



EXPERT WITNESS INSTITUTE NEWSLETTER[©]

Summer 2003

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The role of the IT expert witness in software and systems development/implementation contract disputes and litigation

This is a synopsis of a talk given in London to the Association of Independent Computer Specialists on 10 October 2002 by Dr Stephen Castell, Chairman, CASTELL Consulting

The fundamental problems

Disputes over failed software implementation projects raise interlinked technical and legal issues which are complex, costly and time-consuming to unravel. This is so whatever the financial size of the claims and counterclaims, the facts and circumstances of the contract

between the parties, or the conduct of the project and the management and software development methodologies which may have been used. Such projects are often terminated, with the software rejected, amidst a considerable range and variety of allegations expressed by both supplier and customer. These include allegations of incomplete or inadequate delivery, software defects, database errors, faulty design, operational deficiencies, performance shortfalls, systems instability or unreliability, shifting user or business requirement specifications, poor project management, inadequate systems or acceptance testing, lack of co-operation, delays and cost over-runs.

Increasingly, such disputes are ending up in the courts or are dealt with by other forms of dispute resolution such as mediation or arbitration. An IT expert witness is retained by each party to give an independent opinion on what went wrong technically/managerially, what and how bad are the consequences, what is the final state of the software, and who is to blame.

I have been involved as an independent expert witness in over one hundred cases over the past fifteen years, for claimants and defendants; systems/software customers and suppliers; in the High Court, or in arbitration and mediation, and in other forms of alternative dispute resolution. I am also experienced as a (CEDR-trained) mediator and as an ICC arbitrator. Matters of dispute have included the software development cases in the English High Court which hold the record for the longest *trial* (*GEC Marconi v LFCDA*, 1991-92), where a CASTELL consultant spent some 40 court days being examined in the witness box in a trial which went on for well over one year; and for the largest claim (£200m+, with £50m counterclaimed, heard briefly in the Technology and Construction Court of the High Court in October 2001 prior to settlement), over the failure of a high-profile outsourcing agreement.

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The expertise and experience generally required for this software development/implementation contract expert witness work is that of an IT professional skilled in software engineering, implementation and development practice; project management; and information systems strategy and procurement. The work has *inter alia* these important features:

- **Responsibilities and duties:** an expert has responsibilities to the client and to the instructing solicitor to apply expertise to define and investigate the technical issues on foot between the parties as thoroughly, but nevertheless cost-effectively, as possible. The expert's primary duty is, however, to the court in establishing the 'technical truth' and assisting the court in determining the issues, on an objective and unbiased basis.
- **Tasks:** these come down essentially to 'investigation, investigation and

investigation': of documents, of people, and, most importantly, of the disputed software and system itself (usually the best evidence there is, to the expert).

- **Main deliverable – the expert's report:** the fundamental reason why the IT expert witness is there is to produce a thorough and well-rounded report, written in clear English, explaining the expert investigations carried out, the analysis of the evidence, the IT software engineering principles (and industry custom and practice) which have been applied.
- **Providing opinions** on the key technical issues which lie at the heart of the case. The expert witness is, apart from the judge, the only person in the litigation who is entitled to give opinion evidence (rather than factual evidence). Such opinions must be objectively justified wherever possible, unequivocally stated ('on the one hand, on the other hand' formulations generally have no place in experts' reports), and compellingly expressed. 'If you haven't yet reached a firm opinion, you haven't yet done the work' is a good principle to go by as an expert. Mind you, you do not always get the budget to do all the work you would like; and so to...
- **Fees/costs:** as an expert, or consultant, or AICS member), one always has to remember that 'one man's fees are another man's costs'. Expert work has an additional guiding principle which all involved in litigation have to follow. Arising from the Civil Procedure Rules – namely, that costs must also be 'proportionate' (for example - you must be careful not to embark on work likely to cost £0.5m in professional fees for a case where the claim is only for, say, £0.25m). This is not always an easy principle to observe in software development cases. The difficulty and effort of investigating technically complex issues of software design, construction, testing, functioning, performance and so forth can in many ways be just as great for a £100,000 'customised off the shelf package' incomplete implementation as it can for a failed £10m bespoke software development project. This problem is lessened by, wherever possible, agreeing with the expert on the other side a core list of issues; and also by producing joint statements on matters on which experts can agree, thus taking areas of the dispute out of issue and reducing the need for investigation (and the associated costs) of those particular points.

It is worth saying a few words on what an IT expert is *not*:

- **An advocate:** the expert is not there to argue the client's case – there are already enough expensive lawyers on the case to do that! Seriously, the courts take a dim view of experts straying into advocacy. The judge requires the expert to be an independent 'partner', providing clear understanding, explanation and opinion, in a dispassionate and non-partisan fashion, in order to gain determinative illumination and insight into complex technical matters. If, for example, the expert's true opinion is that some (or all) of the client's claims or counter-claims, then this should be made clear, early and unequivocally.
- **A narrow technical specialist:** disputes over software development or implementation contracts can often call for some narrow specialist technical expertise (such as practical experience of and proficiency with a particular software development language, RDBMS, toolset), but limited technical specialisation of this type is generally not sufficient for arriving at the full-bodied opinion on the usual range of technical issues in such cases which is necessary in order for that opinion to be credible and therefore valuable to the court. When appointed expert on some larger cases, I may make use of a team of other consultants, including technical specialists with particular skills and proficiencies to assist in technical investigations. At the end of the day, however, I have to direct and understand the rationale for and results of such work, be personally convinced of the conclusions reached and thus be able fully to explain, support and 'own' (and be examined in court on) the final opinions I give.
- **"I would have done it this way":** it is not adequate to provide an opinion expressed simply in this way, however good the expert's personal record as a software engineer or project manager in the field historically may be. The court needs to be presented with an objective, rational basis for analysis and how conclusions and opinions have been reached, underpinned by engineering and project management principles and/or justifiable statements as to accepted industry custom and practice.
- **A software fixer:** beware! – it can be a temptation for an expert team to stray into 'trying to put the failed project right' mode

when carrying out their investigations. To give a strong, analysed and justified opinion in the expert's report on whether or not some particular software behaviour is a serious fault does not generally require first to find, test the fix for it and put the software right.

- **An academic ('custom and practice, not theory'):** it is true that for some types of IT litigation, background and experience as an academic (e.g as a professor of computer science or software engineering at a British university) can be useful. Instances include some intellectual property, and 'hacking' cases. However, in my experience, most commercial software development/implementation contract disputes are really looking for assistance from the type of opinion that comes from the 'grey hairs and scars' of real-world project involvements (and failures!), and for seasoned practical project management experience serving actual paying customers/clients. This is something which (only?) years of working as an information systems practitioner can give you.

Succinctly, the typical scope of work as an expert witness in such disputes is framed by consideration of the following:

What investigations should be done? At the start of looking at a case it can be confusing to the inexperienced to know just where to start applying your (costly) expertise.

What evidence should be considered? Usually, but by no means always, there is already assembled a possibly large portfolio of project and technical documents by the time the expert witness is instructed. So the first task is to read all the documents. Equally important is it to identify and request all the documents not yet to hand but which the expert considers should be in existence for a software project of this nature. And another first task is to interview as many of the key people, singly, in the shortest reasonable time.

The software itself: best evidence? 'Let the software speak for itself'. Much of the work of an expert, when the disputed software/system is still available to be tested (not always the case), consists of identifying, planning, preparing and running appropriate expert testing (usually jointly with the expert for the other side) to demonstrate the presence or absence of the alleged faults in, or enhancements to, the system which are often at the heart of the dispute. The results of such testing can have a dramatic effect on the continuation of the action. In my experience it is not unknown for even the suggestion of rigorous independent expert testing of the software itself (perhaps proposed as to be carried out before the judge) to hasten a satisfactory settlement of the dispute.

What is the expert's opinion? To repeat – this is what the expert has been instructed to give. If the expert is not the sort of person who can reach a firm opinion, with objectively good, rational, defensible analysis to back it up, and expressed in compelling, clear English, and who is prepared to defend a position, convincingly and unshakeably, when cross-examined on it in court, then...

Settlement! or 'Good experts don't go to court'. Just as the Observer Corps' motto is 'Time spent in reconnaissance is never wasted', in my experience that for IT software contract disputes runs: 'Money spent on a good expert is never wasted'. In the great majority of all the cases in which I have been involved as an expert witness, a satisfactory settlement of the dispute was achieved between the parties shortly after serving the report, avoiding the need to proceed to trial and resulting in a huge saving in costs to both sides.

One of the most important issues on which the expert is almost always asked to give an expert opinion in these cases is: what was the quality of the delivered software and was it fit for purpose? To answer this, *CASTELL Consulting* has over the years developed a range of rigorous analytical techniques, *Forensic Systems Analysis*, for assessing failed, stalled, delayed or generally troublesome software development and implementation projects. These techniques, founded on sound software engineering principles, are objective and impartial, favouring neither customer nor supplier, software user nor software developer. This objective and unbiased approach accords with what is required of the expert witness, whose primary duty is to the court in finding the 'technical truth'. It is particularly important technically where software projects involve a mixture of customised software packages and 'bespoke' software construction. These techniques are becoming internationally accepted and an account of the *Forensic Systems Analysis* methodology was published in the October 2000 issue of *Charter*, the Journal of the Institute of Chartered Accountants in Australia; and in the October 2001 issue of the UK *Barrister* magazine. They are to be further developed and promulgated, as a contribution to good IT professional practice, on the proposed website www.ForensicSystemsAnalysis.com.

Members of the AICS could well consider developing their careers in the expert witness direction. They should have wide experience, be technically rigorous and independent in thought, and be critically objective. Above all, they should be able to write clear, good English. One of the best ways to get started in this field is to work with an established consultant who frequently does expert work. I myself am always interested in hearing from independent software practitioners with particular expertise and interests who could for example assist on some of the larger projects where an expert team is necessary. Bodies like the Expert Witness Institute and the Law Society, which publishes an annual directory of 'checked' expert witnesses, welcome IT consultants and contractors who have had some practical experience of expert witness work.

From the Secretary's Desk.....

Money Laundering and the Proceeds of Crime Act 2002

The seminar on this subject on 2 July highlighted the extensive implications for expert witnesses of this legislation. While the regulations are still in draft form, it is expected that they will be enacted later this month and there will thereafter be three months' grace to permit the necessary training to be undertaken.

How does this affect expert witnesses? If you fall into the regulated sector it would seem that if you have any suspicion of a criminal act having been perpetrated you are under a statutory duty to notify a 'constable'. Failure to do so would expose you to the wrath of DORA (the Director of the Assets Recovery Agency) and you could in the ultimate have your assets sequestered. The definition of crime is extremely wide – if you have two convictions for speeding you would be regarded as an habitual criminal!

This is by far the most draconian legislation we have seen and a short evening seminar was inadequate to deal with it, although the discussion did raise some interesting and horrifying implications. Already some members have received a questionnaire from instructing solicitors following advice provided by the Law Society. Should any expert being approached to act on behalf of a litigant reciprocate and issue their own questionnaire? At the very least it seems you must immediately create your own 'money laundering' file. For your own protection you should incorporate in your letter of engagement to the solicitors a protective sentence. The membership committee will be considering what changes would need to be made to the Institute's standard terms and conditions of engagement, but for the moment we suggest you consider the following addition:

"You should be aware that I will not discuss any statutory compliance obligations with clients including money laundering or handling monies."

The ramifications of this legislation are so extensive that it is not certain that an expert witness can claim the protection of legal professional immunity. We are considering running a conference in the autumn to look at this in more detail and the arrangements for this will be published on our website and circulated to members in the usual way. Look out for this. In the meantime you have been warned.

The great flood

As members will be aware, over the weekend of 21/22 June a hot water pipe in the office burst and showered the office. On the Monday morning the

staff arrived to find the office under water and it extended out to the corridor. 'All hands to the pump' became a reality. Fortunately we were able to restore the telephone system within 24 hours and later in the week, when it had dried out, the computer system was up and running without any loss of data. However, for the whole of the following two weeks we were cut off from the internet.

I am sorry if any members had difficulty in communicating with the office but hopefully matters will return to normal very quickly now. The generation to which our office staff belong probably have no concept of the 'blitz mentality' but the way they rose to the challenge demonstrates that it still exists. The EWI Governors, who were meeting in that first week, paid particular tribute to the way they had acted in very trying circumstances.

Case notes

Readers will notice a change in the contributor for our case notes. Joanna Hughes who has provided them for some time is now on maternity leave and we wish her a happy outcome. She expects to return in February but in the meantime we are grateful to Camilla Macpherson, also of Allen & Overy, for helping us in Joanna's absence to deliver the goods.

Referral service

The enquiries which we receive from solicitors and others seeking experts to assist them continues to increase, and the number of repeat requests we receive indicates that the service is greatly appreciated. However, we have for some time been conscious that the information we hold on members' particular expertise is not always sufficiently specific to match the enquiring solicitor's requirements.

To rectify that we have been undertaking an exercise to enable members to identify their individual specialisms and in this we have been helped by a number of members. I would like to thank them and all the members who have co-operated so efficiently in completing the questionnaire and sending it back to us. At the same time we have been circularising the legal profession to make solicitors aware of our referral service. Completing both aspects of the exercise will, we are confident, assist in generating more instructions for our members.

Civil Justice Council – experts Committee

The Civil Justice Council has set up an experts committee under the Chairmanship of His Hon Judge Paul Collins. Our representative is John Cowan, one of EWI's Governors. As this Committee will be dealing with such matters as the accreditation of experts and experts fees we shall be taking a particular interest in this committee.

Brian Thompson, Secretary

Conference

Date: 10 October 2003
Venue: The Royal College of Physicians,
Regent's Park
Title: Expert Evidence at Home and
Abroad

This year the Expert Witness Institute's annual conference is being organised jointly with the British Institute of International and Comparative Law. We are most appreciative of the help we have received from Dr Mads Andenas, Director of the British Institute of International and Comparative Law.

In the last years expert witnesses have had to come to terms with and assimilate the changes in civil procedure. Similar reforms can be expected in criminal cases as the legislation currently going through the parliamentary process reaches the statute book. But the challenges which expert witnesses face in the UK are likely to be increased by the extension of their services beyond the geographical boundaries of the UK.

Many experts are already familiar with the requirements of the Commonwealth which has broadly followed the UK system, but this is changing. Major developments can be discerned in the European Union which basically has a civilian Romanist system as compared with common law in the UK. Our members are now flying the Atlantic to work in North America. How is the expert to adapt to this?

Our annual conference 2003 will deal with the varying requirements for giving expert evidence both at home and abroad. Early booking is advised as the number of places at the Royal College of Physicians is limited.

Guidance from LCD (now called Department for Constitutional Affairs)

Single joint experts in the Family Division

A *Best Practice Guide for Instructing a Single Joint Expert*, explaining how parties should proceed if they agree to use a single expert, has been produced by the President's Ancillary Relief Advisory Group. It outlines the matters which should be included in a court order directing the use of a single joint expert, and describes the matters which must be covered if the parties agreed instructions to the joint expert. The guide also deals with the conduct of the case by the chosen expert and the parties.

Copies can be obtained from Esplanca Harvey, Family Policy Division, Department for Constitutional Affairs, Third Floor South, South Side, 105 Victoria Street, London SW1E 6QT, or telephone 020 7210 1242. The report is also available on the Lord Chancellor's Department website at www.lcd.gov.uk

Dates for your diary

EWI Events (in London unless specified)

- 09 Sept 2003** Seminar: 'The Code of Guidance on Expert Evidence'.
18 Sept 2003 Seminar: 'Expert Witness Open Forum' (*Leeds*)
02 October 2003 Seminar: 'Fixed Fees and the Future'. (Joint seminar: AMRO, MASS & EWI – in Newcastle-upon-Tyne)
10 October 2003 Annual Conference: 'Expert Evidence at home and abroad'
29 October 2003 Joint Conference with RSM: 'Beyond reasonable doubt: Medical experts in the criminal court'
04 Nov 2003 Seminar: 'Are you being paid?'.
19 Nov 2003 Conference: 'Fraud, Money Laundering and the Proceeds of Crime Act 2002'

*We also intend to run more seminars outside of London

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

EWI Course Dates 2002/03

Basic Law for Expert Witnesses (Cost to EWI members £225)

05 September 2003

EWI Approved Training

Excellence in Report Writing (Cost to EWI members £310 + VAT)

03 September 2003

11 November 2003

The Courtroom Skills Training (Cost to EWI Members £355 + VAT)

13 August 2003

04 September 2003

14 October 2003

12 November 2003

10 December 2003

Please contact the EWI office for booking forms or further details

Membership numbers

Founding sponsors	10
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Corporate members	28
Individual members	1007
Retired	7
Sabbatical	2
Applicants	9

Total members & applicants **1075**

Correspondence

Dear Sir,

Expert evidence: looking for reliability

This was the heading of a letter from Bill Braithwaite QC in the Spring 2003 newsletter. The theme of Mr Braithwaite's letter concerned his opinion that there are still defective experts to be found, even following Lord Woolf's changes. As Managing Director of one of the founding sponsors of the Expert Witness Institute, I feel I should respond to this letter.

Most of us who have appeared in Court as expert witnesses have had the frustrating experience of realising, once we have seen the judgment from a case in which we have given evidence, that the judge has misunderstood some of our evidence. Of course, one must take one's own share of the blame for this, as it could have been because we have not given our evidence sufficiently clearly or our reports were not sufficiently comprehensive. An important stage in ensuring that our evidence is clear and comprehensible is the examination-in-chief and re-examination by the counsel instructed by the same party as ourselves. Until the judgment is seen it is never possible to be sure what the judge has understood from our evidence, and by then it is usually too late.

As with conflicting lay witness evidence, when a judge is presented with experts' views which differ, the judge has to decide where he or she has received assistance and where he or she has not. The judge can then decide to accept one expert's evidence and reject another's, or he or she can form a view of his or her own. In my experience, a judge will often find something in one expert's evidence with which he or she disagrees, or where he or she considers the expert has been insufficiently thorough and on that basis decides that the whole of that expert's evidence is unreliable.

Let me give an example. In a recent trial involving a road traffic accident, one of my colleagues gave evidence. It involved a collision between a fire appliance on an emergency call and a car, at a traffic light controlled crossroads. The issue of the distance travelled by the fire appliance after it hit the car and before it stopped was potentially significant. Unfortunately, there were no skid marks left on the road and so the speed of the fire appliance at impact could not be determined from this distance, which was referred to in the trial as 'over-travel'. By considering the maximum rate of deceleration it was possible to estimate a maximum speed of the fire appliance at impact, which my colleague, Dr Ninham, did (about 45 miles per hour). He pointed out in his report that if the deceleration rate were lower, then the speed of the appliance at impact would be lower but by an unknown amount, as the rate of deceleration could not be determined.

It was apparent from the judgment that Dr Ninham had got this point across as the following is included:

"However neither (the expert acting for the claimant) nor Dr Ninham was prepared to accept that (i.e. 45 mph) as a realistic speed and I agree that it does not fit comfortably with the rest of the evidence."

The expert acting for the claimant discussed in his report the effect of different rates of deceleration on the speed of the appliance at impact but did not suggest a particular deceleration rate as more likely than any other. Dr Ninham did not do so because there was no reason to pick one particular rate of deceleration over another; because the evidence did not allow it. The only evidence on that matter was from the driver who said that he braked as hard as possible, suggesting a speed of 45 mph at impact. Instead, Dr Ninham used conservation of momentum and crash damage analysis to estimate the speeds of the vehicles and predicted the speed of the fire appliance to be in the range 21 to 29 mph. The expert acting

for the claimant used the same techniques and suggested a speed in the range 28 to 35 mph

In his judgment the judge wrote:

“The over-travel of the fire engine was one of the few matters from which its speed might possibly have been calculated with some degree of accuracy, the only variable about which there could have been no certainty being the pressure with which the brakes had been applied.”

As a road traffic accident investigator myself, I have some difficulty with this because what the judge describes as the ‘only’ variable is sufficiently important that a speed range of between 15 and 45 miles per hour might be predicted. The Judge later found the speed of the fire appliance to be about 30 mph and that both drivers were equally responsible for the accident.

Why have I spent so much time describing this case and what possible interest could it be to most readers of this newsletter? That is the crux of this letter. The sentence following the one quoted above in the judgment was:

“Dr Ninham’s failure to consider it [over-travel] further, even as a check on other perhaps less reliable methods of assessing speed, casts doubt on the rest of his evidence and on the conclusions he expressed”

and was quoted in isolation by Bill Braithwaite QC in his letter in the Spring Newsletter, followed by a paragraph which contains the following:

‘Most cases never come to trial, and so the defective experts are never found out’ with the clear implication that he is suggesting that Dr Ninham is such a ‘defective expert’. Dr Ninham’s only defect, if indeed it can be considered one, was not to speculate on deceleration rates for which here was no evidence and not to make it sufficiently

clear in his oral evidence what to him was self-evident, that a lower rate of deceleration would have predicted a lower initial speed (a lesson to us all - what is obvious to us might not be obvious to a court). In fact, Dr Ninham chose to use what he considered to be a more reliable approach based on physical evidence from the vehicles involved in the accident in order to provide an estimate of their speed. Dr Ninham agrees that had it included estimates of the effect of different decelerations in his report it might have been of some assistance to the Court; but for this omission to be sufficient for the remainder of his evidence to be put in doubt seems rather harsh.

For this sentence then to be quoted out of context in the Expert Witness Institute’s Newsletter and for the strong implication to be made that Dr Ninham’s report was misleading was not only very distressing for him, but also potentially damaging to Dr Ninham’s and our Company’s reputations. As I have already mentioned, we were founding sponsors of the EWI and when Lord Woolf’s CPR came into force we did not have to change our approach to our work at all, as we have always adopted the stance of neutrality.

Whilst I agree with Mr Braithwaite’s thesis that it is unsafe to assume that once the CPR came into force all experts immediately conformed with it, I consider Mr Braithwaite’s method of attempting to illustrate this inappropriate and disturbing. I hope that Mr Parkinson (also mentioned in Mr Braithwaite’s letter) will be given the opportunity to respond, too.

Yours faithfully,

Rod Newberry,
Managing Director,
Hawkins and Associates,
Consulting Scientists and Engineers,
Cambridge

Congratulations to.....

Sir Anthony Holland on the award of a knighthood in the Queen's Birthday Honours. Tony Holland was a Founding Governor of EWI as well as Past President of the Law Society. He subsequently entered the world of the ombudsman before becoming the Northern Ireland Parades Commissioner.

Mr Justice Jacob on his appointment as a Lord Justice of Appeal. Sir Robin, who has been a Governor and great supporter of EWI since its earliest days, takes up his new appointment in October this year. He is one of the Patent Court judges and will take over from Lord Justice Aldous hearing appeals from the specialist court.

Nicholas Somers FRICS FRSA FIAVI, who has recently been appointed chairman of the Antiques and Fine Arts Faculty at RICS (Royal Institution of Chartered Surveyors).

Subscriptions 2003/2004

Members will be delighted to learn that the Governors of EWI have decided to fix the subscription fees for the forthcoming year at the current level. For individual members this means the renewal fee will again be £180, for the fourth successive year. The renewal papers will be sent out in September, but if you are interested in paying by direct debit when subscriptions are due on 1 November please get in touch with the office.

Fellowship

The Fellowship Selection Committee will be meeting twice a year (1 March and 1 September) to interview applicants. If you wish to apply to become a Fellow of the Institute please put your application forms in before the interview date. Fellowship Application forms can be obtained from the EWI Office.

Lessons from the Courts

Infringing Evidence admitted by judge while rather off the beaten track of the Newsletter's Case notes section, members may be intrigued to read how factual evidence may be acquired, and what judges can – or cannot – do about it.

Martin v McGuiness; Court of Session, Outer House, Lord Bonomy;
The Times, 21 April 2003

Evidence gathered by private investigators into the degree of harm sustained by a pursuer in an action for personal injury which infringed his right to private and family life under article 8.1 of the European Convention on Human Rights may none-the-less be admissible under article 8.2, provided that the inquiries made and surveillance carried out are reasonable and proportionate in the circumstances and necessary in a democratic society.

Lord Bonomy, sitting in the Outer House of the Court of Session so held, repelling a plea-in-law that evidence gathered in contravention of article 8.1 was inadmissible in an action brought by Robert Martin against John McGuiness for reparation arising out of a road accident.

Lord Bonomy said that it is a material part of the defender's case that the pursuer exaggerated the effects of a road accident on his resultant back injury. That assertion depended partly upon observations made by private investigators.

The pursuer argued that the admission of evidence gathered in breach of article 8 amounted to an

infringement of his right to respect for his private and family life. Any court admitting such evidence would thus be acting in a way which was incompatible with a Convention right.

His Lordship had no hesitation in rejecting the suggestion that the investigators' conduct was not capable of being viewed as an infringement of article 8.1. The pursuer had taken no exception to inquiries made or video footage shot other than at his home.

The inquiries that he had complained of included a private investigator having come to his house and spoken to his wife on the false pretence that he was a former Army colleague of the pursuer, and surveillance having been carried out from a property adjacent to his house including the use of a telephoto lens to film events in the garden around the house. However, other considerations arose and had to be taken into account.

The question came to be whether the conduct was nevertheless conduct which did not in fact infringe the pursuer's right having regard to his reasonable expectations of privacy in the circumstances, or the fair balance that had to be struck between the competing interests of the pursuer on the one hand and of the defender and the community as a whole on the other hand, or because it was conduct justified by article 8.2.

That had been the unanimous opinion of the European Court of Human Rights in *Lopez Ostra v Spain* (1994) 20 EHRR 277.

Where evidence has been gathered in circumstances which can be said to infringe article 8.1 it is open to the court to admit that evidence where to do so is in keeping with the provisions of article 8.2. There has first of all to be a basis in law for admitting that evidence.

In deciding that question, the presiding judge had regard to the fair trial provisions of article 6, to any European jurisprudence

cited to him that had a bearing on the decision, and to the principles and rules of domestic law governing the admissibility of evidence.

The evidence may be admitted if there was a legitimate aim for obtaining and presenting it. That test was satisfied if the admission of the evidence is for one of the listed aims set out in article 8.2.

In this case, it was said to relate to the protection of the rights and freedoms of others. To allow evidence gathered in a way that could amount to an infringement of article 8.1 for that reason it must also be necessary in a democratic society to do so.

There must therefore be sound reasons relating to the protection of rights and freedoms of others which were recognised in society, and the infringement had to be proportionate in the circumstances to its aim.

The presentation of a false case against any defender in litigation would amount to an infringement of his rights not only to protect his assets but to a fair trial. A party against whom a claim is made is entitled, in order to protect his interests, to scrutinise and investigate the legitimacy of the claim made against him.

A pursuer intent upon exaggerating the effects of an injury against him is likely to try to ensure that he gives a convincing impression of more extensive injury whenever he is in a public place. In and around his home, he is more likely to be less circumspect and off his guard.

In striking a balance, his Lordship had particular regard to the degree of intrusion into the pursuer's privacy on the one hand, and the requirement in an adversarial system of litigation that the defender should himself investigate the case against him with a view to defending himself and his assets from a false claim together with the general threat to the assets of the wider community from the impact of successful fraudulent claims on insurance premiums on the other hand.

Such inquiries and surveillance as could conceivably be proved as having been carried out in the case were reasonable and proportionate steps to be taken on behalf of the defender to protect his rights and as a contribution of the wider rights of the community, and were, therefore, necessary in a democratic society.

The court was not acting incompatibly with the pursuer's article 8 right in admitting the evidence gathered by the inquiries and surveillance. The pursuer was bound to anticipate that his conduct might be scrutinised.

Change of expert; importance of choice in disputed liability

Simon v Royal London Hospitals NHS Trust
(Settlement approved, Mayor's & City of London County Court)

The facts

The claimant is a registered general nurse who at the time of her accident at work on 30 June 1997 was a junior ward sister, Grade F, working at the London Chest Hospital. She was a specialist respiratory nurse and weeks before her accident at work, she had completed

the Manual Handling Trainers Course run by the Trust and was the designated manual handling trainer for her ward. She was 40 years old at the date of her accident.

On the date of the accident the claimant was in charge of a ward of 28 respiratory patients of mixed dependency. Also on duty was the ward manager (in a wholly administrative role) and four other staff one B grade RGN and three healthcare assistants, two of whom were from an agency and had not worked there before. One of the patients (now deceased) was high dependency and should have been nursed 'one-to-one' but the nurse booked to look after her did not arrive for duty. The patient suffered from Type II respiratory failure secondary to muscular dystrophy. She was on BiPap ventilation, was fed via a naso-gastric tube, had an indwelling urinary catheter and an intravenous drip site. She had very little muscle tone and weighed somewhere between 18-23 stones. She was nursed on a standard King's Fund bed with an air mattress, which meant she slid down in bed several times during the shift. She required to be moved up the bed and the claimant assisted by the three healthcare assistants carried out the manoeuvre using a green slide sheet as advised by the Trust's manual handling adviser, at least four times during the shift. During the last of those manoeuvres the claimant felt pain in her neck, left shoulder and left elbow. However she finished her shift and was not overly concerned as the following day was her day off. She recorded the injury in the accident report book.

Injuries

The claimant was unable to return to work. Her symptoms did not improve and she was deemed incapable of returning to work by the Trust's occupational health physician some ten months later. The Trust was also unable to offer her alternative employment involving light duties and she was therefore dismissed from her post in March 1998.

The medical expert advised that the injury to her neck had accelerated by a period of about 5-10 years a previously asymptomatic pre-existing degenerative disease process and that she was fit for some light work within one year of her accident.

The claimant was unable to find alternative employment until November 1999, which was again terminated due to her disability in February 2000. She found temporary employment working three days per week in October 2000 at a specialist chest clinic.

The litigation

The claimant's case was essentially:

1. The patient was too heavy to be lifted manually.
2. The assessment of the patient by the Trust's own manual handling adviser was inadequate.
3. The manual handling training provided to the client was inadequate, incorrect and potentially dangerous.
4. The provision of aids/equipment for lifting/moving the patient was wholly inadequate.

The Trust lost all of the patient's medical records (including computer records) for the period from her admission in March 1997 to October 1997. The Trust maintained the following defence:

1. The weight of the patient was only 16 stones (a weight only verified on paper by a record made by the patient's GP some three years earlier).
2. As she was under 20 stones, it was therefore appropriate to move her in bed using the green patient slide sheet provided.
3. The claimant had never voiced her concerns about this or any other patient to the manual handling adviser.
4. The claimant was the author of her own misfortune in that she was the person in charge at the time of the accident, she organised and conducted the lifting manoeuvres and she was the ward's designated manual handling adviser.
5. Finally, that the movement described did not constitute a 'manual handling operation' within the Regulations.

The medical expert, Mr Michael Beverley, consultant orthopaedic surgeon, was instructed jointly by the parties and his evidence was not disputed. Previous solicitors had instructed a nursing expert to advise on the liability and employment issues in the case. Even though the expert pointed out that she was not qualified to comment on the liability issues, her instructions were confirmed. The defendants instructed their own nursing expert. Proceedings were issued and matters proceeded to the filing of a joint statement by the experts in June 2000. Unfortunately the claimant's expert conceded entirely the claimant's case on liability in the joint statement and subsequently counsel advised that she could not succeed. Her solicitors came off the record. Another firm of solicitors then agreed to investigate liability further on her behalf but came to the same conclusions in February 2001. One month before trial, the claimant's representative body withdrew support and funding for her case.

The claimant appeared in person at trial in March 2001 and successfully applied for an adjournment. She then approached an expert in manual handling, Mr Christopher Hayne, a chartered physiotherapist, who provided a preliminary view of the claim which was favourable. Bolt Burdon were instructed in May 2001 under a conditional fee agreement. It was not possible to obtain after-the-event insurance for the claimant. However, following a conference and advice from counsel, the claimant's professional representative body agreed to reinstate her indemnity against her opponent's costs and disbursements.

Trial was relisted for 2 July for three days. Mr Hayne's report was served on the defendant together with an application for leave to rely upon it three weeks before trial, and was heard on the morning trial was due to begin.

The claimant argued on the basis of *Daniels v Walker* and more particularly *Cosgrove v Pattison* that she ought to be entitled to abandon the previously instructed expert and her evidence and rely on Mr Hayne instead. His Honour Judge Marr-Johnson granted the application and the defendant immediately applied for a further adjournment which was also granted.

Mr Hayne advised that proper assessment of the patient by a suitably qualified person (in this case the Trust's manual handling adviser) would have revealed the risks of attempting a physical lift. Instead, he argued, there were several mechanical aids/equipment available to the Trust to buy or more probably rent, which would have virtually eliminated the need to physically move the patient at all and would have been more, comfortable for the patient. He also advised that

the training given to the claimant was incorrect and inadequate. He found that labelling the claimant the ward manual handling trainer following such a course was meaningless. Even if the training had been adequate, he argued that to be a confident manual handling trainer required experience and he noted that the Trust's manual handling adviser was qualified over 25 years compared to the three-week period between the client's training and her accident. He also found that the patient must have weighed more than 20 stones.

The claimant's solicitors requested details of the post-mortem carried out on the patient following her death in December 1997. This revealed that, although the primary cause of death was respiratory failure, she also had an ovarian tumour weighing 221bs. A junior doctor had noted an 'abdominal mass' in November 1997 but had also commented that the patient was '... too large for the CT or ultrasound scanners and no further investigation had been undertaken. Mr Hayne relied *inter alia* on the Royal College of Nursing's guidance for moving patients *The Moving of Patients* (1997) in his report. In response, the expert instructed for the defendant relied upon the guidance issued by the RCN in 1998.

The claimant stated that she had discussed the patient with the Trust's manual handling adviser on at least one occasion prior to her injury. This was denied by the Trust. However, the claimant produced a copy of an incident report she had filed with the manual handling adviser in May 1997 concerning an earlier incident which had led directly to the patient being nursed 'one-to-one'.

A Part 36 offer to settle in the sum of £75,000 was made to the defendant on 3 September 2001. The offer was calculated having regard to the expert medical evidence and taking into account her earnings since the accident and considering generally the risks of proceeding to trial. Negotiations were entered into on 19 November 2001 following service of a supplementary statement of the claimant exhibiting the post-mortem results of the patient together with a copy of the earlier incident report, which she had retained. Matters were concluded on 18 December 2001 in the sum of £70,000, which was approved by the court on 7 January 2002 with the trial of the matter due 23 January 2002 for three days.

Editor's comment:

*The claimant's success owed much to her own determination. Two well-known firms of specialist personal injury solicitors had advised her she could not succeed. It also illustrates the importance of choosing the correct expert and, happily for the claimant, that it is possible in certain circumstances to abandon an existing expert. The argument advanced on the claimant's behalf in relation to the expert was that a joint statement from the experts where they agree on liability is akin to a single joint liability expert and, for the reasons set out in *Daniels v Walker* and *Cosgrove v Pattison*, it would be unjust to deny the claimant the opportunity to rely on an alternative expert.*

Case notes: Camilla Macpherson, Allen & Overy



Competing medical evidence

The Court of Appeal case of *Griggs v Transco plc* (16 April 2003) provided useful guidance for judges faced with competing medical evidence in personal injury cases.

In this case there had been some dispute between the medical experts as to whether vibratory trauma had caused the claimant's injuries. Lady Justice Hale said: *It is an important part of the judge's task to assess whose opinions are the more reliable*".

She concluded that:

- The judge who had heard the experts was best placed to assess whether the views they held were genuine, or whether they were *vainly clutching at straws to bolster a case*
- One factor to consider was the difference in qualifications and experience of the experts.
- The most important factor to consider was *"the quality of the evidence and the reasoning upon which their opinions was based."*

Furthermore, a judge is entitled to accept an expert's conclusion even if it is based on 'diagnosis by exclusion' because *"if the claimant establishes that all other possible causes of the damage must effectively be excluded, then it does indeed become more probable than not that the possible cause which has not been excluded is indeed the cause"*.

In this case the claimant's expert had concluded that it was 85-90% probable that this 'possible cause' had resulted in the claimant's personal injury. Therefore the Court of Appeal held that the judge at first instance had been entitled to find in the claimant's favour, and indeed it would have been surprising if he had not done so.

Whether party bound by instructions given by other side to joint expert

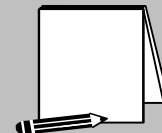
Yorke v Katra

Lord Justice Buxton, in describing the case of *Yorke v Katra* (Court of Appeal, 9 June, 2003), commented that *"this appeal has a most unfortunate history."* Indeed it does, being a small claim in the amount of £2,800 which in the past three years has, as Lord Justice Buxton pointed out, taken up the time of two district judges, two circuit judges and two judges of the Court of Appeal, without yet coming close to a satisfactory conclusion.

The matter in dispute? Whether, where a joint expert has been instructed, a party should be bound by the instructions to that joint expert given by the other side. The defendant's defence had initially been struck out because, by amending the letter of joint instruction drafted by the claimant's solicitors before signing it, it was held that he had not complied with an earlier court order.

In the Court of Appeal, it was pointed out that Civil Procedure Rule 35.8(1) provides that "Where the court gives a direction under rule 35.7 for a simple joint expert to be used, each instructing party may give instructions to the expert". The notes to CPR 35.8 also envisage that parties may give separate instructions to an expert even though he is a joint expert. It was therefore permissible in this case for the defendant to amend the letter of instruction before he signed it, thereby legitimately providing instructions of his own, and the district judge had not had jurisdiction to bind him to the instructions drafted by the other side. It was therefore ordered that the letter of instruction be sent to the joint expert in the form as amended by the defendant.

Other Case notes: Contributed by John Finch



Judge disagreeing with expert evidence — I Re N-B and others (Children) (Residence: expert evidence) [2002] (EWCA CIV 1052 NU 29 November)

A judge is at liberty to depart from the opinion of the experts, even if unanimous on issues of future placement and management of a case involving children, where he is evaluating the opinion of the experts as to placement, management and welfare issues. However, a judge is not entitled to reject expert evidence relating to the psychological assessment of a party simply on the basis of impressions he has formed of the party in the witness box. It is incumbent upon a judge to explain his departure from the experts opinion, so that the basis of his decision is clear.

Judge disagreeing with expert evidence — 2 Re B (Non-accidental injury: compelling medical evidence) [2002] EWCA CIV 902; [2002J 2 FLR 599 CA

The medical opinion was unanimous that the injuries to a 12-month-old child could not have gone unseen by the mother, even if she had not inflicted them. Nevertheless, the judge found that the mother's cohabitant had inflicted the injuries and that she had no knowledge of them. The judge therefore rejected the application for a care order in respect of the mother's 6-year-old child. The judge was wrong to reject the medical evidence without giving reasons why he set it aside, perhaps, for example, where he has other evidence which makes the uncontroverted medical evidence logically impossible. This did not exist in this present case.

(Reprinted from The Litigation Letter, ed. His Honour Judge Michael Cook, publ. Informa plc.)

Trial judge's discretion over expert witness costs

The case of A.L.Barnes Ltd v Time Talk (UK) Ltd, reported in The Times - on 9 April 2003 illustrated the importance of the manner in which a trial judge should exercise his discretion in a case involving both the merits of a claim and the costs of bringing it.

The Court of Appeal held that it is wrong in principle for a judge determining orders as to costs in commercial litigation to segregate a large element of the costs out of the picture before deciding who was the successful party and entitled to an order for its costs. The Court of Appeal (Lord Justice Ward, Lord Justice Clarke and Lord Justice Longmore) so held on March 26, 2003 in a reserved judgment when, inter alia, allowing an appeal by a claimant, A. L. Barnes Ltd, from an order by Judge Langan in Leeds District Registry that it should pay 50 per cent of the general costs of the defendant, Time Talk (UK) Ltd.

Lord Justice Longmore said that the judge at first instance decided that no order be made in respect of the parties' costs which were associated with instructing expert witnesses and which were most of the costs of proving the quantum meruit claim. In so doing he fell into an error of principle so fundamental as to vitiate the exercise of his discretion.

Had the judge asked himself at the outset who was the successful party, before segregating the effective costs of proving the claim, he would have had to answer that it was the claimant who had recovered more than the defendant and who was thus the successful party.

The circumstances of the case showed that the claimant's success was properly to be reflected by an order for its recovery of 25 per cent of its costs.

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