



# EXPERT WITNESS INSTITUTE NEWSLETTER©

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## Message from the Chairman James Badenoch QC

As your newly appointed Chairman I am delighted that one of my first duties is to report to you that the membership subscriptions for the next financial year, 2004/2005, have been fixed at the current level. The Governors took note of our Treasurer's 'quiet satisfaction' with the Institute's financial position, and so for the fifth successive year there will be no increase in the individual membership fee of £180.00. The fees for other membership categories will also remain unchanged.

As a not-for-profit organisation we are determined to offer value for money, and the growth in our membership and the support for our events suggests that this is appreciated. However, although the subscriptions will remain unchanged, the Institute is not standing

still. The Governors are keenly aware that we must continue to progress and to develop, and to that end suggestions from members are always warmly welcomed.

## GIVE THE EXPERT A CHANCE, TOO

**Dr Stephen Castell offers helpful suggestions to solicitors instructing him as computer expert witness in complex software implementation contract disputes.**

In an article (*The Times*, Law Section, 23 September 2003), Daniel Barnett, barrister, supplied a handy solicitor's guide to preparing the perfect brief for counsel. As an expert witness in over one hundred major IT cases worldwide over the past fifteen years, I found myself frequently muttering full agreement with Mr Barnett's wickedly accurate guidance. Here are my further 'expert' tips to add to Mr Barnett's in the cause of assisting instructing solicitors to help us, the client, and the court.

### Appoint me as late as possible

I love the challenge of being asked, just a few weeks before trial, to examine and test from cold the multi-user computer system in dispute. That is, to investigate the complete software, databases, clients/servers and networks for functionality, performance and usability, and to give my opinion as to its fitness for purpose. And all this by reference to the complaints as to software/system defects, deficiencies, delays and so forth still only superficially expressed in an inadequately particularised Scott Schedule, despite the fact that the latter contains over 200 items, and has clearly taken a team from one of the parties many months to prepare. And at the same time being required to take into account thousands of pages and several CDROMs full of technical requirements and design specifications, system test results, project management minutes and other critical documents, some still trickling-in as (whoops!) 'late disclosure'. Not forgetting the now common plethora of e-mails between the parties during the course of the system implementation project – which it is argued had the effect of constantly changing the original contractually certain definition, scope and acceptance criteria of the requirements for the disputed computer system.

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### Do not let me discuss the case with counsel before pleadings are settled

Barristers are so expensive – often even more costly than experts! No-one wants us both to sit down together for days at the start, trying to achieve a common, harmonised appreciation of and insight into the knotty 'technical-legal-factual-financial matrix' which is the hallmark of the typical complex IT systems dispute. There is surely no need for the particulars of claim, or defence and counterclaim, to be settled and expressed comprehensively, clearly and most effectively at the outset. Where would be the fun in leaving no opportunity to make the legal and expert team look silly in front of the client at some future case-management conference?

### Do ask me to assist counsel with late amendments to pleadings

Counsel and I prosper in dealing with the really expensive challenge of re-working the initial 100-page pleadings very late, when I have been frantically appointed and have barely had a chance to form some preliminary idea of what the technical issues are in this particular case. We do so enjoy working furiously together against impossible timescales

to draft the major and fundamental amendments to the pleadings now needed to reflect properly the client's real technical case (and we don't need to worry, because we are assured that the other side is in even poorer shape).

**Do not photocopy the expert's initial reference set of all the pleadings, case disclosure documents and suchlike onto a distinctive colour paper (like lemon yellow)**

It is so much more wild, ecstatic fun to arrive at the position when you are up against tough deadlines trying to produce several hundred pages of firm, clear, coherent expert's report, not to know quite whose comment was whose, scribbled - when? - on yet another white A4 piece of paper. It would be too boringly straightforward simply to be clear by colour-coding that the document was one originating within the actual IT project in dispute (that is, it is disclosed documentary evidence), and not one produced recently, during and for the litigation, as a working/discussion paper by someone in the client, legal or expert team (that is it is confidential, privileged, non-disclosable).

**Make sure that the client has not secured a complete, reloadable system image of the software in dispute**

As you know, the court routinely orders without prejudice experts' meetings 'to identify and define the software and other material which experts need to examine, what system testing should be done and how the results should be presented to the court; to isolate, and attempt to narrow, the technical issues; and, where possible, to reach agreement and take technical matters out of issue...'. At such meetings I really enjoy agonising fruitlessly with the expert on the other side over whether or not there are *any* correct versions of the software preserved, reloadable and available for joint inspection and testing, and of a proper standard of evidential probity. It's great that the parties (and their solicitors) permit us such time-consuming, lucrative activity simply by having omitted to preserve an agreed reference system image on re-installable backup media (for instance DAT tape, or CD-ROM) – and/or not depositing a secure copy with a third-party escrow agent – at the critical time when the system dispute first crystallised or escalated. It is so much more of an enjoyable ordeal later for the experts if the 'best evidence' rule is ignored, and the crucial point that the software which is being litigated over is itself going to be the 'best evidence' is forgotten.

**Do allow the judge to make orders at case management conferences essentially enjoining the IT experts on each side to 'get together and sort this highly technical case out'**

I really do try, My Lord... But one of the really thrilling 'frustration highs' I get as an expert is when, without strong directions from the bench to mandate and assist me, I find I cannot drive through any technical simplification of the case (let alone a settlement) when the lawyers who have 'care and control' of its process and progress want to do something else, tactically, in the interests of their clients.

**Do give me tightly-reined instructions at odds with my independent primary duty to the court**

I really enjoy being glared at by the judge in a CMC – or, even more pleurably, at trial! – when I have not been able to do something he and I both know is right, but which I have not been given formal instruction (or budget) to do properly, or even at all.

**Refuse to project-plan the litigation**

Why follow the good project-planning principles that most managers in other industries adhere to? It is so much more nail-bitingly exciting to overlook that, if you want me to do some work *next* week, we should together plan it out *this* week. Why bother drawing up formal 'whole of litigation' project plans and client cost-estimate targets? Is there any need to book my (and your, and counsel's, and the client's) time well ahead, based on a reasonable projection of the likely work content, and pattern, which we know, from our years of pooled experience of such technically complex disputes, will – surprise, surprise – end up being demanded by this case? It's more delightful to do everything at the last minute, working through the night and weekends, with quality of deliverables (and resilience of marriages) threatened, because new delivery dates have just been agreed with the client, the other side, and the court, without checking with me first.

**I know that yours is a nerve-racking profession – you may never know when, or on what basis, or even if, you are going to be made a partner in your firm; or when you might, say, be asked to take sudden retirement to 'make way for younger blood'. So, I do sympathise with your aversion to 'what ifs' concerning the future, and to forward-planning. No worries. Just keep those new instructions coming, please, and here's to the usual post-settlement team celebration/wake at The Olde Chip and Pin (NB expenses not to be billed to the client). Many thanks!**

*Dr Stephen Castell*  
Chairman, CASTELL Consulting

## BROADENING OUR AUDIENCE

Members will be aware that we have in the past responded to requests to hold seminars and training events outside London. Some of these have been very successful, but others have not always attracted the level of support to make them viable.

However, we are now, through the use of modern technology, seeking to make our London seminars available to a wider audience. We are planning to create an outreach version of our 21 October seminar on the subject of Brain Damage at birth –

Challenges for the expert witness by using a video link between the London office of Irwin Mitchell and their Leeds office. This seminar is already generating considerable interest and if you would like to participate but cannot get to London you might like to consider attending at the Leeds office of Irwin Mitchell. We shall be making the same charge as in London. (ie £25 for members) and we will have a host on hand to ensure that those in Leeds can participate in the discussion as effectively as in London. The details are still being finalised but if you are interested please contact the office.

## THE VIEW FROM A DOCUMENT EXAMINER

*EWI member Michael Ansell describes his professional activity and demonstrates that, far from a quiet life in the laboratory, his work can produce some startling experiences.*

When filling in the application form for EWI seminars I often have difficulty completing the entry 'Profession'. This is because the simple description of my profession is 'Handwriting Expert' or 'Document Examiner'. The problem with the former description is that when attending a seminar wearing a 'Handwriting Expert' badge I am usually asked the question "Do you determine a person's character from their writing?" My answer is no. If it can be done at all, that is the province of graphology which is a different discipline. The problem with the latter description, 'Document Examiner', is that it tends to indicate that I examine the documents rather than the handwriting; but, as a science graduate, I do both. The description given in court is that I am a 'forensic scientist specialising in the examination of documents and handwriting'. I am one of a small number of scientists who started work in a different forensic speciality – in my case drugs and toxicology – and subsequently trained in document examination.

The balance of work in my field is possibly different from that of many members of the EWI because almost all my income comes from forensic casework. Most of my work involves determining authorship of disputed handwriting and signatures on, for example, cheques, agreements, wills, benefit claims and so forth, and it is divided fairly equally between criminal and civil cases. My work also includes comparisons of typescripts and of inks as well as alterations to documents for which sophisticated scientific techniques may need to be employed. Anyone who watches crime programmes on television – either fact or fiction – will undoubtedly have seen ESDA (electro-static detection apparatus) in use looking for indented impressions of writing and possibly a video spectral comparator (VSC) being used for the non-destructive examination of inks. Both these essential pieces of equipment are found in any document examination laboratory.

The new technique on the block is Raman spectroscopy. Apart from its inclusion in the Vinland map programme, this technique does not appear to have had much publicity yet. However, the paper in which I wrote about it with a colleague has been published in *Science and Justice* – the magazine of the Forensic Science Society.

I have touched on the research side of my work and at present I am involved in a pilot project with the University of Kent and the Forensic Science Service on handwriting classification. I also lecture at the University of Kent and offer occasional training courses to banks and, through an EWI contact, seminars such as the one run last year in Mauritius on money laundering.

Although document examination does not usually feature in high profile criminal cases such as murders I did examine diaries in the Neilson case in North London. I have also been asked to examine 'blood' in a black magic case. Rather disappointingly, it turned out to be red ink! I have given evidence on at least 1500 occasions to a wide variety of courts and tribunals worldwide. One of the most interesting court venues was at a grand prix motor racing tribunal in Paris in which the signature of a steward disqualifying a driver had been forged. Very large sums of money can rest upon the result of such proceedings but the document examination work itself was not as interesting as a recent graffiti case for Southwark Crown Court; and nothing concentrates the mind more than an appearance at the Court of Appeal in London or Ghent.

Although I do not examine paintings for their authenticity I am sometimes asked to examine writing on paintings to determine their provenance. I examined the Tom Keating forgeries of Samuel Palmer paintings allegedly executed in 1842 on which the fluffy white clouds contained titanium dioxide which is a pigment not introduced until the 1960s.

However, offering to carry out an analysis of writing on paintings did once cause a horrible problem for my whole family. A few years ago I analysed a document on behalf of a client appearing in a civil court. At the time I had very little feedback about the case. I subsequently found out however that, in total, three experts had been instructed and all three of us had concluded that my client was not correct in what he was saying.

Some months later I was asked to compare writing on some miniature paintings, and this client was most insistent that I should open the package containing the paintings personally. The package was due to arrive by courier. But the next we knew about the matter was the arrival at midnight of two police officers who told me that there had been a serious incident in which one of the other experts had received a shoe box full of live shotgun cartridges and nails from the disenchanted client in the civil case which had exploded, seriously injuring both the expert and his wife. They had also found a box addressed to me on which they carried out a controlled explosion but were still so concerned that they asked us to leave our home for three days.

Clearly document examination can be more exciting than I anticipated - or maybe this is just life in the civil courts?

**Michael Ansell**

# From the Secretary's Desk.....

## No fat cats here

Despite the image of the highly paid expert witness which has been portrayed in the press in recent times a survey conducted in early 2004 by Sweet & Maxwell, publishers of the Law Society Directory of Expert Witnesses, has confirmed that the majority of experts who undertake expert witness work are not getting fat cat incomes. On the contrary the survey responses confirm that a third of those consulted charge less than £99 per hour, and just over half charge between £100 and £199. Only 15% state that they charge more than £200 per hour. The survey suggests that medical experts are the most highly paid with 29% earning over £200 an hour and 4% charging over £300. Unsurprisingly, medicine and healthcare is the largest area of expert witness work, accounting for 42% of the respondents to the questionnaire. There is, therefore, a possibility that the analysis of the response will be somewhat skewed – but if so the likelihood is that reality for most expert witnesses is towards the lower end of the scale.

Interestingly, the survey also confirmed that you are a mature and experienced group of people. Over 50% admitted to being over 55 years of age with less than 20% aged under 36; and nearly 75% have been acting as expert witnesses for at least 10 years. Paradoxically this raises the question of where are future expert witnesses going to come from?

## Calling all Fellows

The Governors have recently elected David Green as Fellow of the Institute – congratulations to him. David is a Chartered Surveyor. In one sense his success provides an answer of sorts to the question posed in the previous item, for the role of the EWI Fellow is specifically to assist younger experts to qualify for full membership. So if you fit the description of 'mature and experienced' please consider offering your services to develop the next generation of expert witnesses. It will be appreciated not just by the Governors of EWI; you will be making valuable contribution to the enhancement of British justice.

## Strange but true

One of our members acting as a single joint expert was recently involved in a case management meeting to discuss his report. Contrary to his expectations neither of the instructing solicitors was there and the judge, who happened to be a lady, said they were not needed and proceeded to settle the case with the assistance of the SJE. There is unfortunately, no record of what the solicitors thought of this but the SJE was very happy.

Even stranger was the experience of another of our members who was originally instructed as expert witness for the claimant, who then promptly sacked his solicitor and continued as a litigant in person. The defendant's solicitor then agreed that the expert should act for both parties as a single joint expert and the report to the court was duly produced. It appears that this was not to the satisfaction of the claimant who persuaded the court to allow him to appoint another expert witness. Solicitors for the defendant then advised the SJE that he was now acting for them and very quickly an order from the court confirmed this. Thus our member acted in turn as a party expert for the claimant, as a SJE and then as a party expert for the defendant. Just as well CPR requires the expert witness to be objective and impartial. How and what he charged for his services remains an unanswered

question.

## Criminal Procedure Rules

We have received a number of questions from solicitors as well as from members as to when rules to govern the procedure of criminal cases can be expected. The short answer is not just yet; the longer answer is no more informative. The Department for Constitutional Affairs has advertised for applications for consideration as members of the Criminal Procedure Rules Committee. The advertisement suggested that applicants should expect that if successful the appointment would be for two to four years, so on that basis it looks to be some time before we can expect criminal procedure rules to put alongside the well-established civil procedure rules. I hope when they are published they will be given a different name – to have two sets of CPR will be confusing. Incidentally, expert witnesses were not among the categories invited to apply but in any case it was made clear that appointment would carry no remuneration other than re-imbursement of reasonable expenses.

## Expert Fees in Criminal Cases

We are increasingly being asked what level of fees is acceptable in criminal cases. These are controlled by Part V of the Costs in Criminal Cases (General) Regulations 1986 and were last revised by the Department for Constitutional Affairs in July 2003. The guidance provided for taxing/determining officers states that there are no prescribed scales for the allowance for the remuneration of expert witnesses, but taxing/determining officers are given a point of reference on quantum to assist them in exercising their discretion in determining such claims. The rate bands provided are stated to be merely a guide to the levels of allowances which may be considered to be appropriate and should not be regarded as providing either a maximum or a minimum limit. Indeed, it is accepted that exceptionally it may be appropriate to depart from them and in exercising their discretion Taxing/Determining officers should take into account all the relevant circumstances including the work done, the status or experience of the person doing the work, and the availability of experts in the area of the country concerned.

The allowances effective from 6 May 2004 are as follows;

1. Consultant medical practitioner, psychiatrist, pathologist  
Preparation (examination/report) £70.00 - £100.00 per hour  
Attendance at court (full day) £346.00 - £500.00
2. Fire (assessor) and/or explosives expert  
Preparation £50.00 - £75.00 per hour  
Attendance at court (full day) £255.00 - £365.00
3. Forensic Scientist (including questioned document examiner, surveyor, accountant, engineer, medical practitioner, architect, veterinary surgeon, meteorologist)  
Preparation £47.00 - £100.00 per hour  
Attendance at court (full day) £226.00 - £490.00
4. Fingerprint expert  
Preparation £32.00 - £52.00 per hour  
Attendance at court (full day) £153.00 - £253.00

It is stated that this information will be revised annually, but historically the Department for Constitutional Affairs has not been very rigorous in reviewing the scales. At least the list of occupations now includes surveyors, a significant omission in the past.

**Brian Thompson, Secretary**

# A CHAIRMAN FOR ALL REASONS...



The *Newsletter* editor talks to the newly-installed EWJ Chairman, James Badenoch, QC

I first met James Badenoch in Oxford in the late 1960s. We used to sit across from each other at the long table which ran the length of the law library at Magdalen College. Behind James' customary seat hung a portrait of the late Lord Denning, Master of the Rolls, an alumnus of the College. Students of law at Magdalen were members of the Atkin Society. It was Lord Atkin who, as a Law Lord in 1932, broke new ground to lay the foundations of the modern law of negligence. How appropriate it is that this should be the field of law in which the new Chairman practises.

It has been said that those who say they can remember the 60s were not there. James and I can, and were.

James Badenoch was born in Oxford in 1945, the eldest son of Dr, later Sir John, Badenoch. His father was a consultant at the Radcliffe Infirmary, a fellow of Merton College and Director of Clinical Studies [Dean] of the Oxford University Medical School. The obstetrician who delivered him was Professor Stallworthy. This, perhaps otherwise obscure, fact he recalls for a particular reason: the infant so delivered came much later in his life to be the only barrister (or so he believes) ever to have called the man who delivered him as an expert witness in court. It is not generally thought that the knighthood which was later conferred on Professor Stallworthy was directly linked to his part in James' birth.

James was born into a distinguished medical family. Not only his father but also almost all of his relatives were doctors or surgeons, including his grandfather, a great uncle, four uncles, and at least eight cousins (of varied consanguinity) – many of them scattered around the globe. In consequence it took him a long time to come to terms with the fact that his preference at school for Greek over Chemistry made a medical career for him an unlikely prospect.

He won a classical scholarship to Magdalen College, Oxford, but abandoned Latin and Greek in favour of Law, having only just been dissuaded by anxious parents from his principal ambition, which was to go to Art School instead. As it happens, and appropriately for a student from the late 1960s, James' artistic talents lay in drawing and painting, and not in the modern way of cutting up dead cows; and so a career in the visual arts might not have stood the test of 'progress'.

He read for his law degree during what has, for good reason, been called the 'golden age' of law studies at Magdalen. His tutors included Dr JHC Morris, then the senior law fellow of the College, Professor Rupert Cross who had just been appointed to the Vinerian Chair of Law, Dr Guenther Treitel who later assumed that distinguished mantle, and Colin (later Professor) Tapper – all of whose names resound in the academic legal world. James does not, however, altogether regret that on occasion his devotion to legal study at the feet of these outstanding men came second to other pursuits. These included singing in quite a successful rock band which, he says with modesty, relied more on visual effect than on musical talent. Reading law with him at Magdalen were some future distinguished academics, including Professors-to-be Barendt, Ogus and Rickford.

James Badenoch was called to the Bar in 1968, and was pupil to John Allott (later Mr Justice Allott) and to Harry Woolf, later Law Lord, Master of the Rolls and now Lord Chief Justice. His chambers, 1 Crown Office Row, were in those days devoted to what can be called 'true' common law practice – that, he says, meant a bit of most things apart from wills, trusts and settlements, tax and patents. Accordingly, as a young barrister, he came to do crime, contract and sale of goods, landlord and tenant, planning, licensing, divorce and children's law, Factories Act work and personal injury generally.

It was across this broad spectrum of professional legal practice that he became familiar with the use of expert evidence in court. His experience ranged from the physics of road accidents to the complexities of leaseholds, from the physical effects of accidental injury or of child abuse to the social effects of liquor licences for supermarkets.

His love of the medical world remained, however, very strong - unsurprisingly, given his background. As medical negligence and other medical work became a growing field, and as his chambers began to attract that work and to earn a reputation for it, he was pleased to find that it became increasingly the core of his professional practice. Whether due to his genetic makeup or, more probably, to his familiarity with the medical world he became particularly, if not quite exclusively, specialised in this field of work. When he took silk in 1989 he did so on the basis of a very large medically-related practice. In this work he has

continued to flourish at the Bar, and the many legal directories which have appeared in recent years all place him among the very top QCs in this field.

James Badenoch's continuous and very close work with expert witnesses in his medical law practice makes him an ideal choice for Chairman of the EWI. Indeed, his practice has made him particularly keenly aware of how crucial it is to find the right expert, to deploy that expertise wisely and well, and for the lawyer to work closely with the expert so that each fully and clearly understands the other's role and function. There is no substitute, he says, for a thorough mastery – with the aid of focussed tutorials from your expert – of the foundations and the details of the expert case, and the expert dispute. He advocates in particular the importance, in advance of the hearing, of thoroughly testing the expert opinion you rely on against the case as it appears to be put by the other side, to put the merits of the case to the test, and to prepare the expert and the client for the cut and thrust of adversarial combat in court.

The cases in which he has been involved include *Wilsher* (loss of the chance of a better medical

result not satisfying the 'balance of probability' standard of proof) in the House of Lords – a landmark decision on medical negligence. They include also leading cases in the Court of Appeal and in the Privy Council, as well as innumerable High Court cases principally concerned with alleged negligence in medical and surgical practice. His case-load has taken him into so many highly complex areas of medical expertise that working with, and calling and cross-examining, expert witnesses has become his principal task as a barrister.

James looks forward to developing the work of the Expert Witness Institute and to building on the distinguished work already done by his friend and predecessor, Sir Louis Blom-Cooper. In particular, he hopes to see the highest standards of forensic work for which the Institute stands recognised by all. He wishes also to see the restoration in the public's mind of confidence in expert evidence given in court, a confidence somewhat dented of late by criticism in some very high-profile cases.

James Badenoch will be a veritable champion for the careful and conscientious expert witness, and a scourge of lax and inadequate standards in forensic work.

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## THE SINGLE JOINT EXPERT – A LEADING SOLICITOR'S VIEW

As we all know, Part 35 of the Civil Procedure Rules, introduced to a legal world breathless with anticipation in 1999, formally recognised the hitherto shadowy beast, the Single Joint Expert. Like the Beast of Exmoor, the SJE had often been sighted prowling the court corridors, but now it burst into the light, trumpeting its virtues and asking all to accept it as the epitome of Lord Woolf's future.

Of course, practical experience has caused us to look at this beast with rather different eyes.

### The concept in action

The concept of course is simple and supposedly effective. Forget all this expensive nonsense of hired guns blazing away at each other over a few days in court – just appoint one highly-rated expert to examine the case and come up with all the answers. Make sure that the parties accept the expert's ruling and sort the case out.

*Daniels v Walker* was the first real dent in the system. If you don't like what the SJE says, just go out and get another expert whose opinion you do like and use him instead.

Then we have the conflict between the Pre-action Protocol and the Civil Procedure Rules. The PAP allows the claimant (in fast track cases) to appoint what is in effect a SJE on his own – the Rules say that experts should be instructed jointly. Some courts have attempted to rewrite the PAP by sticking rigidly to the Rules.

The real problem with a SJE is the formality with which one has to deal with him or her. No longer the quick "what on earth does paragraph 23 of your report mean" phone call; no longer the "you've forgotten this point" letter; no longer the steamy conference with counsel. All has to be done openly, formally, in writing and with the opposition. All very laudable, but time-consuming and, more importantly, more difficult to get to the real guts of the case. Informality still has its effective place in the legal system.

What if the SJE gets it wrong? How would one know? The reality is that, where big money is riding on the opinion of the SJE, most parties will have a 'shadow' expert looking at the issues in addition. How, then, can it be said that the SJE system saves costs? It does not.

In personal injury litigation the SJE is used for non-controversial issues. The courts simply do not, in bigger cases, insist upon or even suggest that a SJE should be appointed. Each party still goes off and gets its own expert reports. In the case of nursing care experts it would usually be the case that even if a SJE were suggested the parties would never be able to agree on the appointee!

All of this sounds very negative. The reality is that the SJE system is not working as Lord Woolf intended or envisaged, nor does it need to. The SJE is there when needed. It's just that they are not needed very often.

**Ian Walker, Senior Fellow, College of Personal Injury Law; Partner, Personal Injury Department, Russell Jones & Walker.**

Ian Walker is a panellist at the EWI seminar *The Problems of the Single Joint Expert* to be held on 23 September, 2004

# BOOK REVIEW

By John Finch

***Whiplash: The Cervical Spine in Medico-Legal Practice, by J.W. Rodney Peyton; Manticore Books Limited, 2004. Published price £14.95, but to EWI members £13.50 incl. p&p.***

This book has recently been published as a guide for experts in both the legal and the medical professions involved with the preparation of reports for whiplash injuries and providing evidence in court. It will also be of considerable interest to expert accountants providing quantification reports.

It is a pleasure to review such a readable and useful book, more especially when both the author and the publisher are members of the Expert Witness Institute.

The author notes that road traffic accidents have now reached "truly epidemic proportions" and that at least one in every 200 of the population will be involved in a road traffic accident in any one year. While by no means the sole cause, road traffic accidents are the predominant cause of injuries to the spine and in particular to the cervical spine, the site of whiplash injury.

This book fills a distinct gap in the literature on whiplash injuries. Its principal focus is the testimony to be provided by expert reports in the course of personal injury claims; but this focus is placed in a broader and most informative context. Before dealing with the matters of the medico-legal assessment and report, and presenting evidence to a court, a systematic analysis is given of the functional anatomy of the neck and of the ways in which it may be injured. In a chapter entitled 'Mechanisms of Injury' there is a succinct and (to this lay reviewer) fascinating account of the part played by speed and by the force and direction of impact, as well as of the way in which injury may be influenced by seatbelts, headrests and airbags. The reader is made aware that, even with current car safety measures, there is no room for complacency. Your reviewer is still considering whether he feels as safe as he did before reading this chapter!

The medico-legal focus of this book is explained with clarity at the outset: "Medico-legal practice differs from normal clinical practice in that the history and mechanism of injury rather than clinical management assumes greater importance." Chapter 6, entitled 'Clinical Course and Management of Whiplash Injury', deals briefly with common methods of treatment, pre-existing pathology and aspects of the accident victim's return to work and other post-accident activity; but the subject is addressed in a way which will be of immediate medico-legal use. Chapter 5, relating to radiological investigations, adopts the same approach.

In a book which packs in a welter of information within a short compass (70 pages or so) the chapters which particularly attracted your reviewer, as editor of a legal practitioners' publication on personal injury law, were the chapter on the symptoms and signs of whiplash injury, and on its psychological effects – these matters lying at the very core of the recovery of compensation for whiplash injury and its quantum (amount). There is sufficient information to enable legal representatives involved in personal injury claims, and their experts, to get to grips with some difficult issues which are apt to be

thrown up by whiplash claims. An essential element in any claim for negligence is that the breach (of the duty of care) caused the injury. Once causation and legal liability have been established, however, the legal maxim is that the defendant 'takes the victim as he finds him'. It is for the lawyers to argue the points, but for the expert involved there are lucid explanations in these two chapters of pre-existing pathology and the aetiology and nature of psychological complications. The types of disorder described include adjustment disorder, anxiety disorder and depression. There is a brief but useful comment on somatoform disorder whereby the psychological disturbance manifests itself in physical symptoms. This is a particularly difficult area, given that malingering (or the deliberate exaggeration or even falsification of symptoms) needs to be carefully distinguished from genuine disorder which can include 'compensation neurosis', or real anxiety experienced prior to the conclusion of an injury claim.

The final two chapters are about the medico-legal assessment, and giving evidence in court. They put flesh, in the particular context of claims for whiplash injury, on the bare bones of the expert witness' overriding duty to the court, and emphasise the studious avoidance of giving the appearance of an advocate. There are even recommendations as to the demeanour of the expert witness in the courtroom, and while these do not affect the substance of the substantive matters treated in the book, they serve to show the author's attention to detail on the expert's presentation of evidence and overall contribution to the case.

A feature of the difference between lawyer and expert is the way in which the matter in issue is characterised. The relationship between 'fact' and 'truth' is an interesting one; so much so that the author states, in the context of a lucid explanation, that "the truth and the finding of fact in a court are not necessarily the same thing." It is that the judge, in a finding of fact, favours one expert point of view over that put in opposition. The author reminds that "nothing destroys an expert's credibility more than holding fast to an opinion without clearly showing that they are taking other opinions fully into account and logically reasoning for or against a point of view."

Good barristers, says the author, may be skilled in leading an expert down an unwelcome path, and he counsels prudent ways to address such a situation. The term 'whiplash' is first recorded as having been used at a conference in San Francisco in 1928, to describe the motion of the head on the shoulders after sudden impact from a road traffic accident; but the term quickly came into common usage, in the medical and legal professions as well as by lay people, to describe the effects of the trauma. Nevertheless, the author makes reference to his having been questioned in court by senior counsel as to whether or not an injury could be termed whiplash if the impact was frontal, since the initial coining of the term by Crowe referred only to rear-end impacts! One may be assured that, with the helpful lucidity of the author of this book, that particular path was not a long one.

# EXPERT EVIDENCE

## CUTTING DOWN ON EXPERTS

Writing in *The Times* law supplement on 1 June, 2004 Bill Braithwaite, QC, who specialises in claimants' brain and spine injuries, said: "Most experienced personal injury lawyers find that some of the masters and district judges try to insist on joint experts in all areas of major personal injury claims, but it is noteworthy that both sides frequently object to such an order."

In an objection to the 'one size fits all' approach to the case management of personal injury claims, he adds: "In the personal injury world it is becoming increasingly unacceptable to have non-specialist judges, and it is worse still to have a case tried by a judge who thinks that one must apply the same rule to every case, regardless of justice." Justice, he says, may require that an important issue should be tried, and that might require the best experts on both sides.

The fact that full explanation and clarification of the issues in a potentially complex case (and what may appear initially to be straightforward issues may throw up complexities when fully and properly examined) may require more of the court's time - perhaps several days in a major case - appears to go against the grain with some judges who wish to achieve an expeditious conclusion to the proceedings.

The proper function and the true value (to justice) of expert testimony is highlighted by Mr Braithwaite when he says: "It is axiomatic to barristers who specialise in trial work that it is not sufficient to make a reliable judgement on a witness without discussing the case with him, and ideally one wants to have that discussion in person. It is common for opinions to be formed or changed by a meeting between lawyers and their experts." Major litigation, he says, leads towards trial, and at some stage it is necessary for a party's lawyers to assess the prospects of success. The meeting between lawyers and their experts is one of the strengths of the trial barrister, and is one which leads to the settlement of actions. "It is not possible", he says "to have that sort of discussion with a joint expert."

An associated issue about being economical with experts arises more covertly. A point of case management which, says Mr Braithwaite, is commonly met from masters and district judges is that one should not have many experts even in big cases. He gives by way of example cases in which, in their wisdom, trial judges have enabled a doctor to give evidence about physiotherapy, speech therapy and occupational therapy "even though he has no training in those areas and would defer to the therapists in a hospital setting."

This is surely a point of major professional importance for any expert who works in, and gives evidence on, a multidisciplinary exercise. The expert witness's overriding duty to the court (per CPR) is surely confounded if he is expected to inform the court about fine details of professional practice outside his own immediate professional ambit. 'One size fits all' becomes 'one profession speaks for all' (or at least also for others); and the overriding duty to the court comes to look uncomfortably like an overriding duty to cut down on judicial time and money. False economies on experts are in any case unnecessary given the court's power to disallow costs if it considers that too many experts have over-egged the pudding. If, at the end of the day, the judge considers

that a superfluity of experts has been called by either side, he can say so. A sure way to test whether either side has overdone the number of experts is to try the issue and to listen to them.

If, as Mr Braithwaite points out, it is common for opinions to be formed or changed by a meeting between lawyers and their experts, why should this not equally be true when judges listen to the evidence of those who owe a direct, 'overriding', duty to them under the Civil Procedure Rules? If each case is to be decided on its own merits - as it is supposed to be - it is important for a trial judge to be provided with full and reliable facts on the basis of which he can reach an informed and sound decision. A straightjacketing approach to case management, be it either the overt or less overt way referred to here, is not an ideal way to ensure the delivery of justice.

In an article published in *The Times* on 27 April 2004 District Judge Stephen Gold stated that accident reconstruction experts will rarely be allowed. While Bill Braithwaite agrees that this may be true "in the totality of cases", it is not the case in many major personal injury claims. And even in smaller claims there may be room for doubt. In a case shortly to be reported in *Personal Injury Compensation* a claimant's solicitor who was dissatisfied with the police accident report adverse to his client went himself to the scene of the accident. Following a full analysis of the measurements and circumstances he sent his findings to the defendant solicitors, and the case settled promptly in the claimant's favour.

District Judge Gold pointed out that that the court can limit the amount that an expert can charge as well as, more broadly, limiting the number of experts to be heard. Placing limits on the amount charged is, responds Mr Braithwaite, "just one example of how courts seem to think that they can dictate to experts". Case management practices adopted by masters and district judges to which he alludes render Mr Braithwaite's conclusion unsurprising:

"I accept that the courts must manage litigation, but the current situation seems to suggest that the parties to major personal injury litigation will do almost anything to avoid having their cases tried by judges."

*John Finch*

This commentary was published in *Personal Injury Compensation*, July 2004 (publ. Informa plc)

### Membership numbers

Founding sponsors	10
Professional body / association members	12
Corporate members	22
Individual members	996
Retired	34
Sabbatical	1
Applicants	15
<b>Total members &amp; applicants</b>	<b>1090</b>

# EDUCATION LAW

## **Expert witness Wendy Fidler discusses her own professional activity and the links to others working in the same or similar fields.**

Education law is a multi-faceted discipline involving aspects of educational and child psychology, health and safety, negligence, accommodation and special educational needs in addition to an understanding of the statutory instruments and codes of practice underpinning education per se.

### Background

Some years ago, when I was first approached to give an expert opinion on an educational matter, I took stock of my unusual career route to this new and unexpected role.

The skills developed whilst managing a successful Montessori school, developing best practice with children with special educational needs (SEN) and carrying out school inspections for the Office for Standards in Education, all contributed to the impartial and objective observation, assessment and reporting skills I need for forensic writing.

My first mentor was an eminent arbitrator and adjudicator with a firm of surveyors and architects, who, incidentally, considered the voluntary work I was doing as a community mediator 'namby-pamby'. Times change, and soon I was pointing him in the direction of mediation as industrial best practice. He began to recognise the value of alternative dispute resolution (ADR).

Although he worked in different field, my mentor provided invaluable support most especially with regard to the content and format of expert report writing. More recently I have adopted the Expert Witness Institute (EWI) model report format to ensure continued compliance.

Studying for a master's degree in business administration (MBA) also played a part in fine-honing my analytical skills and gave me the opportunity to research the role of mentoring in providing a cohesive, constructive, consistent culture for healthy organisational growth. These advanced management skills also prepared me for further work with the Department for Education, assisting, for example, with the Leadership and Management Conferences for Head Teachers.

In recent years I have written widely for a range of international journals on matters of education management, special educational needs, school inspections and Montessori education. Sometimes I am required to 'peer review' the research of a professional in a different, but associated, field such as occupational therapy.

### Some reasons for forensic education reports

Medical experts tell me they often report on many very similar cases. The parameters of their work are quite clearly defined and there are legal precedents to guide the judgements made in the light of their findings.

My forensic work often takes me into uncharted waters. Risk assessment, supervision, identification of special needs have, until recently, differed widely between local education authorities, and from school to school. A complex web of statutory instruments, associated notes, government circulars, codes of practice and best practice existed before we had, for example, the special needs tribunals we hear about today.

Every case is different. Bundles of documents from instructing solicitors will often include medical and other reports, which inform my overall opinions. In this way I coordinate the

opinions of my peers.

For example, when asked to consider whether a child with special educational needs, who was placed in a particular school and who subsequently caused severe, permanent injury to a member of staff, was assessed and placed within an appropriate school 'population' according to the law, it was necessary to draw on medical and educational reports in the domain at the time of the incident and those drawn up at a later stage.

I have not yet written forensic reports for criminal proceedings, but I am sometimes asked to prepare a report for civil proceedings which follow on from criminal cases. For example, a case of serious sexual assaults on school premises was followed by civil proceedings for negligence, breach of duty of care and non-identification of special educational needs against the local education authority (LEA).

*Wendy Fidler has professional qualifications in education and management. In addition to her duties as an expert witness and education consultant she is an experienced mentor and mediator. Wendy chairs a branch of the Chartered Management Institute and is a Trustee for a national charity, the Dyspraxia Foundation. Most of Wendy's professional activities are 'portable', enabling her to split her time between homes in Blackheath and Bricquebec. Interests include international travel, sport and creative media.*

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## Dates for your diary

### EWI Events (in London unless specified)

#### Conferences

- 13 Sept 2004** Joint Conference: (RSM & EWI) Beyond reasonable doubt: Medical experts in the criminal court  
**Newcastle-upon-Tyne**
- 30 Sept 2004** Joint Conference: (EWI & Intrabank) Dispute Resolution in the City - meeting the challenge maintaining standards
- 15 Oct 2004** Annual Conference: 'Forensic Evidence on trial'
- 27 Nov 2004** Joint Conference: (Sweet & Maxwell & EWI): The Scottish Expert Witness Conference 2004

#### Seminars

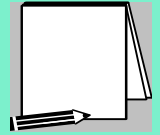
- 23 Sept 2004** The problems of the Single Joint Expert
- 21 Oct 2004** Brain Damage at Birth – Challenges for the expert witness
- 18 Nov 2004** Rehabilitation

#### Courses

- 08 Sept 2004** Basic Law for Expert Witnesses  
(Cost to EWI members £225)

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

# Case notes: Camilla Macpherson, Allen & Overy



## Reviewing a judge's conclusion on expert witnesses?

Wardlaw v Farrar [2003] EWCA Civ 1719 [2003] 4 All ER 1358

This case was an appeal by the claimant, as personal representative of his wife, from an order of the county court which awarded him only £1,000 damage for clinical negligence arising from her death. The main issue was whether delays in admitting the claimant's wife to hospital had increased the risk of her death, and expert evidence was given on both sides. Much of this evidence centred on an article published in *The Lancet*, relied on by one of the experts, and a passage in the *Oxford Textbook of Medicine*, relied on by the other. The article was not copied to the other expert, or exhibited in the litigation, until the first day of the trial. The extract from the textbook had been copied to the other side but only just before the trial and incompletely.

**In giving the lead judgment and dismissing the appeal, Brooke LJ noted that the increase in clinical negligence actions being heard in the county court on the multi-track meant that the county court should routinely consider giving directions relating to exchange of literature to be relied on by experts.**

The standard form of order made in the Queen's Bench Division of the High Court provides that unpublished literature on which an expert relies shall be served at the same time as his statement, together with a list of published material and copies of any unpublished material; any supplementary literature shall be disclosed at least a month before trial; and no expert witness can rely on publications not disclosed without leave of the trial judge. Brooke LJ commented that "*If ... directions had been made in the present case, the medical literature would have been handled in a more orderly manner.*"

Also of note for the expert witness, Brooke LJ also commented that "there is clear authority that this court [i.e. the Court of Appeal] should be very slow to interfere with a trial judge's views on the quality of the evidence of expert witnesses whom he has had the advantage of seeing and hearing."

There are of course occasions when the Court of Appeal can review a judge's conclusions on witnesses and, in the words of Chadwick LJ in *Roadrunner Properties Ltd v Dean* [2003] EWCA CIV 1816, "look at the reasons given by expert witnesses for the conclusions which they draw; particularly where expert witnesses are not giving evidence from direct fact which they have observed, but are seeking to construct what happened from evidence of other facts."

The claim in this case was for damage (in particular to floor tiles and a wall) said to have been caused to a property by work done in the adjoining property. The issue to be decided was whether this work, which had been carried out with a heavy duty drill, had caused the damage. In the county court, the claimant's expert considered that use of the drill might well have been the cause, but since he had not been able to carry out a more detailed examination he was unable to confirm this. The defendant's expert was of the opinion that the damage had been caused by absorption of moisture from the atmosphere which had led both to buckling of the tiles and cracking of the wall plaster. He considered that the fact that the damage to the tiles, which had been unaffected by

atmospheric conditions for 13 years, coincided with the work done in the adjoining property was merely coincidental. There was no evidence as to whether conditions at the time of the work were unusual.

The judge at first instance preferred the evidence of the defendant's expert. In the Court of Appeal, however, Chadwick LJ disagreed: he did not consider that the fact that the claimant's expert had been unable to pursue his investigation meant that the defendant's expert's theory was therefore more probable. Furthermore it was his view that the coincidence between the buckling of the tiles and the work being done was "a proper factor to be taken into account in drawing inferences from causation". The fact that the defendant had failed to enter into a party wall agreement with the claimant (as it should have done) also entitled the court to take a reasonably robust view of causation. In allowing the appeal, albeit only in respect of the damage done to the wall and tiles, he concluded "if there is material from which ... a causal link can properly be established, I think a court, in those circumstances, should be slow to discard common sense in favour of expert hypothesis."

Sedley LJ, in his concurring judgment, also made the point that this case was a prime example of one in which only one joint expert should have been appointed. Although the parties had initially been ordered to instruct a single joint expert, they had been unable to reach agreement and had therefore ultimately been permitted to appoint their own experts. Sedley LJ said that in the absence of agreement between the parties, the court should have exercised its powers under CPR rule 35.7 to name its own expert or provide some other means of nominating an expert.

## Admissibility of lip-reading evidence

R v Luttrell and others [2004] EWCA Crim 1344

The Court of Appeal recently held that lip-reading evidence from a video is capable of passing the ordinary tests of relevance and reliability and is therefore potentially admissible in evidence, although it requires a special warning from the judge as to its limitations.

The appellants had been convicted in two separate cases with different facts, but the ground for appeal was the same, namely that the expert lip-reading evidence given at their trials should not have been admitted. The expert had given evidence as to what had been said at various meetings between the appellants which had been recorded on CCTV. In both trials, the expert evidence was held to be admissible after detailed consideration of the possible shortcomings of such evidence, and evidence from the expert herself as to her skills and working methods. It was then heard by the jury.

The Court of Appeal noted that, over and above the basic requirement that it be relevant, the test for expert evidence to be admissible is as follows: "*Two conditions must be satisfied: first, that study or experience will give a witness's opinion an authority which the opinion of one not so qualified will lack; and secondly the witness must be so qualified to express the opinion.*" The first condition can

be divided into two parts, deriving from *Bonthyon* ((1984) 38 SASR 45, per King CJ): "(a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of special assistance to the court. If these two conditions are satisfied, then the evidence is admissible although the weight to be attached to it will be a matter of fact."

The Court of Appeal concluded that lip-reading evidence from a video was capable of being relevant and reliable and was therefore potentially admissible. It would not always be admissible, for example in circumstances where video footage was of poor quality or the view of the speaker's face was poor. Furthermore such evidence should be accompanied by a warning from the judge "as to its limitations and the concomitant risk of error". Such a warning could, amongst other things, spell out the risk of mistakes as to the words that the lip-reader believes were spoken, as well as the strengths and weaknesses of the material being reviewed, for example matters of lighting, distance, angle of the speaker, and awareness of the lip reader of the context. In the present appeal, an appropriate warning had been given in one case, in respect of which the conviction could not therefore be considered unsafe; but in the second case, where a direction had been given but no special warning, the appeal should be allowed and a re-trial ordered.

Of interest for all experts in developing fields, the Court of Appeal also noted that "although at one time a more conservative approach had been adopted, the policy of the English Courts has been to be flexible in admitting expert evidence and to enjoy the advantages to be gained from new techniques and new advances in science."

#### **Distinct functions of judge and expert in care proceedings**

Re T (children) (sexual abuse: standard of proof) [2004] EWCA Civ 558

In this case, the issue for the court to decide was whether a child, T, who had been injured in the home, had sustained her injuries due to sexual abuse (rather than accidentally) and should therefore be taken into care.

At the first hearing, evidence was given by three consultant paediatricians: the consultant paediatrician who had examined the child initially, and two consultants instructed as experts. All three produced reports, although neither of the experts was able to examine T. The experts, on the basis of photographs of the injuries, initially came to different conclusions as to their seriousness. It only transpired at the

hearing, when the consultant who had carried out the initial examination brought all the photographs to court, that these differences had arisen because the police had supplied the experts with different sets of photographs. At this point, having seen all of the photographs, one of the experts changed his opinion about the extent of the injuries.

The care proceedings were dismissed at first instance, and the local authority and the children's guardian appealed. On appeal, the local authority argued that the judge had applied an incorrect standard of proof, misinterpreted the medical evidence and failed both to analyse the evidence of the parents and to make findings about the credibility of the family's evidence.

The Court of Appeal agreed that the judge had allowed himself to elide the distinction between care proceedings and criminal proceedings in this case. He had also failed to distinguish between the differing functions of the judge and the medical experts: It was for the medical expert to provide guidance as to the relevant medical knowledge, and for the judge to consider the question posed in Section 31 of the Children Act 1989 as to whether T was suffering or likely to suffer significant harm, and whether that harm or likelihood of harm was attributable to the care given to the child. The case would therefore be re-heard.

Dame Elizabeth Butler-Sloss noted that the expert who had not been able either to examine the child or to see all the relevant photographs had been placed in a "most difficult and unsatisfactory position" and criticised the failure of the system which had meant that this case would now be further delayed. She also noted per curiam that "Photographs have become an increasingly important part of medical evidence. When they are taken, suitable local protocols should be devised as soon as possible to enable all the photographs to be released to all the relevant experts when they receive instructions to report in care proceedings."

#### **The expert witness in a public law forum**

Lynch v The General Dental Council [2003] EWHC 2987

In this case Mr Justice Collins considered when it might be appropriate for new expert evidence to be adduced at a judicial review.

The claim was brought by an orthodontist who had applied to the General Dental Council to be entered onto its list of specialists. There are three ways of obtaining specialist status: by qualification, by training and by experience. The claimant, who had qualified as a dental practitioner in Australia and had done only orthodontic work since 1989 (moving to the UK in 1996), applied on the basis of experience. His application was rejected, with no reasons given, and his subsequent appeal was dismissed, although this time reasons were given.

The claimant applied to the Director of Appeals for the decision to be set aside in the interests of justice, and when this application was also rejected he applied for judicial review on the grounds of irrationality. He sought to support his case with evidence from two experts showing that his expertise did meet the requirements necessary for recognition as a specialist. The application to use this evidence was at first dismissed by order of Deputy Judge Nigel Fleming. Leave to appeal was refused by Hale LJ, but the order was varied to prevent the claimant from relying on the specific evidence, although not to prevent

him relying on expert evidence generally. It was also directed that any further application relating to expert evidence should be heard by the judge who was to hear the claim.

When the matter first came before Collins J in October 2003, he directed that the judge who heard the substantive matter should decide this point, and if the claimant was permitted to adduce expert evidence, the defendant should be permitted to lodge expert evidence of its own in reply. He also pointed out that an argument of irrationality deriving from a matter in issue between experts would fail if the defendant was able to produce an expert report which contradicted the report produced by the claimant, because it was not for the court to decide between experts on issues of fact. The defendant did then produce such a report, so the issue of admissibility became unimportant for this claim. Nevertheless, Collins J returned to this issue in his judgment of December 2003, because he considered it a point of "general importance", not least because permitting expert evidence to be used in cases such as this would invariably add to costs for all parties involved in a judicial review.

Hale LJ, in refusing leave to appeal, said that the application to adduce new evidence did not fall within any of the principles set out in *R v SSE ex parte Powis* [1981] 1 WLR 584. Furthermore, it would be wrong to allow evidence to be brought which would advance the opinion that the panel had been irrational, since this would usurp the function of the court.

The *Powis* principles state that the court can receive fresh evidence:

- to show what material was before the minister or inferior tribunal;
- to determine a jurisdictional fact or procedural error where jurisdiction depends on an issue of fact or the issue is whether procedural requirements were observed; or
- where proceedings were tainted by misconduct of the minister, inferior tribunal or parties, for example by bias or fraud.

Collins J agreed that, in general, new expert evidence should not be admitted unless it fell within these principles. However, where the decision under review was made by an expert tribunal, and involved matters which might not be understood without assistance from an expert, then an explanation of technical terms might be necessary if the court was properly to consider an argument of irrationality. He went so far as to say that "in a truly technical field, where the significance of a particular process is in issue, expert evidence can be admitted to explain the process and its significance". Such an extension of the *Powis* principles was permissible because it would assist the court in reaching a just conclusion.

However he also emphasised that cases such as these would be very unusual, and "what I have said should not be regarded as opening the door to the admissibility of experts' reports in all cases such as this that involve judicial review of an expert tribunal or body". He was also careful to limit the effect of this extension further by noting that expert evidence adduced at judicial review must not go beyond explanation and venture into opinion as to whether the inferior tribunal had been irrational (since this would seem to usurp the function of the court). In addition, where the tribunal was composed of or advised by experts, it would be virtually impossible to submit evidence which went beyond mere explanation of technical terms since this was likely to involve challenge of that tribunal's factual conclusions.

#### Comment

Ultimately this claim succeeded not because of the arguments put forward for adducing new expert evidence, but because the reasons given for dismissal of the appeal, while not irrational, had been inadequate, and one of the reasons had been based on a possible misunderstanding. Collins J therefore recommended that the claimant be given another opportunity to appeal the rejection of his initial application. Nevertheless the judgment of Collins J gives useful guidance as to the potential (albeit very limited) role for an expert witness in the forum of public law.

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