



EXPERT WITNESS INSTITUTE NEWSLETTER[©]

Spring 2004

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The Money Laundering Regulations are now in force: Expert Witnesses be prepared

What the regulations require

Expert witnesses operate both within and outside the regulated sector covered by the Money Laundering Regulations which came into force on 1 March, 2004.

Every person, firm or company engaged in "relevant business in the UK" should:

1. Establish appropriate procedures of internal control and communication to forestall and prevent money laundering.
2. Make all relevant employees aware of the law in relation to money laundering.
3. Give training to relevant employees on how to recognise and deal with transactions which may be deemed to be suspicious and related to money laundering.
4. Put in place identification procedures in relation to any new clients or customers with whom a business relationship is formed or for whom one or more transactions totalling over €15,000 is undertaken or concerning whom there is a suspicion of money laundering.
5. Establish a system to create and retain records of identification of clients or customers and of transactions relating to relevant business.
6. Appoint a person in the organisation to be the money laundering nominated officer or reporting officer.
7. Require internal reports of suspicious transactions which might be money laundering to be made by any person within the relevant business and passed to the money laundering nominated officer who will consider such reports and if appropriate report directly to the National Criminal Intelligence Service (NCIS).

Who is included?

The question that all experts should ask themselves is whether they fall within the regulated sector and operate in a relevant business; because it is only transactions coming to their attention within that business that would form the source of any report to the Money Laundering Nominated Officer and ultimately the NCIS.

If you undertake any of the activities specified as "relevant business" you are caught by the new regime. These activities are defined at length in the Money Laundering Regulations and include: banking; dealing in investments; giving investment advice; estate agency; operating in a casino; insolvency practice; tax advice;

accountancy services; auditing; legal services in connection with financial or real property transactions; services in the formation, operation or management of a company or a trust; dealing in goods involving payment in cash of any currency of €15,000 or more (this includes auctioneers of goods). From these definitions it is clear that the regulations are targeted at any business involved in financial transactions to try to identify money laundering.

What is money laundering?

Section 340 of the Proceeds of Crime Act 2002 defines money laundering as the acquisition, use, possession, concealment, disguising, conversion, transfer or removal from the United Kingdom of criminal property or activities facilitating the acquisition, retention, use or control of criminal property by another person or aiding or conspiring with another person to commit any money laundering offence. Criminal property is money or any asset which constitutes or represents any person's benefit from any criminal offence committed in the United Kingdom or any

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offence committed elsewhere which would be an offence had it been committed in the United Kingdom.

Practical issues for the expert.

Part 7 of the Proceeds of Crime Act 2002 and the Terrorism Act 2000 have been brought together in the Money Laundering Regulations and have severe practical implications for the way in which experts conduct their business. There are immediate practical problems which must be overcome by any expert instructed either directly by a client, or more usually through a solicitor involved in litigation or some other form of dispute resolution. The first of these problems is a matter of obtaining documentary evidence to verify the identification of a new client who wishes to instruct the expert. The regulations require that, as soon as practicable after contact is first made, evidence is obtained of the new client's identity, either directly from the client or by verification from a third party source. Identity records are required to be retained for five years after the business relationship ends.

There is an exemption in that identification records are not required in respect of a one-off transaction where the expert does not know of or suspect money laundering and which does not involve payment of more than €15,000 by or to the client. The typical problem that experts will face is that not only do they need to confirm the identity of the instructing solicitor but also the actual identity of the individual client or corporate client behind that solicitor. The spirit of the regulations is that the expert should understand every step in any transaction that they are asked to consider as an expert. In practice there is also a possibility that the expert may be covered by the information discovered by a solicitor to identify their own new clients. It is worthwhile remembering that the new client identification rules did not apply to solicitors' offices prior to the 1 March, 2004 and it is for experts to satisfy the statutory requirements themselves.

The next problem will occur if, during the course of any review of the evidence to produce an expert report, a suspicion is discovered. A suspicion is something which is not as strong as 'knowledge' but is based on information which, when examined, gives reasonable grounds to suspect that money laundering offences have taken place, necessitating a suspicious activity report (SAR) to the Money Laundering Nominated Officers (MLNO). This is a particular difficulty for the expert who may have been instructed in, say, a divorce or medical negligence matter but comes across evidence of an Inland Revenue or VAT under-declaration of income which is a crime and a reportable offence through the MLNO to NCIS. There is no *de minimis* level of criminal transaction specified in the Money Laundering Regulations or the Proceeds of Crime Act 2002. Therefore petty theft and petty

dishonesty by any client creates a problem for the expert. There is continuing debate as to whether the expert should report each and suspicious transaction, or should prepare one global report.

Self-employed experts are their own MLNO and will have to be familiar with the NCIS reporting requirements and forms. Even if the identity of the perpetrator of a crime is unknown a report will still have to be made. There are full guidance notes on regulated sector disclosures on the NCIS website and there is a 'standard report' and a 'limited intelligence value report', both of which may be appropriate.

Matters giving rise to particular concern.

There is some argument that legal professional privilege will apply to suspicious transactions discovered during the course of an investigation by an expert undertaken to comply with the expert's obligations to the Court. There is, however, a risk in not making a timely report, and the expert should not underestimate the risk of conviction and imprisonment for 2 – 14 years as a real threat.

Two other aspects within the Proceeds of Crime Act are extremely worrying for experts. The first of these is becoming concerned in an arrangement which facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person (Section 328 Proceeds of Crime Act). The best guidance is to make a report to NCIS in any situation involving these circumstances because this affords protection to the expert. The regulations require that the report should be made as soon as practicable once the expert has information which gives reasonable grounds for suspicion that another person is engaged in money laundering.

There is also the offence of tipping-off and there is an enormous danger of disclosing to the client the suspicions of the expert and that reports have been made to NCIS through the MLNO. Any such SAR must be kept entirely confidential and not disclosed to the client or to anyone who does not need to know of its existence. This must be the best advice for experts although individuals have to make their own subjective decisions as to whether a transaction is suspicious or not. The real test must be to consider whether telling the perpetrator or suspected perpetrator of such a transaction would prejudice any further investigation or the quality of evidence available to the proper authorities. Some very useful guidance can be found at the Law Society website <http://www.lawsoc.org.uk> and from the Consultative Committee of Agency Bodies at <http://www.ccab.org.uk> or from the NCIS web-site at <http://www.ncis.co.uk>.

Experts should not ignore the draconian requirements of this legislation. Every expert

should be aware of the implications of failing to recognise and deal with reasonable suspicions and of failing to keep up to date with their compliance requirements under the UK legislation. The regulated sector is facing these money laundering questions already. Experts must not only keep up to date with their own field of expertise but must also make sure, if the money laundering regulated sector is expanded to include all work done by experts and lawyers, that they are ready and have given proper thought to dealing with suspicious transactions which come to them during the course of their business activities.

Experts need to include extra checks within their scheme of thinking so that they are alert to, and look for, any type of crime whether it be breach of copyright regulations, health and safety issues or defrauding the Crown. Any activity which includes a criminal penalty, for example an overdrawn director's loan account or a pay-as-you-earn mis-declaration is a criminal offence and should be reported under the Money Laundering Regulations. If any reader is in doubt about the consequences for their own position and profession they should take proper legal and professional advice.

Kay Linnell, Head of Forensic Accounting Services at Morley & Scott

THE RICS DISPUTE RESOLUTION FACILITY

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

Focusing on some key issues

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

- What is the distinction between the role of the expert witness and advocate?
- When does one role finish and the other begin?
- What constitutes an expert witness report?
- What is the correct wording of the mandatory statement of truth?
- What other declarations should I include in my report?

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

Contingency controversy

On the issue of contingency fees there is much controversy. Contingency fees are a common fee arrangement for surveyors acting as negotiators. The problem arises when the role changes to that of expert witness, a change that can be categorised by a change in duties. As a negotiator, the surveyor's duty is to the client. As an expert witness the overriding duty is to the tribunal by being truthful as to fact, honest and correct as to opinion and complete as to coverage of relevant matters.

RICS is strongly of the opinion that this duty, to be independent and impartial, is incompatible with contingency fees. Best practice guidance recommends that a surveyor notify his client that contingency fee arrangements may jeopardise the credibility of his evidence. The Practice Statement also requires surveyors to notify the judicial body of all issues that could affect the validity of his opinion. Contingency fees can be seen to affect the perceived validity of expert opinion.

Raising awareness

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

*Yvonne Hanley, LLB, Barrister
Director, Faculties and Forums; Director, Dispute Resolution Faculty, RICS*

From the Secretary's Desk.....

Expert witnesses in the dock?

The criticism of expert witnesses that seems to have grown in volume since the Angela Cannings appeal cannot have escaped the notice of members. While this has been addressed in the main at paediatricians the media have latched on to the critical role that the expert witness plays in the resolution of disputes or the proper administration of justice and are quite prepared to extend a prejudicial view to all expert witnesses. As an Institute which acknowledges amongst its objectives acting as a voice for expert witnesses, especially in communicating with the media, we are concerned to challenge some of the extreme views which have been circulating lately.

At a recent seminar organised by the Commercial Litigation Forum in the City of London, two of our Governors, Lord Justice Jacob and Alex Brown, were invited to participate as panel members. Sir Robin, speaking to an audience which was composed substantially of solicitors, emphasised the point that the role of the expert witness was to assist the court and it was the duty of the lawyers running the case to understand the expert evidence which was to be heard. Rather than blaming the experts it was surely the lawyers who were at fault in allowing expert opinions to go unchallenged. In an adversarial situation it was important for the lawyers for both parties to ensure that the judge or the jury fully appreciated the arguments on both sides. He accepted that scientific evidence, to the lawyers, could often be difficult to understand but, drawing from his own experience at the bar, he said that if he had to deal with an esoteric subject he arranged for a short intensive "teach-in" for himself so that he understood what the arguments were about.

The office has received numerous enquiries from journalists about this, both for television companies and also for newspapers and we have sought to present a balanced view that these miscarriages of justice are as much if not more the result of a failure of the system as the responsibility of an individual expert witness. We are not, however, just reacting to such opportunities; we are also being pro-active and our Annual Conference will be primarily concerned with restoring public confidence in expert witnesses. Entitled "Forensic evidence on Trial" we have been fortunate to obtain Lord Justice Judge, who gave the outstanding judgment in the Angela Cannings appeal, as our keynote speaker. The booking form will be available shortly, but please make a note of the date, 15 October 2004, in your diaries. This is your opportunity to make your views heard to an authoritative panel of speakers.

The Cannings appeal is reported in detail on page 8.

Discipline

It is, I suppose an easy progression to make from criticism of experts to the Institute's disciplinary procedure. Not that I suggest we can expect an increase in the number of events that might trigger it; in fact since the foundation of the Institute we have only had to have recourse to it on one occasion. However, we do receive a number of complaints each year, often from litigants in person who fail to understand the requirements of CPR Part 35, in particular the overriding duty to the court and the need for the expert to be impartial and objective. These have been handled on an ad hoc basis by the Secretary and a Governor. Nevertheless the Governors have become aware of a lack of precision in the Institute's Articles of Association in the manner in which

an initial complaint has been dealt with and accordingly it is intended to strengthen the disciplinary procedure so that initially a preliminary screener is appointed to consider whether or not there is a prima facie case which should be considered by an Investigating Committee. Full details will be set out in the Notice of the Annual General Meeting and obviously members can raise their queries at the meeting, if not before. I reiterate that it is not the view of the Governors that we expect to have to deal with an increase in disciplinary cases, but it is important that we have a clear and transparent procedure which is understood and accepted by all our members, and this is perhaps even more relevant as we seek to enhance the standing of our members in the current climate.

Sir Michael Davies Lecture

Bookings for the Seventh Michael Davies lecture to be given by Sir David Edward are already being received. Sir David was a judge at the European Court of Justice from 1992 until December 2003. We look forward to a fascinating address. Why not also stay on for the dinner afterwards? Last year it was so successful that the demand for places can be expected to be very high this year. An opportunity to dine in the prestigious Gray's Inn does not come along all that often so do join us on 29 April.

Before I leave the subject of the Sir Michael Davies lecture, members who attended the sixth lecture last year were treated to an invigorating address by Professor Richard Evans of the University of Cambridge concerning his involvement in the David Irving libel trial. We are now publishing that lecture as an occasional paper so if you were not able to be there you can still enjoy his experience as an expert witness. We hope to have copies available at the AGM this year.

Money Laundering Regulations

The Money Laundering Regulations came into force on 1 March 2004 and we have already received a number of enquiries from members concerning the application of the regulations to them as expert witnesses. An article on the subject contributed by Kay Linnell, a forensic accountant with Morley & Scott, is therefore timely. One question we have been asked was: "If an expert when examining papers becomes suspicious of money laundering but it is not disclosed by the client/solicitor, does the expert have to advise NCIS without reporting the suspicion to the client/solicitor?" EWI Governor, Alex Borwn, provided the following reply which members may find helpful:

"In order to determine whether there is an obligation to report to NCIS, I think the expert has to ask three questions:

1. Is the expert in the regulated sector? – if not there is no reporting obligation.
2. If the expert is in the regulated sector, did the information come to him in the course of his business? – if not there is no reporting obligation.
3. Who is the client? Is it the solicitor who instructed the expert or is it the lay client (ie the solicitor's client)? There are conflicting views on this point."

It may well take some time for matters to settle down, but some comfort may be derived from an indication from The Law Society that the provision of legal advice, participation in litigation, will writing and publicly funded work will not generally be viewed as "relevant business".

An account of the Regulations and their likely impact on expert witness practice appears on page 1 of this Issue.

Brian Thompson, Company Secretary

EWI SEMINARS AND EVENTS FEEDBACK

The EWI runs regular seminars and training days throughout the year. Obviously not all members can get to all events, but below is a summary of those recent events and some feedback we have received from members attending. If any member has any suggestions about events we currently run, events you would like the EWI to run, or topics you would like to have the EWI cover during seminars, please contact Vicky at the EWI office on 0870 366 6367.

The Code of Guidance on Expert Evidence - 9 September 2003

The seminar on the Code of Guidance was a very popular event. The event was chaired by Mr Roger Clements and the panel was made up of District Judge Nic Madge, Alan Gore QC and Frances McCarthy who were all members of the Code of Guidance Working party. Copies of the Code of Guidance and Part 35 were distributed to all delegates in the seminar pack. The feedback received from the seminar confirmed that it was very informative, relevant and helpful to experts from a practical viewpoint. The question-and-answer sessions of all seminars are always popular but discussions of what solicitors want from experts, reviews of recent case law and advice on the code itself were cited as being very useful by a good number of delegates. It was suggested that a note of the seminar should be published and that perhaps future seminars on the Code of Guidance should be aimed at specific professions. All of the suggestions put forward by delegates have been taken on board by the EWI and we are hoping to be able to repeat the seminar in the not-too-distant future given that a revised Code of Guidance may be expected from the Civil Justice Council shortly. If any members have suggestions regarding the Code of Guidance we would be very pleased to try to accommodate any requests.

Basic Law Course for Expert Witnesses, London - 26 November 2003

One of our regular courses, the Basic Law Course is held approximately three times a year. For the first time we used the new premises at The Diskus, and we were very pleased with the way in which the whole day was prepared for us. The new premises are equipped with the most up-to-date modern technology which allows the lecturers flexibility with their presentations. The next course on 10 May 2004 also is held at the Diskus to be well booked already.

Basic Law Course for Expert Witnesses, Harrogate - 14 January 2004

This was the first time EWI has run a Basic Law Course outside London, and there was a good attendance. We also had an assessor sitting in on this course as we are constantly looking to maintain the high standard. The feedback from the assessor and the delegates on the day was very positive with one delegate stating "[the] course was excellent in providing me with a better "general knowledge" of the legal system".

Annual Conference: Expert Evidence at Home and Abroad - 30 January 2004

Baroness Scotland of Asthal QC gave an excellent opening address to the conference. During her talk she joined her voice to those in the judiciary who would like to see a single unified body responsible for expert witnesses. She made special mention of the Joint Working Group and praised the efforts being made by them. We were then treated to papers from speakers from all over the world, who gave their views on the use of expert evidence in different jurisdictions. All the speakers were excellent and the EWI wish to thank all of them for travelling so far to provide us with some really interesting talks. Special thanks should go to Amy Buchanan, an Associate of Allen & Overy Solicitors, who stepped in to replace a speaker at the very last minute, always a very difficult thing to do. One of the most popular speakers was one of our very own members, accounting expert witness, Kay Linnell, who gave an entertaining talk on fraud in the civilian systems. A transcript for the conference is being put together at the moment and all delegates will be getting a copy as soon as it is ready. Members will be able to purchase a copy of the transcript from the office at a members price of £25 (non-members will be able to purchase the transcript for £50). The next Annual Conference: "Forensic Evidence on Trial" is being organized for 15 October, 2004.

Expert Witness Frightened of Court? - 19 February 2004

This seminar was a new format for the EWI and we were pleased to have a good response from delegates, as well as some very constructive suggestions that we will be looking at for future events. The seminar covered several aspects of giving evidence in court and was chaired by the EWI Governor, Mr James Watt. Jill Schmitt, a Thought Field Therapist, talked about the techniques expert witnesses can use to calm themselves before entering court. Two volunteers agreed to experience Thought Field Therapy which they applied in the mock cross examination by Mr Andrew Newman of Bond Solon. The reports from the two volunteers were that they had found the treatment very effective and found it a "very useful exercise". Andrew Baillie QC gave a presentation that included many practical techniques to improve an expert witness's presentation in court, and also some valuable "tricks of the trade" from a barrister's point of view. The Rt Hon Lord Justice Robin Jacob, who is also a EWI Governor, attended the seminar and during the question-and-answer session delegates were also able to get the judge's viewpoint. Many delegates thought that the session would have benefited from the seminar being longer, although at two hours it was 30 minutes longer than usual!

EWI seminars are designed so that members can attend after normal working hours, but still finish at a reasonable time, although many still prefer to stay and continue the discussion more informally over a glass of wine. If you have not sampled one yet, you should consider booking in for one of our future seminars. It is not just an opportunity to hear top-class speakers on subjects of particular interest to expert witnesses and to be able to cross-examine them, but afterwards the scope for networking is regarded as very useful.

MEDICAL REPORTS LIABLE TO VAT

The case and its background

The decision of the Court of Justice of the European Communities, published in *The Times* on 27 November 2003, ruled that services consisting of medical examinations and the drafting of expert medical reports and certificates are exempt from value-added tax as the provision of medical care only if their principal purpose is therapeutic, and not if it constitutes a step in the making by another of a decision having legal consequences as, for example, (in one of the cases before the court), medical reports prepared for personal injury litigation or for deciding entitlement to a disability pension.

The first claimant in the first case, Dr Peter d'Ambrumenil, acted as an expert medical witness before various courts and gave evidence in a large number of cases concerning, particularly, medical negligence, personal injury and disciplinary proceedings. He also acted as a professional arbitrator and mediator. The second claimant, Dispute Resolution Services Ltd, a company formed by Dr d'Ambrumenil, carried on a substantial part of his professional activities, supplying services involving both legal and medical expertise, in particular arbitration and mediation services.

The Sixth Council Directive (77)/388/EEC; 17 May, 1977) provides for the harmonisation of the laws of EU member states relating to turnover taxes, including value-added tax. Article 13(A)(1) of the Directive provides: "Without prejudice to other Community provisions, member states shall exempt the following ... (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the member state concerned....".

Strict interpretation of what is VAT-exempt

In its judgment the European Court of Justice held that, under the court's case law, the exemptions provided for by article 13 are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. Article 13(A)(1)(c) does not exempt all the services which can be effected in the exercise of the medical and paramedical professions, but only "provision of medical care".

That concept does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders. Therefore, if the context in which a medical service is effected indicates that its principal purpose is not the protection of health but rather the provision of advice required prior to the taking of a decision with legal consequences, the exemption under article 13(A)(1)(c) does not apply to the service.

An expert medical report, whose principal purpose is to provide a reply to questions set out in the request for the report, is effected in order to enable a third party to take a decision with legal consequences for the person concerned; and while it may indirectly contribute to the protection of the health of that person by detecting a new problem or by correcting a previous diagnosis, the principal purpose remains

that of fulfilling a legal or contractual condition in another's decision-making process.

By contrast, regular medical checks at the behest of certain employers or insurance companies *may* satisfy the conditions for exemption under article 13(A)(1)(c), if they are intended principally to enable the prevention or detection of illness or the monitoring of the health of workers or insured persons. The fact that they take place at a third party's request and may also serve the employers' or insurance companies' own interests does not preclude health protection being regarded as the principal aim of such checks.

Summary of what is exempt, and what is VAT-able

The court directed that Article 13(A)(1)(c) of the Sixth Directive means that the exemption applies to:

- (i) conducting medical examinations of individuals for employers or insurance companies;
- (ii) the taking of blood or other bodily samples to test for the presence of viruses, infections or other diseases on behalf of employers or insurers;
- (iii) certification of medical fitness, for example, as to fitness to travel, where those services are intended principally to protect the health of the person concerned.

The court further ruled that exemption does *not* apply to the following services, performed in the exercise of the medical profession:

- (i) giving certificates as to a person's medical condition for purposes such as entitlement to a war pension;
- (ii) medical examinations conducted with a view to the preparation of an expert medical report regarding issues of liability and the quantification of damages for individuals contemplating personal injury litigation;
- (iii) the preparation of medical reports following examinations referred to in (ii) and medical reports based on medical notes without conducting a medical examination;
- (iv) medical examinations conducted with a view to the preparation of expert medical reports regarding professional medical negligence for individuals contemplating litigation;
- (v) the preparation of medical reports following examinations referred to in (iv) and medical reports based on medical notes without conducting a medical examination.

Comments from the Secretary

Customs & Excise have been taking legal advice and are in discussion with the BMA to establish precisely which medical services will no longer fall within the VAT exemption for medical services. Customs intend to issue a Business Brief as soon as possible but in the interim doctors are not required to take any action to register for VAT or charge VAT on these services. Any changes will be implemented from a future date and there will be no compulsory back dating of VAT registrations. Under the recent budget proposals the threshold for VAT registration is increased to £58,000 from 1 April 2004.

Dates for your diary

EWI Events (in London unless specified)

- 29 April 2004** AGM: Seventh Sir Michael Davies Lecture & Annual Dinner at The Honourable Society of Gray's Inn
- 18 May 2004** Seminar: "Report Writing for the Specialist"
- 17 June 2004** Seminar: "Marketing your expert witness practice"
- 15 July 2004** Seminar: "Recent case law for the expert"
- 23 Sept 2004** Seminar: "The problems of the Single Joint Expert"
- 30 Sept 2004** Joint Conference: "Experts: Keeping up Standards"
- 15 Oct 2004** Annual Conference: "Forensic evidence on trial"

Please contact the EWI office or visit our website www.ewi.org.uk for details or booking forms for any of the events above

EWI Course Dates 2003/04

Basic Law for Expert Witnesses

(Cost to EWI members £225)

10 May 2004
08 September 2004

Please contact the EWI office for booking forms or further details

EWI Approved Training

Excellence in Report Writing (Cost to EWI members £310 + VAT) for further information contact Bond Solon direct on 020 7253 7053

The Courtroom Skills Training (Cost to EWI Members £355 + VAT) for further information contact Bond Solon direct on 020 7253 7053

MAKING A DETERMINATION AT TRIAL – Court of Appeal calls the toss

In *Cooper v Floor Cleaning Machines Ltd and another*, *The Times* headline for 24 October, 2003 "Judge's job at trial is to make a judgment" no doubt conveyed a stunning revelation.

The Court of Appeal ruled that, except in the most exceptional case, it is incumbent on a judge hearing an action for negligence to analyse the evidence and decide which party's case is the more likely to be correct. The court allowed an appeal by the defendants, Floor Cleaning Machines Ltd and Dean W. Crompton, from a decision by Judge Cook in Guildford County Court on April 10, 2003 when he dismissed both the defendants' counterclaim and the claim made by the claimant, Dorothy Cooper, that arose as a result of a traffic accident in November 2000. The claimant did not appeal against the judge's decision.

The case involved a collision between the vehicles of two motorists both leaving the M25 motorway at junction 10 and intending to travel northwards along the A3. There were no independent witnesses. The judge, having heard evidence from both motorists and finding that neither was to be disbelieved, said that in the incredible circumstances unless he was going "to toss a coin" the only fair decision he could reach was to conclude that on the balance of probabilities neither had discharged the onus of proving negligence against the other.

The judge reached his decision and gave his judgment without consulting counsel. He was imprudent to have done so as counsel might have dissuaded him from his conclusion, said the appeal judges. The collision could not have happened

without one of the parties being negligent, they ruled.

The judge failed to analyse the evidence so as to decide which motorist's account he preferred. Had he embarked on that exercise he would have noticed various features in the evidence favouring the defendants' case. Taking all relevant matters into account the broad probability was that the defendants' account was more likely than that of the claimant.

In *Morris v London Iron and Steel Co Ltd* (1998), an industrial relations case, Lord Justice May conceded that in the exceptional case a judge conscientiously seeking to decide the issues might be forced to say "I just do not know". It will, however, be rare for a traffic accident case to fall within that exceptional category. There will be pointers or some indication that the account of one party is more likely to be correct than that of the other.

Here, notwithstanding two diametrically different accounts of how the accident happened, it was incumbent on the judge to analyse all the matters before him. Had he done so he would have decided that the defendants' case was more likely to be the correct one. The judge made primary findings of fact and the Court of Appeal was in as good a position as the judge to reach the appropriate conclusion on the issue of liability.

The claimant's invitation for a re-trial before a different judge was not acceded to, a case of negligence having been made out against her.

COGENCY OF EXPERT EVIDENCE
THE COURT OF APPEAL IN THE CANNINGS CASE
(Reason for decision given 19 January, 2004)

Juries should not have to choose between the conflicting opinions of expert witnesses where there is no cogent evidence supporting either stance, the Court of Appeal has ruled. Therefore, where there have been two or more unexplained infant deaths in the same family, the prosecution of a parent for murder *should not be started* if the outcome of the trial depends exclusively on a serious disagreement between distinguished and reputable experts as to the cause of death unless there is evidence, additional to the expert evidence, supporting the conclusion that the infant was deliberately harmed.

The Court of Appeal, Criminal Division, made this decisive ruling in a reserved judgment giving reasons for allowing on December 10, 2003, the appeal of Angela Cannings against her conviction on April 16, 2002, at Winchester Crown Court (Mrs Justice Hallett and a jury) of the murder of her two infant sons, for which she was sentenced to life imprisonment.

Background

The appellant had had four children: Gemma, born in 1989; Jason, born in April 1991; Jade, born in 1996, and Matthew, born in 1999. Gemma, Jason and Matthew died aged, respectively, 13 weeks, seven weeks and 17 weeks.

The Crown's case was that the appellant smothered both Jason and Matthew and to support that allegation it was suggested that Gemma's death, and acute or apparent life threatening events suffered by Jason, Jade and Matthew, were also consequent on smothering by the appellant. The appellant's case was that the deaths were disastrous, but natural, even if unexplained incidents, to be classified as sudden infant death syndrome.

The Court of Appeal's stance

In their Lordships' view there are two possible approaches to cases where three infant deaths have occurred in the same family, each apparently unexplained and for each of which there is no evidence extraneous to the expert evidence that harm was or must have been inflicted, for example, indications or admissions of violence, or a pattern of ill-treatment.

Nowadays such events in the same family are very rare. One approach is to examine each death to see whether it is possible to identify one or other of the known natural causes of infant death. If that cannot be done, the rarity of such incidents in the same family may raise a powerful inference that the deaths must have resulted from deliberate harm.

The alternative approach is to start with the same fact, that three unexplained deaths in the same family are indeed rare, but thereafter to proceed on the basis that if there is nothing to explain them, in our current state of knowledge at any rate, they remain unexplained, and still, despite the known fact that some parents do smother their infant children, possible natural deaths.

The Court of Appeal had no doubt that the second approach is the correct one to take. Their Lordships had read bundles of reports from numerous experts of great distinction in the field, together with transcripts of their evidence. They were left with an overwhelming and abiding impression from studying that material that a great deal about death in infancy, and its causes, remains as yet unknown and undiscovered. There is a need for caution against the dangers of dogmatism at a time when our knowledge is limited and incomplete,

they said.

Since the trial, further investigation had been carried out into the extended family. Further infant deaths had been identified but on close examination it was not obvious that they were all relevant. Nevertheless, the appeal judges had been left with the strong impression that some of the mystery surrounding sudden infant death syndrome is likely to be dissipated when knowledge of the impact of genes and genetics becomes greater than it is now.

The need for healthy scepticism

Their Lordships received in evidence a substantial body of research, not before the jury, suggesting that such deaths can and do occur naturally even when they are unexplained. If that evidence had been before the jury it would inevitably have resulted in a difference, if only of emphasis, on an aspect of the evidence to which the prosecution attached great importance. While the speed of research was gratifying they said, one unintended consequence is that it sometimes creates doubt about what were once thought to be certainties. What was confidently presented to the jury as virtually overwhelming expert evidence providing the necessary proof that Jason and Matthew's deaths resulted from the infliction of deliberate harm, should now be approached with a degree of "healthy scepticism".

On three specific issues: first, the rarity of three natural unexplained infants deaths in the same family; second, the interval between the infant's death, or near-death, and the last time when that infant appeared to be well; and, third, the possible significance of an apparent life-threatening event preceding death, the evidence before the Court of Appeal presented a different picture, and one more favourable to the appellant, than that which had been before the jury. In their judgment, the mere fact that specific natural causes were not established for any of the deaths did not lead to the inference that the infants had been smothered or deliberately harmed, but rather left open the possibility

that sudden infant death syndrome should not be excluded.

Sympathy for the jury

The Court of Appeal had some sympathy for the jury at the trial and were anxious as to whether, notwithstanding the trial judge's clear directions, the whole course of the trial, the sheer number of experts called by the defence, and the complex specialist fields in which these distinguished men and women worked, had caused the jury, inadvertently, unconsciously, to have thought to itself that if, between them all, none could offer a definitive or specific explanation for these deaths, the Crown's case had to be right.

Comment

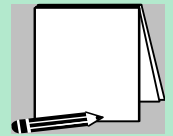
The court recognised that justice might not be done in a small number of cases where in truth a mother deliberately killed her baby without leaving any identifiable evidence of the crime. That is an undesirable result which, however, avoids a worse one. If murder cannot be proved, the conviction cannot be safe. Unless one is sure of guilt the dreadful possibility always remains that a mother, already brutally scarred by the unexplained deaths of her babies, might find herself in prison for life for killing them when she should not be there at all. In any civilised community, that is abhorrent, said the three appeal judges.

Membership numbers

Founding sponsors	10
Professional body / association members	12
Corporate members	27
Individual members	1018
Retired	33
Sabbatical	1
Applicants	15
Total members & applicants	1116

Case notes: Camilla Macpherson, Allen & Overy

Additional reporting by John Finch, Editor



Something in the air

Piper & Another v Clifford Kent Ltd [2003] EWCA Civ 1692

In this case, evidence from a joint expert witness was insufficient to refute evidence of credible witnesses to the contrary.

The appeal arose from a claim for nuisance based on the proximity of the claimants' home to a very large egg-producing farm. At first instance, the judge awarded the claimants £10,000 for past nuisance but held that there was no continuing smell nuisance after 2000. The claimants appealed on the basis that the smell nuisance was continuing.

In the county court, the judge accepted evidence from the claimants and several of their neighbours that the smell nuisance was continuing. Furthermore there was no evidence that there had been a change of practice or machinery after 2000 which might have meant that the nuisance had stopped. His reason for concluding that the nuisance had stopped was therefore based on his own site visit, at which he had not considered the smell too bad, and the report of a joint expert witness who had made two visits to the site. The expert said that he had not found the smell overpowering, but had failed to record the wind direction, which the claimants (and their witnesses) had said was a significant factor. In fact, according to Lord Justice Jacob, giving the lead judgment, "he appears at this stage not really to be giving expert evidence but simply the evidence of a visitor".

Lord Justice Jacob said that the judge had overlooked both the fact that the expert had not recorded the wind direction, and the fact that the nuisance had never been said to be continuous. Although the smell nuisance had not existed on one day, this did not prove that it did not exist on other days. He also overlooked the evidence brought by the claimants and their witnesses that the nuisance was generally no better now than it had been in the past.

It was held that there was a continuing smell nuisance and the case was remitted to the county court for further investigation and determination of the appropriate remedy.

Evidence of false memory syndrome

R v Richard W [2003] EWCA Crim 3490

In this successful appeal against a conviction for rape, Lord Justice Judge commented on the circumstances in which it would be appropriate for a jury to hear evidence from an expert witness, specifically in this case expert evidence about False Memory Syndrome ("FMS").

Lord Justice Judge, in agreeing with the judge at first instance that evidence as to FMS was not of any value in this case, and, had it not been excluded, would have usurped the function of the jury in deciding the credibility of the witnesses, noted that the purpose of expert evidence in criminal proceedings is "to inform a jury of what they might not know of their own

collective experience of life". It was important, in the context of FMS, to distinguish between evidence as to the existence or nature of a syndrome that has been identified by experts, which a trial judge may decide is admissible in a particular case to assist the jury in performing their duties, and evidence from an expert witness which, being based on a study of very similar material to that available to the jury, therefore "directly (or much more likely indirectly) informs the jury of the expert's opinion whether the witness in question is or is not to be believed". This should not be admissible because it impinges on the primacy of the jury to decide issues of credibility.

Procedure when instructions thought incomplete

Lucas v Barking, Havering and Redbridge Hospitals NHS Trust; CA, Waller, Mantell and Laws LJ; The Times, 28 August 2003

The restriction on obtaining an order for inspection of specific documents referred to in expert witnesses' reports prevents a party calling for their disclosure without having reasonable grounds for considering that the statement of instructions given to the expert is inaccurate.

Rule 31.14 of the Civil Procedure Rules provides: "(2) Subject to rule 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed..." Rule 35.10 provides: "(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written. (4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions - (a) order disclosure of any specific document; or (b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete."

The claimant sought damages against the defendant for personal injury. As required by the rules, the claimant had produced with his particulars of claim two experts' reports relating to his injuries, both of which referred to his witness statements and also a previous expert's report. The defendant, relying on rule 31.14(2), sought an order for inspection of those documents. The claimant resisted the application on the basis that the documents requested were part of the instructions provided to the experts and fell within the restriction in rule 35.10(4). The master in the court below had construed "instructions" narrowly, adopting Moreland J's definition in *Taylor v Bolton Heath Health Authority* (unreported, January 14, 2000) of "what an expert was told to do". Thus the master directed disclosure of the previous expert's report and the claimant's witness statements. The Court of Appeal took the view that the master had erred. A different, wider and correct construction of "instructions" was applied by Hart in *Morris v Bank of India* (unreported, January 15, 2001). In the instant case

the claimant's witness statements were supplied to the experts as part of their instructions.

The purpose of rule 35.10(4) is to prevent compliance with rule 35.10(3) rendering such a statement disclosable unless there are grounds for believing the statement of instructions was inaccurate or incomplete. That was not here suggested to be so. A similar approach should be adopted to the earlier medical report rendering that document also part of the instructions given to the expert. The key to the case, and to the sense to be attributed to the term "instructions" in rule 35.10(3) and (4), is, in the words of Lord Justice Laws, the imperative of transparency, a general theme of the Civil Procedure Rules but here specifically applied to the deployment of experts' reports.

The aim of rule 35.10(3) and (4) is broadly to ensure that the factual basis on which the expert has prepared his report is patent. That approach demands a wide reading of the term "instructions". There is a plain impact on the scope of legal professional privilege, and thus a degree of protection against the loss of privilege is given by the restrictions on disclosure provided by rule 35.10(4). It is a premise of the arrangements constituted by rule 35.10(3) and (4) that in the ordinary way the expert is to be trusted to comply with rule 35.10(3). The effect of the rule 35.10(4) restriction is that the party on the other side may not as a matter of course call for disclosure of documents constituting the expert's instructions as a check to see that rule 35.10(3) has been fulfilled. There has to be some concrete fact giving rise to "reasonable grounds" within the closing words of rule 35.10(4). It is unsurprising that the expert is thus to be trusted: it is consistent with his overriding duty to help the court.

Comment

Overall, rule 35.10(4) strikes an important balance between, on the one hand, the protection of the party whose privilege is lost and, on the other, the vindication of rule 35.10(3) where there is a real question mark as to its fulfilment.

Conflicting expert evidence: judge read too much into joint statement

Youssef v Jordan [2003] EWCA Civ 1852

This clinical negligence action was brought by an Iraqi refugee who, after initial surgery on his nose in order to allow him to breathe more easily, later underwent cosmetic surgery to improve its appearance. After this second operation, the claimant complained of long-term breathing difficulties and claimed that the defendant surgeon had failed to warn him properly of this risk.

The ENT consultant surgeons providing expert evidence disagreed as to whether there was nasal obstruction and, as well as individual reports, produced a joint statement. This noted that they did not share the same views but concluded that a sensation of nasal congestion unrelated to mechanical obstruction was not uncommon after such an operation. The judge at first instance concentrated primarily on this conclusion and, reasoning that there was no evidence that the difficulties could be attributed to the operation, held that there was no case to answer: the claimant would not be able to prove causation. Permission had not been granted for the experts to give oral evidence. The claimant appealed.

In the Court of Appeal, Wilson J, giving the leading

judgment, said that the first instance judge had been wrong to conclude that there was no evidence to connect the nasal obstruction with the operation. He had read too much into the conclusion of the joint statement, the previous paragraphs of which made clear that the claimant's expert did not consider that the conclusion should be applied to the claimant. The judge's reasoning might in part have been because the experts were not going to be giving oral evidence. However this was not a relevant consideration. Furthermore since there was evidence from one of the experts that the nasal obstruction might have been caused by the operation, as well as evidence from the claimant about his alleged difficulties and from the defendant about the claimant's subsequent complaints, there was a case to answer. The appeal was therefore allowed.

Comment

In litigation it can be dangerous for a defendant to do well and thus make an over-enthusiastic submission of no case to answer. In those circumstances it is the judge's duty to survey the evidence of the expert witnesses together with that of the defendant, so as to determine whether the claimant can establish his case.

Weight to be given to experts

In re M (child; residence); Court of Appeal

It is not open to a judge to reject the uncontested evidence of three expert witnesses that the core personality of a boy's father was so damaged by childhood experiences as to make him unsuitable to be the three-year-old's primary carer following the mother's death. The judge erred in weighing that evidence against the impression the father had made in the witness box.

The Court of Appeal so held on 2 July 2002 allowing an appeal by M's maternal uncle from the dismissal by Mr Justice Holman on 15 February 2002 of the uncle's application for a residence order.

Lord Justice Thorpe said the judge is at liberty to depart from the experts' opinion, even if unanimous, on issues of future placement and perhaps even on the parent-child attachment, but in this instance the expert evidence concerned the father's damaged core personality and continuing emotional and psychological instability. It was not open to the judge to reject that evidence simply on the basis of impressions while in the witness box. In so far as the judge was entitled to depart from the experts in relation to management, placement and welfare it was incumbent on him to explain his departure more fully than he had.

Expert evidence and witness reliability

R v Pinfold, R v Mackenny; Court of Appeal; 15 December, 2003

Expert medical evidence to assist a jury as to the weight, if any, to be attached to a particular witness's evidence can be admitted even though it is not based on physical examination for the witness whose creditability is being impugned. However, the court should take care not to allow to be placed before a jury evidence which does not

allege any medical abnormality as the basis for the witness's evidence being approached with caution, since it is the jury's task to decide for themselves what evidence they believe.

The prosecution's case depended upon the evidence of a co-accused, John Childs, being accepted by the jury. In addition to being an accomplice Childs, even at trial, was a very unsatisfactory witness. It was clear that the jury were not prepared to convict the appellants unless there was corroboration of his evidence.

The appellants sought to rely on a considerable quantity of fresh evidence, including retractions by Childs of his evidence incriminating the appellants, to show that the convictions were unsafe. The question was whether, as Childs was already discredited and the jury convicted only where there was corroboration after the clearest of warnings by the judge of the dangers of convicting the absence of corroboration, it was right for the Court of Appeal to say that the convictions were unsafe.

The approach of the Court of Appeal towards the admission of expert medical evidence to assist the jury as to the weight, if any, to be attached to a particular witness's evidence has over the years developed and is now more generous than was once the case.

It was their Lordships' view that while the court will carefully scrutinise medical evidence before deciding whether it should be admitted, the absence of an examination of a witness or defendant concerned cannot be decisive in determining the admissibility of the expert evidence. The court has to determine whether the evidence can be considered credible evidence by the jury as to an abnormality from which the witness suffered at the time of giving evidence and which might mean that the jury would not attach the weight it would otherwise do

to the witness's evidence.

The absence of an examination by the expert goes to the weight to be attached to the expert's opinion and not to the admissibility of that opinion. What a court must be on its guard against is any attempt to detract from the jury's task of finding for themselves what evidence to believe. The court should therefore not allow evidence to be placed before the jury which does not allege any medical abnormality as the basis for the witness's evidence being approached with particular caution by the jury. It is the jury's task to decide for themselves whether they believe a witness's testimony.

During the trial, Childs refused to be examined by a psychiatrist. However, a psychological report was prepared by an expert adviser on legal psychological issues, who had observed Childs' examination-in-chief and cross-examination and had analysed relevant witness statements and depositions. He concluded that there was sufficient evidence to suggest that Childs suffered from a personality disorder and that his behaviour was psychopathic. His personality characteristics cast some doubt on his reliability as a witness. His mental state meant that his demeanour and behaviour in giving evidence would not betray the usual indications to the jury as to when he was lying.

The trial judge decided that the evidence was not admissible. On the approach to the admissibility of medical evidence that should be adopted today, the expert evidence was to be regarded as admissible given the circumstances of this particular case. Their Lordships came to the conclusion that Childs' evidence was so unreliable that it was worthless. The appellants' convictions depended on Childs' evidence. That evidence had some corroboration but if there was no evidence capable of belief to be corroborated that did not assist the prosecution. The appellants' convictions were quashed.

Correspondence

Due to lack of space in this issue we have been unable to include letters from members. Please do not be deterred from writing. The Newsletter is always available to make your views known, so keep the letters coming.

Editor

Postscript

We welcome Ben de Halpert to the EWI team. As he is often the first point of call in answering the telephone, members will have an early opportunity to get to know him.

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