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EDITORIAL

Each EWI Newsletter has hitherto been identified by the year and the season of its publication. With this number, it enters its 11th year of publication and it is identified as such by its volume number on the title page, which has taken on a new appearance. Appearances are not all and we are fortunate to be able to publish contributions from within and outwith the legal world.

Recent concern about child protection is reflected in the articles by Rosalyn Proops, who discusses some of the implications of the Chief Medical Officer's report "Bearing Good Witness" and Penny Cooper, who deals with confidentiality and transparency, two potentially conflicting aspects of the work of the family courts. The reforms initiated by Lord Woolf in his report "Access to Justice" (HMSO 1996) encouraged Alternative Dispute Resolution (ADR). We are, therefore, fortunate to publish the first of a series of three articles on the subject by Chris Makin. Chris has been a forensic accountant, expert witness and arbitrator for very many years and has been party expert, single joint expert, Court appointed expert and expert adviser in very many cases. In the first of his articles the importance of mediation is explained. Bob Goodall, a medical expert, discusses the thorny problems represented by ranges of opinion that arise particularly acutely for single joint experts when reporting to the Court. It is salutary to be reminded from time to time that experts are at risk of legal action if they fall short of the high standards expected of them. We are fortunate to have a contribution from two solicitors, Naomi Griffin and Alan Owens, on the liability of experts. They give some practical tips on how to avoid being sued.

CPR has been on the lips of experts since 1999. Since April 2005, the confusing abbreviation CrPR has come into use for its criminal counterpart. An introductory outline of CrPR by Alex Brown, a Governor of the EWI, appears in this number. We also reproduce an important extract from a letter by HMRC about what is and what is not subject to VAT. Also for the first time we are publishing advertisements and we hope to be able to continue to do so.

We are fortunate once again to be able to publish some Casenotes by Camilla Macpherson of Allen & Overy; this time she is assisted by Tim Regis.

Finally, we are grateful to our contributors for their willingness to contribute and for their timely submissions.

We invite contributions to the EWI Newsletter. These will be subject to review and the Editor's decision about acceptability for publication will be final. Contributions may preferably be submitted electronically as text documents to bartlett@ewi.org.uk. Alternatively, two copies of typewritten manuscripts, which will be acknowledged, may be sent to:

The Editor, Expert Witness Institute,
1st Floor, 7 Warwick Court, London WC1R 5DJ.

LIABILITY FOR VAT

Some members remained uncertain as to their commitment for VAT after the article by Dr David Thomas of Counsel, in the Autumn 2006 number of the Newsletter. In response to an enquiry, Miss Rosanne Ross of HM Revenue & Customs at Southend on Sea replied as follows:

"I understand that your client is providing medico-legal services as an expert witness and you would like confirmation of the VAT liability of this.

I can confirm, making reference to Public Notice 701/57 'Health Professionals' Section 2.5, and reads that: You provide medico-legal services if your service consists of both medical and legal elements. Examples of medico-legal services that might be carried out by a health professional include:

- negotiation or advocacy; arbitration, mediation or conciliation;
- investigation of the validity of an insurance or negligence claim;
- consideration of medical reports and other evidence with a view to resolving disputes; and
- any work carried out for lawyers and insurers.

These services are standard-rated where the predominant element is legal. Services that are predominantly medical will be exempt when the conditions at paragraph 2.2 are met, even when performed in the course of a legal or insurance case or on behalf of an insurance company or employer."

When considering liability for VAT the following website <http://www.jspubs.com/experts/ewire/itemtext.cfm?ewid=132> may also be found useful in considering liability for VAT.

An Invitation to the Membership Dinner & Sir Michael Davies Lecture (Following the AGM)

Dr Hugh Montgomery, of University College London, will deliver the 2007 Sir Michael Davies Lecture which is entitled "**A matter of life and death**".
(*Global warming and how, if at all the earth and the human race can survive it*)

A quote from the EWI Chairman, James Badenoch QC: "*Don't miss the remarkable Dr Montgomery. His lecture on this subject (to an audience of 800) was I think the most fascinating and alarming I have ever heard. You will not be disappointed*".

The Lecture is at 5pm, in the "Large Pension Room" in Gray's Inn, and will be followed by a **reception and dinner**. Members and guests are warmly invited to join the Governors at this special event, and to meet Dr Montgomery who will be dining with us. Members are encouraged to bring guests. A booking form will be sent out shortly.

The lecture will be preceded by the formal proceedings of the AGM, which will start at 4 pm. Any members who wish to attend the AGM will be very welcome.

The Chief Medical Officer's Report: Bearing Good Witness Proposals for Reforming the Delivery of Medical Expert Evidence in Family Law Cases - a Paediatrician's View

Rosalyn Proops
Consultant Paediatrician,
Norfolk & Norwich University Hospital

The Chief Medical Officer has proposed a radical reform to tackle the longstanding problems with the supply of medical expert witnesses in Family Court Proceedings. It is a sensible solution to a difficult problem which may take a number of years to implement fully.

The key principle that underpins the Chief Medical Officer's report is that *'providing expert medical evidence in Public Law Children Act proceedings should be delivered as a public service, fully consistent with a duty on the NHS to safeguard children'*. This statement of intent has the potential to change the culture and the behaviour within NHS organisations and that of health professionals.

The key points of the report are;

- The welfare of children is the overriding concern
- The system must increase the supply and ensure the quality of medical expert evidence
- The work is closer to a public than to a private service
- The system should build on how the NHS already works, in consultant led teams
- Doctors need support systems and time to do the work.

Accountability and governance are at the core of this cultural shift. Placing this work firmly within the NHS, means that the systems of training, accountability and governance can be applied in a transparent manner, which over time should deliver improvements in the timeliness and quality of expert evidence. The main proposals are sensible and in line with NHS work. Each proposal may, however, present some challenges and practical difficulties.

Before looking at the proposals, it is important to note that the report deals with work under the Family Law Children Act and not criminal or civil cases. In the child protection field, however, paediatricians are not infrequently involved with both Family Law (care cases) and the criminal courts. The team proposals described here are, at least in the first instance, confined to Family Law.

The report states that local NHS Trusts should be the first port of call for medical experts, though there must always remain an entitlement to an outside opinion. In most cases clients are content and benefit from local services, but it is necessary for some to have an outside opinion, for independence and sometimes for the expertise only available elsewhere.

The second and key proposal is that the work should be done in teams and not by individuals. Considerable

advantages arise from team working, which builds upon existing NHS structures, provides for support from colleagues and peers and opportunities for training. It is also fundamentally safer for the individual doctor. If properly organised, within the job planning process, it should be possible to make the time available to do the work.

What then is a team? One should not be over-prescriptive about the composition of a team. Thus, a team offering an opinion about a child with a non-accidental head injury, will of necessity be different from one considering parenting, adult mental health and a parent's capacity to change. The assessment methods will be different and may include paper reviews, single interviews, community or residential assessments. There will be a core team with the ability to draw in other experts. Each district, perhaps covering a Strategic Health Authority, will have a number of teams covering adult mental health, child and adolescent mental health and paediatric problems. The report recognises the difficulties in the development of teams. The time required must include the recruitment of more staff and the cost of such staff and of their training needs to be met through the commissioning organisation. Careful thought needs to be given to how the teams report back to the court. Will it be a named individual ready to give evidence in person? Will the courts and the parties be able to call upon other team members? There should be an expectation that any member of the team may be called. The team system must enhance and improve the process of working with the courts for the benefit of children, without placing limits on due process.

If the development of the team might seem complicated, setting up the commissioning process is potentially even more complex. The key principle is that the service has to be commissioned by a local level organisation and not by large numbers of individual solicitors or by the Local Authority. Clients must be assured of the independence of the expert reports. Commissioning will have to be managed through some form of partnership, since no organisation is now readily available with the knowledge and experience to manage this type of low volume, high cost, novel inter-agency service.

At present, Primary Care Trusts (PCTs) are the responsible commissioners for NHS services and have the public health skills and local knowledge. However, placing all the funds for these new teams with PCTs is a step too far in the current financial climate of the NHS. No one could guarantee or ring-fence the necessary funds. The Legal Services Commission would probably be the PCT's most effective partner.

The report describes that current public funds, which are said to be around £20 million, must flow into the NHS so that overall the change will be cost neutral. There are

some questions about the figures in the report, both in the distribution of experts and in the associated financial cost. It is therefore good to know that a more detailed analysis of the current data is in progress. The system will not work unless adequate supporting funds are made available in advance of the final implementation of the scheme.

Training, team accreditation and the development of the evidence base must be considered. These are important areas to ensure quality and confidence in the system. Training costs will have to be included but the matter of accreditation is as yet unanswered. It will be necessary for the teams to demonstrate their competence and approval by the courts. The report describes the development of a National Knowledge Service to support the medical expert witness programme; this is to be welcomed.

The Chief Medical Officer's Report, *Bearing Good Witness*, is a radical programme to reform the delivery of medical expert evidence in family law cases. As with the best of progressive ideas, this one is at its heart a relatively simple proposal but with a number of unanswered questions. An implementation plan is in progress starting with a mapping exercise led by the Regional Directors of Public Health and work is progressing to understand the needs of the commissioning organisation. Progress is also being made with the development of the National Knowledge Service and considerable work is being done around the country looking at training.

Children and families and the professionals who work with them deserve a strong and supported system. This proposal may cause upset in a few quarters, but the NHS must demonstrate that 'child protection is everyone's business' and paediatricians' work in the family courts is just as much a part of their NHS role as the assessment and investigation of the sick child.

Transparency in the family courts – what it could mean for experts

*Penny Cooper, Barrister
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Inns of Court School of Law (City University)*

Consultation

A public consultation, called "Confidence and confidentiality – Improving transparency and privacy in family courts", was held by the Department for Constitutional Affairs (DCA) from July to October 2006. On the face of it, the title is somewhat contradictory; what it really means is that the government wants to make the family courts more transparent because they are not widely "trusted" and it wants to rationalise the privacy and reporting restrictions that are "complicated and inconsistent between levels of court". The consequences for experts are significant.

The consultation closed on the 30th October 2006 and the paper is available online at

Workshops

Dealing with the Media

Date: 22/03/07 London

The aim is to provide practical experience for experts on how to deal with unplanned interviews with the press in and around the court. This interactive fun training will ensure that you will feel confident in what you say which may or may not be quoted accurately, but will reflect well on your own discipline and on other expert witnesses.

Seminars

Joint event with Chartered Institute of Arbitrators Experts and Arbitrators the Interface

Date: 15/04/07 London

To extend knowledge and understand the different areas of dispute resolutions, and to highlight topics of current interest to both experts and arbitrators. In addition, to discuss opportunities for experts in the different areas of dispute resolutions.

A new regime for Disclosure and Procedures for Expert Witnesses in the Criminal Courts

Date: 19/04/07 London

This seminar has been designed to provide the expert witness with up-to-date information about the new procedures and the associated expanded duties under the new Criminal Procedure (CrPR) Rule 33 which came into force on 6th November 2006. The new duties will be explained and the major changes to legal practice explored for experts instructed by the various prosecution agencies including the CPS, HM Customs & Excise, SOCA or by the defence in criminal cases.

Courses

Introduction to English Law for Expert Witnesses

Dates: 19/03/07 and 12/06/07 London

Expert witnesses are specialists in a wide spectrum of subjects, often technical, presenting their expert opinion without having been a witness of fact to any occurrence relating to a legal case. However, the legal world in general, and specifically how litigation cases are conducted in England and Wales, often appears to be a complicated and confusing process to non-lawyers

www.dca.gov.uk/consult.courttransparency1106/cp1106.htm – NB: there really is an extra 'e' in transparency in the web page address. The document makes interesting background reading for experts interested in the workings of the family courts. It covers the current arrangements in the family courts with regard to whether the proceedings are open or closed to reporters and others. The situation is different depending on the level of the proceedings, from Family Proceedings Courts through to the House of Lords, and according to the type of family proceedings. The rules, as they stand, are not consistent and are potentially quite confusing.

Generally speaking, cases involving children are heard in private. The law prohibits publication of what happened in the hearing and prohibits disclosure of documents, such as the judgment and witness statements, unless the

court has given permission. "Confidence and confidentiality" presumes that there is widespread dissatisfaction with the family courts because of this lack of transparency.

One does not have to look far or for long on the internet to find bloggers criticising the family courts, which have "taken away children in secret". It is true that the press do not have the same opportunity to scrutinise family court decisions as they do in most other civil or criminal cases. When Sally Clark's and Angela Canning's high profile cases highlighted flaws in the evidence of experts - evidence given in open court - it led many to question whether similar miscarriages had taken place behind closed doors in the family courts. Professor Meadow had given opinion evidence in both those cases and had given opinion evidence in many care cases where the court had decided that the children should be permanently removed from their parents.

In 2004 the Children's Minister, Margaret Hodge MP, announced in Parliament that there would be a review by local authorities of cases where children had been made the subject of care orders on the basis of disputed medical expert evidence. The expected flood of cases never materialised but concerns about lack of transparency in the family courts still exist today. The consultation document asks whether the media should be allowed to attend proceedings as of right, with the court having power to exclude them where appropriate. Adoption would be treated as a special case, with transparency until the placement order but after that the proceedings would remain private.

"Confidence and confidentiality" describes the experience in New Zealand where the law changed on July 1st 2005. In New Zealand, children's cases may be attended by accredited members of the media and the courts may permit limited members of the public with a legitimate interest to attend. Anyone is allowed to publish reports of children's proceedings provided all identifying details are removed.

What of the responses to the consultation? The Law Society (October 2006) favours the position that family hearings "should be in private unless the court orders otherwise." Having consulted its members it does not think that the media should be allowed to attend as of right. Similarly, the Office of the Children's Commissioner is "not convinced that the family courts should be opened up to the press". Liberty, whilst recognising that it is a difficult balance, thinks there should be a presumption that the press should be entitled to attend.

Allowing greater media access to the courts creates the very real danger that witnesses become less likely to disclose the truth; they will fear that the evidence they give will be reported. Respondents agree that any reporting needs to be carried out with great care and what might work in one case would not necessarily work for another; simply removing names from case reports will not usually be enough. It isn't hard to imagine a case from a small, tightly knit community where any reporting

would give rise to the general public being aware of sensitive details. The consultation recognises that it is a difficult balance that needs to be struck, because people still need to feel "able to talk about sensitive and personal matters"; people should not "feel intimidated so that they are not open and honest with the court".

Implications for experts

It is not just identification of families that could give rise to serious problems. The Royal College of Paediatrics and Child Health responded to the consultation, saying that paediatricians have concerns about inaccurate reporting in the press and being "pursued by parent groups". They ask that if the proposal goes ahead, the DCA works closely with them to "offset any negative impact on the willingness of paediatricians to undertake this essential area of work".

Case law on confidentiality

A number of recent cases have looked at the issue of confidentiality in the family courts. *Re B (A Child) (Disclosure) [2004] EWHC 411 (Fam)* involved the sister of Harriet Harman, Minister of State Department for Constitutional Affairs. Her sister Sarah Harman, a well-known and respected solicitor in Kent, had disclosed to Harriet Harman a case summary and a copy of a judgment from a care case. Sarah Harman acted for the mother and sent the information to her sister with the intention of highlighting her client's case as one involving a potential miscarriage of justice. Even though the identity of the child was not disclosed, it was unlawful. It transpired that there had been multiple disclosures by the mother and Sarah Harman to the press. Furthermore, Harriet Harman, on incorrect advice, also passed the papers on to the Children's Minister, Margaret Hodge. Sarah Harman was strongly criticised by Munby J and later disciplined by the Solicitor's Disciplinary Tribunal for releasing the papers without leave of the court.

The same judge found himself looking closely at the law on confidentiality in family cases in *Norfolk County Council v Webster [2006] EWHC 2733 (Fam)*. The parents of a five-month-old boy, the subject of care proceedings, sought to have media restrictions lifted so that the care hearings could be attended by reporters. They had had three older children removed in previous care proceedings and maintained that they had been the victims of a miscarriage of justice. Munby J, at pains to point out that he was not in any way commenting on the merits of the parents' claim that they were the victims of a miscarriage of justice, dealt in detail with the parents' application for press restrictions to be relaxed. His judgment contains a fascinating review of the law, including European case law. He highlights: "The press and other media play a vital role in ensuring the proper functioning of our democracy, as also in furthering the rule of law and the administration of justice. The role of the court reporter is that of public watchdog over the administration of justice."

The parents in the Norfolk case were successful in having restrictions loosened in relation to their youngest

son, Brandon, though restrictions remained relatively tight in relation to their three older children identified only as A, B and C.

Anonymity for experts?

In a subsequent decision dealing with a number of related press issues (see *Norfolk County Council v Webster* [2006] EWHC 2898 (Fam)), Munby J, prevented the identification of the expert. In *Re B* (see above) he also prevented identification of experts in that case, and commented that it is a difficult balance. "There may come a time when the balance requires to be struck differently" he said. Looking at both sides of the argument he said "In the first case, there might be a powerful public interest in the discredited expert being identified; in the other case there might be a powerful public interest in the public vindication of an expert who had been unjustifiably and unjustly attacked".

One wonders even in the latter case when the expert is vindicated, how the whole experience of being identified in the press would feel and affect the expert in question. Experts have reported how frustrating it feels to be misrepresented in inquiries when their professional body restricts them from responding in any way about the case to the media.

Contrast this with the steps being taken to encourage experts to act in family cases. The Chief Medical Officer has made proposals in "Bearing Good Witness", a public consultation which ran until 28 February 2007, to improve the supply of medical experts in family cases. Increased transparency and greater access by the media may well run counter to any steps taken by the government to attract more medical experts to the field of child protection.

The government wants to see greater confidence and accountability in the family justice system and has proposed some far-reaching changes. Changes in the rules to allow more reporting of care proceedings would certainly mean greater media scrutiny of medical expert opinions. The government needs to tread very carefully and be watchful of the impact this would have on the willingness of experts to come forward and work in child protection cases. We await the Minister's carefully balanced public response.

Re B and the *Norfolk County Council v Webster* judgments can be found in full at <http://www.bailii.org/ew/cases/EWHC/Fam>

Penny Cooper is an Associate Dean at The City Law School, City University. She is the author of Reporting to Court under The Children Act 1989 (TSO, 2006) and co-author of Experts in the Civil Courts (OUP, 2006). She is currently researching the training of expert witnesses. If you would be willing to take part by completing a short questionnaire please contact her at p.cooper@city.ac.uk

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Why is mediation now so important?

*Chris Makin, Forensic Accountant**

When I first became a forensic accountant in the bad old days judges, had read little of the case before the oral hearing, when examination in chief took as long as cross examination and when little if anything was agreed in advance. Hired guns made a good living, and I've met quite a few in my time.

Things are now very different, since in April 1999 the Civil Procedure Rules (CPR) came into effect. The very first page of CPR - Part 1 – Overriding Objective – says:

- 1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- 1.4(1) The court must further the overriding objective by actively managing cases.
- 1.4(2) Active case management includes-
 - (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure...

So, in managing cases the Court must encourage Alternative Dispute Resolution (ADR) and facilitate its use. ADR can include negotiation, early neutral evaluation and other informal procedures, but by far the most popular form is mediation.

In litigation the costs normally "go with the action"; that is, the winner gets damages but also most of their legal costs. Refusal to use ADR puts at risk the winning party's chances of getting costs; that is the court's major weapon of persuasion.

Despite the clear requirement for judges to encourage ADR, it took some time for courts to use their power of persuasion. In *Cowl & Plymouth City Council* [2001] EWCA Civ 1935 and *Dunnett -v- Railtrack* [2002] EWCA Civ 302, the winning party did not get their costs in spite of a well-founded refusal to mediate. In other cases, too numerous to mention, the courts have used sticks and carrots in different degrees. The case of *Halsey -v- Milton Keynes General NHS Trust* [2004] EWCA Civ 576, is seminal. The winning party declined the invitation for mediation by the other side. The Court of Appeal produced the following checklist of matters the court would consider in future cases after such a refusal of mediation, when deciding whether the winning party should get their costs:

- Whether it is important to establish a principle or set a precedent
- The merits of the case, since a party who reasonably believes they have an unassailable case may reasonably refuse, whereas a party who unreasonably refuses is at risk
- Whether other forms of ADR have been attempted, though Courts recognise that mediation is the most successful form of ADR
- The cost of ADR, which is normally modest but which could be disproportionate in a small case

- Any damaging effect of delay, where for example a trial is imminent. It should be noted, however, that successful mediations have taken place only days before trial, or even during a trial adjournment
- Whether ADR has a reasonable chance of reaching a settlement. (This will be dealt with in the second article)
- How strongly mediation may have been encouraged by the Court. (There are now numerous examples of courts using their powers of persuasion)

The fundamental point is that a party that refuses mediation is at risk on costs, and has the onus of persuading the court that their refusal was reasonable. Since, however, mediation is so successful, even in apparently hopeless cases, this is a difficult threshold to overcome.

The clear message is that litigation lawyers must consider mediation at every stage in the proceedings. That is why experts need to know some of the dynamics of mediation and what they can do to help in the process.

In later articles I shall describe how mediation works, why it is so successful, and the role an expert can play to assist their instructing solicitor.

** 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.*

Range of Opinion and the Single Joint Expert

*Bob Goodall
Medical Director of Premier Medical Ltd
and Medical Expert witness*

The court requires experts to assist in the interpretation of specialist areas of knowledge. Historically, where there are differing opinions between experts, the "truth" was arrived at by adversarial cross examination. The reforms introduced by Lord Woolf facilitated and encouraged the use of the single joint expert (SJE), whose role it is to consider and represent differing opinions and to reach a conclusion, with a broadly median view, depending on the evidence and the strengths of potential viewpoints. Can the SJE be relied on to give a balanced opinion every time?

The medical expert prepares a report opining on causation, pain and suffering, prognosis and loss of amenity which assists the parties to the dispute to negotiate a settlement. If the outcome of injuries were evidence-based and scientifically validated this would be a straightforward task and, in some cases, it is. However, the variation in responses to injury, the influence of pre-existing disorders and, in addition, the lack of scientific evidence on the long-term outcome of many injuries, leads to considerable variation in the opinions of experts. Quantum is, of course, directly related to the degree of pain, suffering, loss of amenity and the period or degree of recovery.

Humans vary in their response to injury and disease. Pain is a subjective sensation, the presence of which cannot objectively be proved or disproved. Experts assume a degree of honesty from the claimant. It is, however, known that the transmission of pain from the injured tissues to the brain is heavily modulated by input from other parts of the brain, especially areas involved

in emotion and distress. This explains, to some extent, the apparent difference in magnitude of symptoms, apparently experienced by claimants with similar injuries. A claimant who feels extremely resentful, for example as a victim of a hit and run accident, tends to do badly as do claimants who are psychologically fragile because of anxiety, depression or other emotional disorder. It is likely that such claimants suffer more, as a consequence of psychological distress and altered pain modulation which lead to a heightened perception of pain. It is not too difficult to see how the two are self-perpetuating and in clinical practice this is a common observation. Further complications are the fraudsters, who will range from mild exaggerators of symptoms to fabricators of disability.

Pre-existing illness or disorder also modifies the response to injury and this has led to the notion of acceleration of pre-existing disease or the unmasking of a previously asymptomatic disorder. The quantification of acceleration of disease is a concept created by the medico-legal process; it has no part to play in day-to-day clinical practice, which has no need for such an idea. A typical situation is the worker who undertakes an unsafe lifting practice and suffers a prolapsed (slipped) disc with possible long-term pain and disability. Such lifting may sprain a back temporarily, but the general consensus is that a normal disc will not prolapse even under considerable loading. Investigation reveals a degenerate disc, vulnerable to prolapse, and the incident in question was the "final straw". It is deemed likely that the disc was, in any event, going to prolapse at some point in the future during an activity, possibly unrelated to employment. Determination of the period by which the event has been brought forward, is a significant factor in the determination of quantum. Such notions are absent from traditional medical teaching and research on the subject is limited. Clinicians who deal with patients in both a treating and an expert witness practice will gain increasing expertise in processing the strands of information, in order to come to a reasonable opinion on the likely period of acceleration but inevitably there are variations in opinion. This process goes some way to bringing proportionality of quantum to the magnitude of the initial event but in the absence of hard scientific data, the negotiating parties depend on the SJE to give an opinion that takes varying views into consideration.

The best expert is aware of the importance of articulating evidence and the range of opinion. The expert must, however, take a broad and flexible view in order to represent a reasonable range of opinion. The best expert will process the various components of information and weigh up a likely opinion that takes account of a sceptical view, and also a view that accepts the claimant's testimony. The object is to present an opinion that will be regarded as reasonable by the court. In addition, the expert should seek to put the arguments in a manner that can be understood by a layman - in particular the claimant. The parties to the adversarial process may disagree with the expert, from their own standpoints but, of course, have the opportunity to raise questions.

Psychologists tell us that conscious thought acts as an advocate for the opinions of the inner self which is shaped by previous experience, culture, education and state of emotional well-being. Evidence indicates that, on average, people - including experts - see the faults in others over the faults in themselves and measure their own attributes as above average. The best expert will accept that subjective assessment of claimants is unavoidable and they must, therefore, be self-analytical and self-critical in order to present the case fairly and to represent a fair and reasonable opinion on the relevant issues. The SJE who is self-critical and is aware of potential issues and avoids self-serving bias is most likely to provide an objective and balanced opinion as is required by the Woolf reforms

Can you be sued?

*Naomi Griffin, Solicitor
Alan Owens, Partner
Irwin Mitchell, London*

As an expert witness you cannot be sued in negligence or for defamation in relation to anything you say in court. This immunity does not, however, extend to a large number of the tasks routinely assigned to experts before and during the litigation process. The following are some of the key areas:

Pre-action

Claimants frequently approach an expert before commencing litigation to get an opinion to assist in assessing their chances of success or the level of damages. Problems can arise if an expert does not have enough information to form an opinion, does not sufficiently investigate the facts or has insufficient knowledge of developments. At this stage, claimants may not fully have defined their claim and the expert may be asked to become involved without being entirely confident that his is the right expertise. A pre-action opinion given without sufficient expertise could be the subject of a negligence claim or disciplinary action.

Settlement Negotiations

An expert report is likely to be used to assist in settlement negotiations, either pre- or post-action. Even if the report is provided to the other side on a without prejudice basis, the expert could be in trouble if the claim settles but the report is wrong. In this situation, clients are only likely to sue if they settle for less than the true value of the claim, but there may be disciplinary repercussions for the expert even if the client gets a better outcome than would be expected. This applies even if the claim settles just before the expert steps into the witness box.

Pleadings

Expert accountants and actuaries are often asked to provide calculations of damages which are then incorporated into Particulars of Claim or Schedules of Loss. If the expert were to provide a report with incorrect calculations or information, the client could sue for damages. These might be the costs involved in re-amending the pleadings or much more.

Meeting of experts

After the exchange of expert witness reports, a court will commonly direct experts to meet and/or to discuss their reports and prepare a statement of agreed issues and issues in dispute. If, after a meeting with the other side's expert, the expert makes concessions that are unduly or improperly given, he may face civil and/or disciplinary proceedings.

General Conduct

If an expert at any stage fabricates evidence, or assumes incorrect evidence without checking its validity, gives dishonest evidence, fails to maintain professional objectivity and impartiality at all times and/or is shown to be biased. Experts should ask themselves whether they would express the same opinion if given the same instructions by the opposing party. If experts breach the contract with their instructing solicitor they may face civil and/or criminal proceedings.

At the trial

Despite the immunity, if a judge considers acts or omissions, such as a failure to disclose material findings, show that an expert is not fit to practise his discipline and/or this amounts to professional misconduct, the judge may exercise his or her discretion to refer the expert to a disciplinary body (see for example, *General Medical Council v Professor Sir Roy Meadow* [2006] EWCA Civ 1390).

What are my chances of being sued?

Claims against 'experts', such as solicitors and accountants, occur all the time but claims against experts who are advising in the context of litigation are less common, but not unheard of. Experts can be targeted in post-trial litigation, because of their central influence on both liability and quantum and even more so now as a result of the publicity surrounding the Meadow case. In personal injury (PI) litigation, claimants are increasingly querying expert opinion because of a perceived under-settlement of PI claims. It would be wise to follow the steps set out below to minimise exposure.

What steps can you take to minimise your exposure?

Experts should:

- Always comply with the requirements of Part 35 of the Civil Procedure Rules and the ethical code in the Civil Justice Council Protocol for the Instruction of Experts in the Civil Courts – these guides should be carefully read and re-read;
- At the outset, provide an engagement letter defining the scope of his role and expertise – in the letter, the identity of the client should be clearly identified (one indicator of this is who will pay the expert's fee) and from whom the expert will accept instructions;
- Take out professional indemnity insurance or check that they are covered by their employer's insurance and if so, that the insurance is for enough money and that it covers the expert's work;
- If the expert's engagement letter includes exclusions and/or limitations of liability, he may want advice as to whether the exclusions/limitations could infringe the Unfair Contract Terms Act 1977. He might in large cases consider limiting his liability to the extent of his insurance cover;
- If a draft report has been provided, caveats should be included about information known at the time and what further information may be needed and should be asked for. If an opinion cannot be formed on the information available, such an opinion should not be provided;
- Thorough notes/records of instructions should be kept. Then, all of the facts and instructions given to the expert that are material to the opinion should be set out in the draft and final reports (see *R v Bowman* [2006] EWCA Crim 417 for further guidance);
- Only advice within the expert's expertise should be given. CVs should be regularly updated and checked for any experience that is outdated or qualifications that have expired.

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Experts and the Criminal Procedure Rules 2005

Alex Brown
Forensic Accountant

The Criminal Procedure Rules 2005, referred to hereinafter as CrPR 2005 to avoid confusion with the Civil Procedure Rules 1998 [CPR 1998], were born out of Lord Justice Auld's report in 2001, "*A Review of the Criminal Courts of England and Wales*" in which he recommended there should be a set of rules for the criminal courts and that they be modelled on the CPR 1998.

The government's response was a white paper in 2002 "Justice for All" and the passing of the Courts Act 2003, which paved the way for a unified set of rules for the criminal courts. The main body of CrPR 2005 came into force on 4th April 2005, but part 33 which related to expert evidence was reserved, pending consultation.

EWI participated in the consultation process by making a joint submission with the Academy of Experts, both bodies having concluded that on such a significant matter it was important to speak with a single voice.

After that consultation process, Part 33 of CrPR 2005 was introduced by S.I. 2636 of 2006 and became effective as from 6th November 2006.

Experts who are familiar with Part 35 of CPR 1998 will find much that is familiar to them in Part 33 CrPR 2005. Detailed consideration of both documents does, however, reveal certain differences as discussed below.

Part 33.1 defines an expert as one "*who is required to give or prepare expert evidence for the purpose of criminal proceedings. . .*", and is virtually identical to its counterpart in part 35 CPR 1998.

Part 33.2 defines the expert's duty to the court as being "*to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise*". This is a fuller definition than CPR 35.3 which says "*It is the duty of an expert to help the court on the matters within his expertise*", but should not cause difficulties to any EWI member. Part 33.2.2, as expected, makes it clear (as does CPR Part 35) that this duty overrides any obligation to the instructing or paying party. Part 33.2.3 expands the expert's duty with an obligation to inform all parties and the court if the expert changes his mind from that expressed in his report.

Part 33.3 defines matters which must be contained in an expert's report. The requirements are very similar to those set out in Rule 35.10 of CPR 1998 and at section 2 of the associated Practice Direction, but experts appearing in the criminal courts should be aware that Part 33.3 requires, in addition, that experts state not only

their qualifications but also their experience and accreditation, and that in relation to their tests or experiments, that they summarise the findings on which they rely.

The requirement in criminal cases to report to these standards is likely to increase the time consumed and therefore raise costs.

Part 33.4 requires a party serving an expert's report to inform the expert of that fact and to do so at once. This rule is one that EWI and TAE requested in the consultation process.

Part 33.5 enables the court to direct that the experts meet to discuss the expert issues in the case. As with CPR 1998, experts are directed to state the matters on which they agree and giving their reasons. Part 33.5 goes further by requiring them to state the reasons for any disagreement. Pre-trial part 33.5 meetings should lead to a better assessment and understanding of expert evidence and help to identify weak cases - both to charges being dropped or reduced and to guilty pleas, thereby saving time and public money.

Part 33.6 simply states that a party may not introduce expert evidence without the court's permission, if the expert has not complied with a direction under rule 33.5.

Part 33.7 recites that where more than one defendant wants to introduce expert evidence, the court may direct that such evidence may be given by one expert only. Where the co-defendants cannot agree who the expert should be, the court may select the expert from a list prepared or identified by the court or selected in such other manner as the court may direct.

Part 33.8 is concerned with instructions to a single joint expert (SJE). It is expressed in terms almost identical to Part 35.8 CPR 1998 with the exception that part 33.8 refers to co-defendants whereas part 35.8 refers to instructing parties.

In summary, CrPR 2005 produced no great surprises and has generally been welcomed by experts, because their duties and responsibilities are clearly expressed in the new rules. Although it is outside the scope of this brief article, experts instructed by the prosecution in criminal cases should be aware of the contents of the Disclosure Manual published by the Crown Prosecution Service at http://www.cps.gov.uk/legal/section20/chapter_a.html. Chapter 36 deals with experts as does Annexe K. Experts are required to file a certificate stating whether or not there is information which may be capable of adversely affecting their competence and/or credibility as an expert. This will be dealt with in a future issue of EWI Newsletter.

Casenotes

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JP Morgan Chase & ors v Springwell Navigation Corporation [2006] EWHC 2755 Comm, Lawtel Summary AC0112195, 3 November 2006, QBD

In a recent banking dispute involving the sale of emerging market debt instruments, large portions of the defendant's expert evidence were struck out as being not relevant, duplicative, outside the expert's area of expertise, or dealing with matters which were matters of law for the court to decide. Aikens J excluded various expert reports (in whole or part) from evidence at trial. The claimant's substantive claim is for a declaration of non-liability for losses suffered by the defendant on emerging market debt instruments. The defendant had served expert reports on derivatives, Russia and emerging markets, private banking and portfolio analysis (as well as on other areas not relevant to the decision in this case).

The judge excluded:

- A report on derivatives, written by a lawyer, which focused on the interpretation of letters being relied on to exclude liability. This was on the basis that it was a question of law for the court, so the expert's views would not assist;
- The section of a report on emerging markets which dealt with whether any particular advice (that the expert speculated had been given on the basis of reviewing selected transcripts or documents) was consistent with advice that would be given by a reasonably careful and competent market professional. This was on the basis that the court would first need to decide whether there was a duty to advise and the scope of that duty, and then decide what a reasonably careful and competent professional would have known at the time (which was covered in a different and admissible section of the report) and only then whether any advice actually given was consistent with the relevant standard, the expert's view on the last part would necessarily be speculative;
- Parts of the private banking report were excluded because the author lacked the proper experience or, as with the previous bullet, because it went beyond saying what the scope of a duty might be (permissible) and considered what that duty in the particular case actually was and whether the claimant had in fact fulfilled it, which were matters for the judge; and
- The report on portfolio analysis largely duplicated admissible parts of the private banking report. It was therefore excluded on the basis that it is wrong in principle for two experts to cover the same topic unless there was very good reason.

The judge included a reminder that expert reports are too often overly long and complex. The parties must abide by the letter and spirit of CPR Part 35 and the court must reject any expert evidence that is not reasonably required to resolve the dispute.

The decision in this case is a reminder that the courts are keen to curtail excessive expert evidence. As is well recognised, expert evidence should not decide what it is in fact for the judge to decide. Particular points that arise from this case and are worth noting by experts are:

- An expert should not opine on legal matters; these are for the court;
- An expert can say what might be the possible scope of a duty to advise in his/her field. An expert cannot say what he/she considers was the actual scope of that duty in the particular case. An expert cannot say whether he/she considers a party in fact fulfilled the duty or met the

standard in the matter in question; and

- An expert can examine an assumed set of facts and say if he/she considers the actions of a person on those assumed facts fell below the standard of practice in the relevant profession (although this will not always sit neatly with the prohibition in the bullet point above on commenting on whether a party in fact met a certain professional standard.) An expert cannot say what he/she would him/herself have done in the same circumstances.

The Owners and/or Demise Charterers of the m/v "Eleftheria" v The Owners and/or Demise Charterers of the m/v "Hakki Deval" [2006] EWHC 2809

This case arose from a collision at sea between the Claimant's and the Defendant's ships. There were various disagreements between the parties as to the reasons for the collision, with regard to the angle of the blow, degree of visibility, sounding of fog signals etc.

At a Case Management Conference, the Claimant sought leave to call an expert on the issues of the angle of blow and the speed of the ships, and also sought the appointment of nautical assessors to assist the court, as is often customary in shipping cases. The Defendant sought leave to call experts on seamanship, without the appointment of such assessors. The judge, in giving his directions, gave permission for the parties to call such expert evidence but also appointed assessors. The parties went on to produce expert reports. The question for the court was whether these reports were admissible.

The reason why this was open to doubt was because of the well established rule that, when the court is assisted by nautical assessors, expert evidence on matters of navigation and seamanship cannot also be adduced. Although there are exceptions to the rule, such as where the facts involve ship types, remote geographical areas or specific areas of expertise unfamiliar or outside the general competence of such assessors, none applied on the facts of this case. Consequently, the trial judge ruled that, despite the order given at the Case Management Conference, the court was not bound to admit the expert evidence when it was also being assisted by nautical assessors. The judge made it clear that the parties could still use reconstructions prepared by experts as their own for illustrative purposes and make use of the retained experts' comments in their arguments. However, the reports themselves could not be admitted in evidence.

Tim Regis and Camilla Macpherson *Mary Stallwood v (1) G H David (2) M Adamson [2006] EWHC 2600*

The Claimant in this case (which was on appeal from the County Court) was claiming for damages for injuries caused by a road traffic accident. The issue before the Court was whether there were any circumstances in which a party could obtain permission to rely upon additional expert evidence when its expert had changed his opinion following a discussion between experts.

The Claimant's expert had examined the Claimant on various occasions since her accident and opined that she would not make a full recovery. The Defendant's expert was of the opinion that the effect of any injuries from the accident would have lasted for no longer than 6-12 months afterwards, and further deterioration in the Claimant's condition was not as a

result of the accident. The experts met to discuss their respective opinions with a view to identifying areas of agreement and disagreement. The agreed note of the discussion they produced concluded that the Claimant's inability to work was unrelated to the accident. In reaching this conclusion, the Claimant's expert had clearly changed his opinion, a change which would significantly reduce the Claimant's prospects of establishing her claim.

Consequently, at a Case Management Conference, the Claimant made an application to adduce expert evidence from another orthopaedic surgeon, arguing that she had lost confidence in her previous expert because of his marked change of opinion.

The judge rejected the application on the basis that, first, the accident had happened five years earlier; secondly, the trial was imminent; and thirdly, the application was only necessary because the Claimant's expert had changed his mind having considered the matter in the light of the Defendant's expert opinion.

In considering the first judge's decision, the appeal judge noted particularly that CPR 35.12, which concerns meetings between experts, clearly contemplates that as a result of discussion an expert may change his mind. Indeed, the express purpose of such meetings is "where possible, to reach agreed opinion" on expert issues; see CPR 35.12(1)(b). Therefore, it would be rare for a party to persuade a court not to follow the agreed opinion of experts.

However, a note to CPR 35.12(1) gave an indication as to the circumstances of an exception – namely where there was good

reason to suppose that the applicant's first expert had agreed with the expert instructed by the other side, or had modified his opinion, for reasons which could not properly or fairly support his revised opinion, such as the expert stepping outside his expertise, or acting incompetently in reaching agreement. Where such a good reason could be shown the court would have to consider whether it could properly be said that further expert evidence was therefore required.

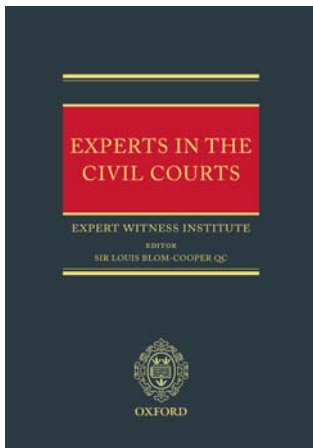
The appeal judge held that the first instance judge had not considered this exception and therefore had not had regard to all relevant matters when considering the Claimant's application. The question should therefore be reconsidered. The judge accepted that the substance of the claim did not of itself amount to a sufficiently good reason for granting permission for expert evidence. In particular, the Claimant had not sought to question the expert as to why he had changed his mind, and there was therefore no reason for supposing that the reasons for his *volte face* were unsound.

However, in this case there was a particular special feature to take into account. Apparently, the first instance judge had hindered the presentation of the Claimant's application with numerous interruptions and comments critical of the Claimant's claim which suggested that he had permitted his own opinion of the claim to influence his approach, rather than the evidence in the case. Taking this into account the court concluded that this amounted to "*very special circumstances*." In light of this, the Court held that the Claimant should be granted permission to rely upon the evidence of an additional expert (indeed such an additional expert had already been instructed by the Claimant and had reported in similar terms to her first expert). If permission were not granted, judged objectively, the Claimant would have had an understandable sense of grievance.

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