, the insurance industry has to co-operate with its competitors.

Sometimes, shortcomings alleged by insurers are not necessarily the fault of the insured. Insurance brokers provide independent and impartial advice to prospective personal and commercial customers on which market to approach, how to apply for cover and what is the best deal for their client in terms of scope of cover, quality of service and price. Brokers must do this job thoroughly and if, when they act on behalf of the proposer/insured, they fail to pass on material information concerning the risk to underwriters and as a result the insurer refuses to pay a claim, the issue becomes one of a claim for professional negligence against the broker.

Regrettably, there is far more work for insurance experts who undertake professional negligence claims against brokers than there is for those who specialise in

underwriting claims. In certain complex cases there is a cause of action by the insured against both the insurer and the insurance broker who will be joined in the action. In one case I found myself advising my instructing solicitor to join the broker in the action. He had failed to do so and, unfortunately, it was too late. A later and separate action against the broker had to be mounted, adding to costs. I never discovered whether the inconvenienced claimant successfully pursued his solicitor for damages arising out of the negligence of the latter.

One of my more interesting cases was not, however, concerned with non-disclosure. My instructions were not by a firm of solicitors but by the legal department of a major and leading firm of international insurance brokers based in London. For added interest, the trial was to be in the Republic of Ireland. The brokers were being sued by their one-time client, an Irish scaffolding company, on the grounds that the client had been badly advised by the brokers to the extent that their overall profitability had been severely dented by the enormous premiums they had been forced to pay for liability insurance. A novel excuse for business failure indeed.

Although the dispute was essentially a claim for professional negligence, a case I would normally have passed to one of my group colleagues, I was pressed to accept the assignment, because the brokers were looking for underwriting expertise and the issues were primarily about underwriting practice in a very difficult market. Scaffolders are a very heavy risk with high premiums, often involving the insured bearing a substantial part of any claim - in this case IR£100,000 in pre-euro days. *Inter alia*, I was to assess the merits of the case and advise in detail on how liability policies are underwritten.

Although the legal system in the Republic is based on the English common law legal system, there are differences. This case arose just after the Civil Procedure Rules had been introduced in England and Wales, with their emphasis on experts being seen to be independent and with a primary duty to the court. The broker's legal department had appointed Dublin solicitors to assist them locally and when I mentioned to the partner concerned how we operated in England, his reply was "I don't want any of that nonsense here; you're on our side and part of the legal team. And don't you forget it"!

The claimants' case had no merit. I was not required to give oral evidence and after wasting the court's time for several hours, and increasingly adding to the judge's impatience, the claimants withdrew their claim. Although

my fees have been paid, I understand that the costs have still not been finalised after five years.

Scotland is another interesting place for experts. In an early Scottish case of mine, the barrister on our first meeting, greeted me somewhat offensively with the words, “I don’t like experts”. I restrained myself from expressing my views about barristers like him. In that case, and a later one, I came up against the practice in Scotland of the courts treating *all* witnesses the same whether they are witnesses of fact or expert witnesses. This practice means that expert witnesses are allowed into the court only while they are giving evidence.

On the second occasion this was to happen, I complained to my instructing solicitor that it was intolerable. In order to be fair to his client it seemed to me that I needed to hear the opening speeches and all the evidence, as one can in England & Wales, because it could influence my opinion. He consulted with counsel and persuaded both sides to apply to the judge, a sensible woman, for me to be in court for the whole of the trial. She agreed. One wonders why other experts put up with the system.

There are numerous differences in legal practice in Scotland as compared with England but we could learn from one another. I am told that although nothing like the Civil Procedure Rules have been formally adopted north of the border, they are increasingly adopted in spirit. Furthermore, I am involved with the Law Commission (England & Wales) concerning the reform of insurance contract law and it was most encouraging that when the review was announced, the Scottish Law Commission immediately sought to be fully involved. Although I have recently stopped taking new instructions it is flattering to be invited to offer the Commission fifty years of insurance experience which they clearly welcome.

The reputation of the insurance industry is not enhanced by insurers who perversely and shamelessly seek every excuse to avoid their liabilities. I acted for the solicitors to a small industrial printing company that suffered a major fire and their insurers refused to pay. The fire cover was part of a package of cover in a business combined policy. The insurers discovered that the insured had had discussions with a customer in USA with a view to exporting an item of stationery to them. These were not goods, such as

pharmaceutical or electrical items, with high potential litigation risks in a country, as we all know, obsessed with extravagant compensation culture. The insurer’s allegations that there had been non-disclosure of a material fact, which amounted to no more than day to day commercial exchanges, had no merit whatsoever.

The insured had instructed leading and very competent city lawyers and, armed with my report, confronted the insurers and secured full settlement without a trial. The tragedy in this case - and it is by no means an isolated one - is that about twenty people lost their jobs and livelihood because of the delay in payment of the insurance proceeds. So, although the insured company eventually received an indemnity for the lost assets, the business had been destroyed. I am pleased to say that the Law Commission, who have yet to make their final recommendations for reform of insurance contract law, are sympathetic to righting this injustice by making compensation mandatory for delayed claim payments. Insurers are not warming to this prospect. Damages in these circumstances are, apparently, available in Scotland.

The Civil Procedure Rules (CPR) have in many ways undoubtedly brought more sanity into the legal process. As a result the nature of my work as an expert has changed during the past five years. The number of CPR-compliant reports I have been asked to provide dropped dramatically. Instead, solicitors have been looking for a letter of advice to enable them to make an initial assessment with the client. It is foolish to rush into litigation without careful consideration of all the potential outcomes. Experts have a very valuable role to provide initial advice to both claimants and defendant insurers.

But care is necessary: whilst experts continue to be immune from suit in so far as their evidence to court is concerned, they are not immune where letters of advice are concerned.

Was I any good as an expert? I couldn’t possibly comment; that’s for others to judge. I can only say that I have derived an enormous amount of enjoyment and satisfaction from the work. I have also helped others to get started and made many new friends. Above all, I would like to think that, at least, I played a small part in contributing to the better administration of justice.

Changes to EWI staff

Goodbye to Vicky Bartlett – Office Manager

Vicky Bartlett has been with the Institute for the past 7 years. She has been responsible for management of the office and has provided continuity and a safe pair of hands through the years. As Vicky has said it is never a good time to move but after such a

How the expert can help in mediation

Chris Makin

Forensic Accountant*

In previous articles Chris Makin explained the legal background to mediation and why it is so successful. In this final article in the series, he shows the great value of experts in the mediation process.

Experts can be of great value in the mediation process, though much of what follows applies only to party experts. The Single Joint Expert is a “Billy-no-mates”, and it would be quite wrong for him to be used in the ways I describe.

We have seen that mediation ought to be considered in virtually every case, since the party which refuses to mediate is at risk of paying both sides’ costs, win or lose. But there is a skill in identifying the point at which mediation ought to be proposed. Put shortly, that point is when each side knows enough about the case to be able to negotiate; when each side can identify the strengths and weaknesses of both sides’ cases, but when a worthwhile saving in costs can still be made. It may be as early as the letter before action and the response; it might be as late as exchange of witness statements and expert reports; it will rarely be later than the production of the experts’ joint statements.

So, litigation is likely to follow a conventional course until the best time to propose mediation and the expert should prepare his report and conduct himself as though every case will go the full distance. Then the dynamics change:

- Mediation is about negotiation, not about who is right
- No formal evidence is taken
- Formal expert reports are not needed, though an informal SWOT (Strengths, Weaknesses, Opportunities, and Threats) analysis can be invaluable

When mediation is mooted, the expert should always inform the solicitor of his fees and unbilled time, since the intention will be to settle the whole matter, including costs and disbursements. The expert should then ask the solicitor what help is needed. Solicitor or counsel will want to know the strengths and weaknesses of the case, relevant to the expert’s involvement. In a partnership dispute, the expert accountant could offer to draw up a spreadsheet showing the closing balance sheet, with reference cells for such variables as profit share, interest rate on capital, values of assets withdrawn by each partner, and so on. Thus, the client would know the amount they would receive or pay if they settled the point at a particular amount.

The expert may be asked to help further in the following ways:

- Be available for consultation by telephone, during the day and sometimes well into the night
- Be available to attend at short notice if that becomes necessary
- Or be a member of the team throughout the day
- Give advice to your side during private meetings
- Hold expert meetings with your opponent during the day, perhaps with the mediator, both parties and both sides’ lawyers observing
- Prepare a joint statement of experts during the day

- Be interviewed by the mediator, perhaps with others watching
 - Review and comment on new material presented during the day
 - Advise your side of the merits of a proposed settlement.
- Your involvement as expert can, however, be far more onerous than at a court hearing, because:

- The informal atmosphere can cause you to lose impartiality, and become too identified with “your” client
- That informality can cause the client to think that you are on their side
- Since you are being seen by those who could give you future work, it is too easy to soften your opinions to impress them
- The other side are constantly assessing how good a witness you will be, if the case proceeds to trial
- In “without prejudice” discussions you may be tempted to say too much
- You do not know what discussions the mediator is having with the other side
- Mediations do not finish promptly at 4.30pm; they can go on into the night, when fatigue may become a problem

More than anything else, the danger is that the informal atmosphere can cause the expert to lose the detachment which is essential for an expert at trial. Mediations do sometimes fail, and it is then difficult for the expert to revert to having an overriding duty to the court, irrespective of the party instructing him or by whom he will be paid, if he has been too helpful during the mediation.

So the moral is clear: by all means participate in mediations if asked to do so; but whereas the style may be informal, it must never be casual. And the expert must stay aloof from the cut and thrust of mediation so as to maintain the detachment which is essential for the minority of mediations which fail, making a formal court hearing necessary. The expert should abide by the spirit of Part 35 of Civil Procedure Rules, even in the informal atmosphere of a mediation.

* **Chris Makin** has practised as a forensic accountant and expert witness for 20 years. He has been party expert, single joint expert, Court appointed expert and expert adviser in hundreds of cases, and given expert evidence about 70 times. He also performs expert determinations. Chris is a chartered accountant and a mediator qualified with the Academy of Experts and accredited by the Chartered Institute of Arbitrators. There is a great deal about mediation on his website, www.chrismakin.co.uk.

The Joint Response of the Academy of Experts and The Expert Witness Institute to the Review of Part 35 of the Civil Procedure Rules

The Civil Procedure Rules 1998 (CPR) came into effect for all litigation commenced after 26 April 1999. In July 2007 The Academy of Experts and The Expert Witness Institute (the Respondents) responded jointly to a request by the Experts' Committee of the Civil Justice Council (CJC) about the operation of CPR Part 35. The full text of the joint response will be available on the EWI website www.ewi.org.uk. The following is a much abbreviated summary.

The CJC raised a number of specific questions but also enquired more generally about the operation of CPR, including the possible need to alter the definition of "expert" in CPR 35.2. The Respondents felt that CPR and the Protocol, were working satisfactorily, but that there is too much detail in the CPR Part 35 and insufficient detail in the Practice Directions, with some overlap between the two. The recommendation was that the CPR Part 35 be slimmed down and that cross reference should be made to the PD and Protocol. The definition of 'expert' in the Criminal Procedure Rules (CrPR) was thought more helpful and the following revised wording was recommended: *A reference to an 'expert' in this Part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of civil proceedings.*

There was an earlier consultation by the Expert Committee last year about Single Joint Experts (SJE) and an amendment to PD35 was proposed. The Respondents endorsed the proposed amendment but supported the position of the Bar Council that it would not be fair to allow one party to call an expert witness but not to allow for an opposing party do so. The amendment to PD 35 should include a specific provision to deal with actual or potential conflicts of interest and the expert report should include mandatory disclosure of actual or potential conflicts of interest or a positive statement that he is not aware of such a conflict. Guidance was also necessary in the Protocol on when an expert can act notwithstanding a conflict of interest subject to disclosure, or when appointment should be declined.

There was a suggestion that particularly in medical cases, problems arose in agreeing and following an agenda for

meetings of experts. The Respondents did not think that current agenda provisions were appropriate, because these place the formulation of the agenda under the control of solicitors. It ought to be the experts who should agree agendas between themselves, subject to consultation with solicitors. The reasons for this view were presented in detail.

Questions to experts under CPR 35.6 must only be for clarification of the report and the question was whether this was still appropriate and whether a widening for the criterion be appropriate. The Respondents felt that on balance the current limitation of questions to be only for clarification should be retained but a warning should be inserted in the Protocol at Section 16 that questions that went beyond clarification may result in costs orders. There were reasons to widen the scope of questions for SJE, where there no likelihood of their giving oral testimony but there was an argument for keeping the process simple and not making a distinction between party appointed experts and SJE. A policy decision is needed as to which argument should prevail.

The next question was about the response to non-compliance with an order or the CPRs; a strict line by judges would make compliance more likely. The Respondents recommended a more robust stance than at present and argued that an expert's non-compliant report should not be admitted as evidence without permission of the judge and that if permission were granted, this could result in an adverse costs order.

Generally, the *Protocol for the Instruction of Experts to give evidence in civil claims* was regarded as helpful but certain matters need to be addressed. When the experts' joint statement has not been agreed by the end of the meeting and agreement is deferred, this may be used to allow experts to consult their clients. This can lead to delay and additional costs and result in experts being exposed to undue pressure within the litigation process. Protocol paragraph 18.10 should explicitly state that a statement should be prepared and agreed at the end of each discussion or meeting wherever practicable. The EWI supports the proposal by the Academy to clarify this point in line with the Academy's Code of Guidance.

stitute she wanted a change. We wish her well in her new appointment with Balfour Beatty.

Changes to EWI staff

Hello to Ronald Male – New Office Administrator

Ronald joined the Institute on 9th October to replace Joanna Hooton who left to take up an accounting career with Westminster Council. Ronald is a marketing graduate from Hertford University. He has had a years experience working in training including expert witness training. He will be working with Membership



CASENOTES

Camilla Macpherson

Distinction between expert opinion and evidence of fact

Kirkman v Euro Exide Corporation (CMP Batteries Ltd), [2007] EWCA Civ 66

This case concerned a claimant who suffered an injury to his knee (with which he had a history of problems) at work. The claimant sought to admit evidence in the form of a witness statement from the surgeon who had treated him for a number of years. This evidence included a statement from the surgeon that he would not have recommended an operation which the claimant had to undergo had it not been for the accident at work.

The defendant argued that this evidence should not be allowed, because it amounted to expert evidence and it had been ordered that each party could only rely on the evidence of one expert (the surgeon not being one of them): because the witness statement included a statement relating to a hypothetical situation (i.e. what the surgeon would or would not have done), and it came from a person with relevant expertise, the defendant argued it was therefore expert evidence.

Smith LJ, giving the lead judgment, acknowledged that the objectives of the CPR include the concept of 'equality of arms', i.e. that each party should have permission to deploy similar resources, such as number of experts. However, this was not an absolute rule and the interests of justice might require taking a different approach. That aside, it was clear that the surgeon's witness statement was evidence of fact and *not* expert evidence. The surgeon, unlike an expert witness, was giving evidence as to what he himself would have advised, and not opining (as an expert would) as to what most competent surgeons would have advised. Although naturally his evidence would depend on a degree

of expertise, it was not expert evidence. The surgeon's evidence could therefore be admitted, and as evidence of fact.

Barry Sutcliffe v BMI Healthcare

Reliance on opinion evidence of anaesthetist expert witness [2007] EWCA Civ 476

This clinical negligence appeal was brought on behalf of a patient who, after a routine operation, suffered severe brain damage as a result of vomit being aspirated into his lungs while he was asleep at a time when his natural gag reflex was impaired. At first instance, certain negligent events were identified, but it was held that none of them had caused the brain damage. A number of expert witnesses in various disciplines had been called to give evidence.

On appeal, the claimant argued, amongst other things, that the judge should not have accepted the opinion evidence of the defendant's expert anaesthetist witness that although the morphine taken by the claimant had suppressed the gag reflex, it would not have made him unrousable. This was particularly the case given that the expert has no experience of a case such as this, and none had been reported in medical literature.

The Court of Appeal, however, held that the judge had been entitled to regard the expert as the more persuasive of the expert anaesthetists particularly as other experts in this case deferred to the anaesthetists; although he did not have experience of the precise situation, he did have experience of the effects of morphine on consciousness and sedation; and his evidence was also supported in general terms by evidence from another expert witness in a different discipline. Consequently, the appeal was dismissed.



**Horner Blakey
Insurance Brokers**

3rd Floor, Bury House
31 Bury Street
London EC3A 5AH

T: 020 7929 0108
F: 020 7929 0224
W: www.hornerblakey.co.uk

Home Office Insurance

We are pleased to be able to offer members of the EWI a new product, which should benefit those members who work from home but employ staff. Previously a separate office policy was needed even if only to cover the statutory employers Liability requirement, now we can offer this under one policy

Competitive Household insurance
Now including

- Home Office equipment cover
- Employers Liability, for up to 3 employees

Please call us now for a no obligation quotation on
Tel: 0207 929 0108

Reg No: 5630996
Authorised and Regulated by the Financial Services Authority