



EXPERT WITNESS INSTITUTE NEWSLETTER

Summer 2005

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Master of the Rolls welcomes Civil Justice Council Experts Protocol

After years of uncertainty amongst the Expert community this June saw the publishing of an agreed protocol for the guidance of experts.

The Master of the Rolls, Lord Phillips of Worth Matravers, welcomed the launch of the Civil Justice Council Protocol for the Instruction of Experts to give Evidence in the Civil Courts. The launch coincides with the release of the Code of Practice for Experts (covering Europe) agreed jointly by the Academy of Experts and the Expert Witness Institute.

Lord Phillips of Worth Matravers said, 'I am delighted that the Civil Justice Council has consolidated the existing advice to experts into a single Experts Protocol.'

The Experts Protocol is designed to give guidance to experts and those who instruct them when they work in the civil courts. Drafted by Mr Justice Bean and His Honour Judge Nic Madge, the protocol replaces the existing codes of guidance for expert witnesses. It has been agreed by the Academy of Experts, Expert Witness Institute, and other members of the Civil Justice Council's Expert Committee.

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Lord Phillips of Worth Matravers said: "I am delighted that the Civil Justice Council has consolidated the existing advice to experts into a single Experts Protocol. I would like to express my thanks to Mr Justice Bean and His Honour Judge Nic Madge for their efforts on producing this succinct and clear document which I am sure will be of great help to experts in the future.

It is also my pleasure to launch the Code of Practice and to thank the Academy of Experts and Expert Witness Institute for their efforts in working together to produce this document. I hope other expert organisations will feel able to adopt this Code to help continue raising the standards of experts across the UK."

Changes in the Board of Governors

Mr Hugh Edwards, who was appointed a Governor of the EWI shortly after its formation, decided the time had come for him to stand down. The board accepted his resignation on 9 June 2005 with regret and recorded its warmest thanks to him for his contribution to the sound development of the Institute, particularly in relation to the office accommodation.

On 19 July 2005 the Board appointed Mrs Justice Dobbs as a Governor. Dame Linda was a leading

criminal barrister and was Chairman of the Criminal Bar Association. She became a High Court Judge in October 2004. James Badenoch QC, Chairman of EWI, commented that Dame Linda will bring a new and exciting perspective to the governance of the Institute where she sees an important role for EWI in assisting criminal barristers how best to handle expert evidence in the new regime established by the Criminal Procedure Rules.

Message from the Chairman James Badenoch QC

Your Board of Governors has recently reviewed the current subscription rates for membership of the Expert Witness Institute. Members will be aware that for the last five years these have been held at the level first fixed in the Summer 2000 and the support members have given to the Institute since then, through its various events and publications, has been such that no adjustment has been necessary.

Happily, the financial position of the Institute remains satisfactory and we have been able to build up our reserves to provide a cushion against unexpected expenses. As you will know the Treasurer's aim is to ensure that our reserves are sufficient to cover six months normal expenditure in running the Institute and we are roughly over half way to achieving that target. So in the ordinary course there would seem no necessity to make any change.

However, the Governors are conscious that the lease on our offices runs out in February 2006. We have appointed a firm of Chartered Surveyors to open negotiations with our landlords to obtain a new lease. If this is not successful, then we shall

need to move. We do not, at this stage, know what we shall have to pay for our accommodation next year but we do know that whatever it is we shall have to meet legal and professional fees and possibly also removal costs. We also know that the rateable valuation of offices will be going up, so the likelihood is that we shall have to budget for overall higher premises costs in 2006.

The Governors decided that in view of this it would be prudent to make a small increase in membership subscriptions at this time to avoid having to introduce a more significant rise next year. Accordingly the subscription for individual membership for 2005/2006 will be £190.00 an increase of approximately 5% and other subscription rates will be adjusted in line with this. The Governors are proud to have held subscriptions at the same level for so long and are determined that we shall continue to give members value for money. It also means that this time next year we shall have the opportunity to review subscription rates in the light of our experience and hopefully will continue to be able to stabilise them.

Annual Conference 2005 *Announcement*

The Right Honourable Lord Woolf as Lord Chief Justice for England and Wales, retires on 30 September and he has advised us that he will be unable to give the keynote address at our Annual Conference 2005. However, we are fortunate to have obtained the agreement of the Right Honourable Lord Justice Clarke, the new Master of the Rolls as he will then be, to speak. While it is naturally disappointing that we shall not hear Lord Woolf it is quite a coup that we shall now have the opportunity to look forward with the new Head of Civil Justice to what the future holds for expert witnesses.

With the expert witness system under the spotlight as never before, this conference brings together a remarkable assembly of speakers. They include some of the really big movers and shakers of the modern British legal system, including Lord Justice Auld, Mr Justice Calvert-Smith, Master Turner and now Lord Justice Clarke. In addition from the expert fraternity we have Professors Sir Alan Craft and Allan Jamieson and Mr Roger Clements.

*14 October 2005. CPD 5 Hours £180 for members
The Conference Centre, Church House, Dean's Yard,
London SW1P.*

From the Secretary's desk

Experts under attack

With the GMC having decided that Professor Sir Roy Meadow misled the court and gave erroneous evidence in the Sally Clark case the credibility of expert witnesses has again come under attack. Much of the comment in the media is singularly ill-informed and sensationalist and if allowed to go unchallenged will be detrimental to the efficient administration of justice.

The Governors of the EWI are considering what they can do to rectify the situation. Our Annual Conference in October will be a major public occasion to set the record straight and we are fortunate that in the absence of Lord Woolf we have persuaded the Master of the Rolls, as he will be then, Lord Justice Clarke to speak.

The BBC have recorded a programme in the Radio 4 series "The Commission" about the use of expert witnesses. Our former Chairman, Sir Louis Blom-Cooper, appeared on it and gave forceful evidence before the panel. The programme, apparently, is to be broadcast in August and was therefore pre-recorded. It remains to be seen how much of his contribution is retained. In the past the programme has been broadcast on a Wednesday at 8.00 pm. While the audience at this time is likely to be somewhat select there is usually an item on the BBC website afterwards, so please look out for it.

Predictable fees

EWI Governor, John Cowan and I attended a "big tent" meeting organised by the Civil Justice Council on 21 June to debate the proposal that experts' fees in low value fast track PI cases should be capped. Unsurprisingly, there was a clear divide between the medical fraternity who take the view that the value of a case often has little relevance to the complexity of the issues, and the PI solicitors and insurers for whom the achievement of a settlement at minimum cost is most important.

However, our clear impression is that there is strong pressure, whether from the CJC, the judiciary or the Treasury, to limit costs. Solicitors have already had to accept these limitations in fast track PI cases and it suggests that experts' fees are likely to go the same way.

The interim assessment of the Legal Services Commission to the reaction to the Consultation Paper on the use of expert witnesses also suggests that the many responses (there were 169 of them) will have scant success in changing their proposals to limit expert witness fees to a scale very little different from that currently applicable for criminal cases. The final report from the LSC is expected in September but unless they have a "damascene" change of heart it will

not be surprising if experts increasingly decline instructions in legally aided cases. Putting this alongside the public criticism of expert witnesses this looks like being a major own goal as experts will more and more decide not to offer their services to the courts.

Accreditation

The media reaction to the Professor Sir Roy Meadow case, and the LSC consultation paper have all helped to maintain public focus on the subject of accreditation. The Governors of EWI have formed a small sub-committee to consider how the Institute should react to it and in particular to what extent our standards for membership should be enhanced. This could have major implications for the way the Institute is run in the future, so nothing will be decided quickly. The essential objective is how we can confirm to the courts that members of EWI are "fit for purpose".

One small crumb of comfort was provided by the Master of the Rolls, Lord Phillips when launching the new Protocol for Experts and the joint Code of Practice. He paid particular credit to the work of the Institute and the Academy which had meant that the Protocol could be produced quickly. An explanatory article on the Protocol is included in this issue. It, and the Code of Practice, can be viewed on the EWI website, together with the Press Release issued by the CJC which quoted Lord Phillips.

Feedback

The complaint is frequently made that the only feedback the expert witness gets after a case is entirely negative: the losing party feels hard done by and lays the blame at the door of the expert; the instructing solicitor is more concerned with the next case and, win or lose, is disinclined to tell the expert how the case turned out; and in extremes the judge may have some unkind things to say. But in at least one case, of which I know of there is a member who seems regularly to receive plaudits for her work, and I know because she sends copies to me. A recent letter from an instructing solicitor said: "my thanks to you for really superb work in such a tight time frame. It was a pleasure to be able to ask for your professional assistance in this case."

I am sure other members must from time to time be similarly congratulated. It would be helpful to hear from you. We would then be able to put together a portfolio which would answer those critics who see nothing but problems where expert witnesses are concerned.

Brian Thompson
Secretary

Protocol for the Instruction of Experts to give Evidence in Civil Courts

On Wednesday, 22 June 2005, the Master of the Rolls, Lord Phillips launched the Experts Protocol to replace the existing Codes of guidance for expert witnesses. Drafted by Mr Justice Bean and his Honour Judge Nic Mudge it, like the previous codes, is intended to provide guidance to experts and those who instruct them when they work in the civil courts. The new protocol will come into force on 5 September 2005 and will also be incorporated into the White book.

The new protocol ... is intended to provide guidance to experts...and will come into force on 5 September 2005

A copy of the Experts Protocol is being made available to all members of the Institute shortly. Alternatively, you can download a copy from our website (<http://www.ewi.org.uk/files/ExpertsProtocol.pdf>)

As with the previous Code of Guidance on Expert Evidence, the intention of the Protocol is to assist in the interpretation and application of Part 35 of the Civil Procedure Rules and its associated Practice Direction. Whereas the Code set out, as a starting point, the overriding objective as defined in Part 1 of CPR, the new Protocol only refers to it in passing and instead directs its attention to the Practice Direction on Protocols and the specific objectives contained therein to:

- a) Encourage the exchange of early and full information about the expert issues involved in a prospective legal claim;
- b) Enable the parties to avoid or reduce the scope of litigation by agreeing the whole or part of an expert issue before commencement of the proceedings; and
- c) Support the efficient management of proceedings where litigation cannot be avoided.

The Code of Guidance drew a distinction between the expert acting as advisor and as an expert witness under Part 35 of the CPR and highlighted the effect that this distinction had upon disclosure and privilege. The new Protocol does not seek to include this so specifically. Clause 5 emphasises that the Protocol only applies where experts are instructed to give or prepare evidence for the purpose of civil proceedings. However, two footnotes indicate the approach of the courts to disclosure of reports as set out in *Carlson v Townsend* [2001] 1 WLR 2415 and *Jackson v Marley Davenport* [2004] 1 WLR 2926.

The approach of the authors of the Protocol is very similar to that of the working party which drew up the Code of Guidance, in that they have adopted a logical procedure identifying what expert witnesses are

required to do and then following the procedure from appointment and instruction through to the preparation of the report, the role of the single joint expert, experts' discussions and attendance at court.

Clause 4 of the Protocol, which deals with the duties of experts is a restatement of the rules set out in the *Ikarian Reefer* judgment as subsequently restated by Judge Toulmin in *Anglo Group PLC v Winther Brown & Co Ltd* [2000] 72 LR 118. The overriding duty to the court is emphasised: "Experts must not serve the exclusive interest of those who retain them", and while it is stressed that experts are required to assist the court it does not impose on them "any duty to act as mediators between the parties or require them to trespass on the role of the court in deciding facts". The independence of the expert can be demonstrated by the expert expressing "the same opinion if given the same instructions by an opposing party". Experts should not only confine their opinions to matters which are material and are within their expertise, but should also indicate any matters which would fall outside their expertise. Whereas the Code of Guidance merely indicated that failure on the part of the expert to comply with CPR or court orders could in extreme cases result in the expert's evidence being debarred from being placed before the court, the Protocol is able to cite the more swingeing penalty envisaged in *Phillips v Symes* [2004] EWHC 2330 (CH) which could hit the expert in his pocket.

Clause 6 covers the question of whether expert evidence is appropriate and reflects in more shortened form paragraph 6 of the Code of Guidance. The rest of that paragraph 6 is incorporated in Clause 7 of the Protocol – "The Appointment of Experts" which goes on to cover in a similar way the terms of appointment which were set out in paragraph 8 of the Code. Clause 7 also now contains procedural details which previously appeared in paragraph 19 of the Code; in particular, that experts should be kept informed about deadlines and should be sent promptly copies of relevant court orders (reflecting the latest amendment of the Practice Direction to CPR Part 35).

The duties of the expert is a restatement of the rules set out in the Ikarian Reefer judgment.

Clause 8 of the Protocol, "instructions", incorporates much of paragraph 11 of the Code with an interesting addition:

"(f) an outline programme, consistent with good case management and the expert's availability, for the completion and delivery of each stage of the expert's work."

This should assist the expert to produce the report in

timely fashion. If the instructions do not include such a programme you should ask for it. Those instructing experts should also be aware that Clause 3.4 applies as much to them as to the expert:

“Courts may take into account any failure to comply with this Protocol when making orders in relation to costs, interest, time limits, the stay of proceedings and whether to order a party to pay a sum into court”.

Where there are problems with the instructions, either through incompleteness or because there is a conflict between the instructions and the expert’s duty to the court, the expert may consider withdrawing from the case. This is covered under Clause 10 of the Protocol and had no exact parallel in the Code although paragraph 12 indicated that in the absence of clear instructions the expert should decline to act. The expert does, of course, have the right to ask the Court for directions. Previously this was included under “Procedure”, paragraph 23 of the Code, but CPR now covers this in more detail and accordingly Clause 11 of the Protocol sets out the current procedure. Experts may also apply to the Court where those instructing them have not provided necessary information. There was reference to this in paragraph 22 of the Code but Clause 12 of the Protocol expands this also to set out an appropriate procedure.

The Protocol next turns to the Contents of the Experts Report, Clause 13. The Code dealt with this with separate sections covering the report itself, information, the content of the Report, and amendment of the report. While much of the wording of Clause 13 will be familiar, the authors of the Protocol have dealt with the production of the report as a whole with subheadings to cover specific topics:

- Qualifications
- Tests
- Reliance on the work of others
- Facts
- Range of opinion
- Conclusions
- Basis of the report: Material instructions.

It is interesting that the Protocol makes specific reference to the model forms of experts’ reports produced by both the Academy of Experts and the Institute. The Institute’s model form has an executive summary at the front of the report, although it is stated that this is optional and it may appear at the end, following all the reasoning. Clause 13.14 of the Protocol debates the advantages and disadvantages of these alternatives but prefers the conclusion to be placed at the end of the report. There is also useful guidance in Clause 13.15 about what should be included as the substance of material instructions. We

are now revising the EWI model report to reflect the requirements of the Protocol. Clause 14 of the Protocol, “after receipt of expert’s reports,” broadly restates the contents of the paragraphs 19, 20 and 21 of the Code of Guidance. Amendment of the Report is covered under Clause 15 of the Protocol. This is set out in more detail than paragraphs 17 and 18 of the Code.

Questions on the expert’s report are covered under Clause 16 of the Protocol. Experience of the Civil Procedure Rules has confirmed that this is an area where problems can arise and the Protocol considers what the expert should do in these circumstances. The Civil Procedure Rules lay down the time frame in which parties can raise questions on the expert’s report but significantly do not impose any deadline by when the expert should respond. The Code of Guidance sought to establish best practice here by recommending that questions should be answered within 28 days (paragraph 24). This is omitted from the Protocol which is perhaps unfortunate.

The Protocol in Clause 17 next turns to consider the appointment of single joint experts, whereas the Code regarded conferences and discussions as more naturally following questions on the expert’s report. While the Code indicated that “the courts encourage such appointments [of SJE’s] particularly in cases where the sums involved are not large and the issues are not complex” the authors of the Protocol drawing on the experience of the Civil Procedure Rules are much more positive:

“Single Joint Experts are the norm in cases allocated to the small claims track and the fast track”.

If the proposed SJE has acted previously as an adviser to a party, the other parties should be given all relevant information about the previous involvement (Clause 17.5). This glosses over the potential hazards involved and the Code was, possibly, much more informative:

“This may mean disclosing to the other party any privileged or confidential information the expert has received and any advice s/he has given”.

The provision of instructions to the SJE has also caused problems over the time since the Civil Procedure Rules were implemented. Clause 17.10 of the Protocol provides useful guidance where instructions are not received by the expert and it is recommended that the expert should give the parties a deadline that in the absence of such instructions the expert will begin work without them. If the instructions are received subsequently the expert should consider the impact that complying with them will have on the timetable for delivering the report and the maintenance of the proportionality principle. If the expert decides to ignore the late instructions the

report must reflect this fact, but the parties may apply to the Court for directions.

The duty of the SJE not to attend a meeting or a conference which does not include all the parties is emphasized with reference to *Peet v Mid Kent Healthcare NHS Trust* [2002] 1 WLR 210. The principles of independence, impartiality and transparency are again reiterated. The Protocol also identifies that the SJE may be cross examined in court, although this is unusual. The case of *Daniels v Walker* [2000] 1 WLR 1382 is cited, in which Lord Woolf confirmed that in fast track cases the presumption was that a single joint expert would be appointed and cross examination would only be permitted exceptionally where questions had failed to satisfy the parties. This was subsequently confirmed in the cases of *Popek v National Westminster Bank plc* [2002] EWCA Civ 42 and *Austen v Oxfordshire County Council* [2002]

Clause 18 of the Protocol is concerned with the arrangements for discussions between experts. It is suggested that in fast track and small claims cases meetings of experts would be unusual and the format of the meeting, whether face-to-face or by telephone or other electronic means should be determined by the proportionality principle. The Protocol confirms that the parties, the lawyers and the experts should cooperate to produce the agenda, but in the event that this is not possible the court may give directions for drawing up the agenda. The Code of Guidance suggested a timetable for agreeing the agenda and recommended that it should consist of closed questions which are capable of being answered 'yes' or 'no'. The Protocol is more relaxed about the time

table – 'allow sufficient time for the experts to prepare for the discussion'; and the reference to closed questions is omitted. It is, of course, only of particular importance in medical cases and the Protocol is intended to cover all disputes that come before the courts.

The suggestion that lawyers should not normally be present at experts' discussion, which was included in the Code (paragraph 27) is now given more force by reference to *Hubbard v Lambeth Southwark and Lewisham Health Authority* [2001] EWCA 1455. That case highlighted that agreements reached by the experts in their discussion did not, of themselves, bind the parties. However, the Protocol introduces the interesting thought that in view of the overriding objectives, parties should give careful consideration before refusing to be bound by such an agreement and **must also be able to explain their refusal should it become relevant to the issue of costs** (emphasis added).

The final Clause of the Protocol deals with the attendance of the expert at court; this emphasizes that if called, experts have an obligation to attend court, but it is incumbent upon those instructing experts to ascertain their availability before the trial dates are fixed. An interesting addition to the guidance, formerly provided by the Code comes in the reference to the use of witness summons: this 'does not affect the contractual or other obligations of the parties to pay experts' fees'.

Brian Thompson, Secretary

Discussion Meeting

Medico-legal reporting agencies – benefit or threat to the proper administration of justice?

Since the introduction of the Woolf reforms there has been considerable growth in the involvement of medico-legal reporting organisations, particularly in low value fast track P.I. cases. Increasingly solicitors and insurers are referring cases directly to them, and recent experts' meetings organised by the Civil Justice Council have suggested there should be a rebuttable presumption that medical reports in these cases should be provided by GPs. The view is taken in certain circles that this will lead to a lowering of standards and a reduction in fees.

A second concern is the financial viability of medico-legal reporting organisations. AMRO (The Association of Medical Reporting Organisations), which is a corporate member of EWI, has sought to establish standards in this field, but only the largest agencies are eligible for membership. At a time when yet another

agency (Medico-Legal Reports Ltd) has gone into liquidation, doctors who provide reports for these agencies may find themselves considerably out of pocket.

Dr Roger Norwich and Dr Duncan Veasey have sought to raise these issues in the past, and wish to see them debated by members, along with their view that such bodies ought not to be admitted to membership of EWI. In response the Governors have agreed that a meeting to discuss the topic will be held at the London Offices of Irwin Mitchell, 150 Holborn, on Thursday 29 September 2005 at 4:00pm, to which all are invited. It is not proposed to make any charge for this meeting.

To reserve a place please contact the EWI office on 0870 366 6367 or fax 0870 411 2470 or by email: info@ewi.org.uk

Clinical Negligence Litigation

In the last issue of the newsletter there appeared a piece by the surgeon Michael Bishop about clinical negligence litigation, which some readers found disturbing, both in its tone and its content. As will I am sure have been apparent he was expressing a personal view. For balance we print here some replies to that. Again they represent member's personal views.

James Badenoch QC EWI Chairman

Michael Bishop's unbalanced article on medical expert witnesses in the Spring 2005 Newsletter cannot be allowed to pass unchallenged. Expert medical witnesses have had a bad press in recent months, but the huge majority follow the Civil Procedure Rules implemented in April 1999. No doubt there are so-called experts, hired by both the defendant and the claimant, who show as much bias as Michael Bishop does in his 'Personal View' and who pursue the 'hired gun' attitude to support both those who prosecute and those who defend allegations of negligence. They are rare in our experience, rather than being the rule which Michael Bishop seems to imply.

Lord Woolf made it clear that all expert witnesses, whether medical or otherwise, have an absolute obligation to follow the Civil Procedure Rules. His clear intention was to ensure that the biased hired gun was a thing of the past. In our experience his efforts have been successful.

The function of the expert medical witness is to examine and state the facts and then provide an opinion on the propriety of the treatment provided. It may be worth considering exactly what Lord Woolf sets out in the revised Civil Procedure Rules. Part 35 is the relevant section. This makes it clear that the expert has an overriding duty to help the Court, not to support the party who has engaged the expert. This means strict impartiality, unlike the views expressed by Michael Bishop. Lord Woolf requires various undertakings from the expert. The facts used by the expert in the report must be true. The opinions given by the expert must be reasonable and be based upon present experience of the problem in question. Where there is a range of reasonable opinion the expert is obliged to consider the extent of that range in the report and to acknowledge any matters which might adversely affect the validity of the opinion provided. The expert is obliged to indicate the sources of all the information provided and not to include or exclude anything which has been suggested by others (in particular the instructing lawyers) without forming an independent view. Finally the expert is obliged to make it clear that the opinions expressed represent his or her true and complete professional opinion. This is a very clear mandate and it is our experience that the vast majority of reputable medical experts follow these injunctions to the letter.

The medical expert witness must be an accredited doctor of sufficient standing and experience to be able to assess the problem in question. He or she must be able to set out the various aspects of the problem in an impartial and informed fashion which can be understood by the lawyers. This requires training and an understanding of how to explain the convolutions of medicine and surgery to lawyers, but can hardly be measured by 'accreditation'. The various legalistic terms, such as 'breach of duty' and 'causation' so derided by Michael Bishop, are necessary to communicate with the lawyers. Michael Bishop demonstrates a woeful ignorance of the duty of the expert witness when he speaks of 'negligence'. This is not, has never been and will never be the province of the expert witness - negligence is decided by the Court after balancing the opinions provided by the expert witness.

Lawyers choose experts for various reasons. Foolish lawyers may choose an expert perhaps because he/she is cheaper or may provide a more rapid answer than another, rather than on proven skill in the art of assessing and explaining medical problems to lawyers. This cannot be used as a criticism of the experts - it is a criticism of the lawyers. Reputable lawyers use experts that they have learned will give reliable impartial opinions - it is better to have your expert demolish a case before it starts than to have it die a lingering and costly death because the original opinion was not impartial.

Michael Bishop's article is so full of prejudice, linguistic obfuscation, pleonasm and pejorative phrases that we hope that it will not be regarded as anything other than a very "Personal View"

Richard G Notley and Raymund Carroll

Mr Christopher J McCullough has submitted the enclosed letter in response to the same article.

I do not hold such a jaundiced view of the medico legal process in clinical negligence claims as that espoused by Mr M C Bishop, Consultant Urological Surgeon, in the spring 2005 EWI newsletter. The emphasis on the expert witness providing his evidence for the Court should dispel any partisan tendency. However, I do strongly agree that transparency is of the utmost importance and would support the publication of agreed settlements. His proposal of nationally

managed system of coded cases with their outcome would be of considerable assistance to medical experts. It is not uncommon to provide a report and to have no feedback at all on the views that one has expressed. The ultimate outcome of the case is often not communicated to the expert witness and details of the

settlement are often clothed in secrecy. Such information would be of great educational value to the expert and should be provided as a matter of routine.

C J McCullough, MA FRCS
Consultant Orthopaedic Surgeon

Book review: Lady Chatterley's Trial

Regina v. Penguin Books Limited
October 1960, Old Bailey

Edited by C H Rolph, 2005, £1.50
(ISBN 0-141-02232-9)

A series of Pocket Penguins have been launched as part of Penguin Books' 70th birthday celebrations.

In 'Lady Chatterley's Trial', 2005 C.H. Rolph draws upon extracts from his classic, 'The Trial of Lady Chatterley', first published in Penguin Books 1961.

This pocket version is 'designed to give a flavour of the proceedings rather than pursue all the trial's ins and outs, and it is hoped that it is reasonably fair to both sides'.

At a time when Experts and their opinions are coming under scrutiny as never before, it is interesting to remind ourselves of the eminent and academic witnesses who were called to give evidence in this ground-breaking case.

Mervyn Griffith-Jones, in his opening address for the Prosecution, provided a resumé of the narrative in question, and the grounds on which the prosecution contended the book to be obscene. He added:

'It has taken over 30 years for it to be possible to publish the unabridged version of the book in this country. Members of the Jury, it is for you in effect to say now whether it has taken only thirty years, or whether it will take longer.'

In his opening address for the Defence, Gerald Gardiner recalled that unexpurgated editions of Hamlet and Canterbury Tales have things in them, which, prima facie, are obscene, but that Penguin Books have always refused to publish work that was not of the author. He reminded the Court that during the past 30 years, previous defects in the obscenity laws had been recognised by Parliament.

Firstly, it was now no longer possible to examine an extract of prose out of context - to decide whether a

book would deprave and corrupt the whole text must be considered.

Secondly, the words 'those whose minds are open to such immoral influences' were removed – otherwise all our literature would be such as was suitable for minors.

Thirdly, there was a proper distinction between pornography and literature.

The Defence witnesses called were Dame Rebecca West, The Bishop of Woolwich, Richard Hoggart, E.M. Forster, Norman St John-Stevas, Sir Allen Lane, and C D Lewis.

In his summing up for the Defence, Gardiner reminded those present that nothing would ever prevent young people looking up certain words in the dictionary, the Old Testament or Shakespeare, and that as long as there are medical books in second-hand shops, some young people will look at a particular diagram without a desire for medical education. 'Society cannot fix its standards by what is suitable for a young person of 14.'

For the Prosecution, Griffith-Jones recalled the views of the eminent and academic Expert Witnesses, but appealed to the 'ordinary men and women of the community' – the jury, not the 'so called experts' to decide that there was 'nothing in this book of such value, as can justify its publication for the public good.'

The verdict, as we know, was that Penguin Books Ltd was, 'Not Guilty' of publishing an obscene article.

Read the fascinating extracts from the Expert Witness statements – C.H. Rolph, the author of the original book, 'The Trial of Lady Chatterley', has edited them.

Wendy Fidler
Forensic Education Consultant MEWI

Why Marketing Experts? Why Marketing Audits?

At Seminars and Conferences of Experts this question has been asked. The answer given being “wherever an organisation needs or wants to know more about their suppliers, customers and or consumers, past, present and for the future.” Rarely is the market audit and review made in isolation but in parallel or within a sequence of specialist reports. These are frequently financial reports, where the key issues for quantum are those of forward sales volume and value. Reviews from the different specialist perspectives of two practitioners have proved helpful to the Courts.

“To be “true” and “fair”, audits must be systematic, critical, integrated to the organisation’s planning and without bias”

What is a marketing audit?

Essentially this is a structured approach to data collection, analysis and review to identify key issues and priorities for the reduction of risk in forward forecasting. For most organisations this will focus forward planning to achieve agreed aims. For quantum these audits answer the key questions about the organisation.

- What is their offer?
- What was the immediate impact of the event(s) being considered?
- What is the longer-term impact?

As with any benchmark, marketing audits typically cover internal and external issues, ie those they can respond to and try to influence with those where there is a level of decision making and control.

External audits look at market and sector trends, supplier, competitive and customer behaviour whilst internal audits look at the specifics of the organisation’s own resources and performance, be these the capacity and quality of their people, plant and/or processes which provide the products and services offered.

External monitors are necessarily easier to access, using publicly available data eg market size trends, population sizes, ownership of key assets, attitudes to current issues etc whilst internal monitors such as market shares may or may not be reported in business/trade press and profit margins/costs are minimally reported, if at all. Some markets are researched commercially, others may be too small for a research agency to monitor profitably or the key organisations may be large enough to commission their own confidential reports.

External issues apply to all consumers and suppliers of a market and are identified as opportunities and threats. Internal issues are identified as the differential strengths and weaknesses of that particular organisation, section and/or brand relative to competition.

What have marketing audits delivered?

For example in one case, publicly available ie free to user, data was combined with the agreed purchase of commercially available market research. The initial instructions had been drafted without knowledge of this source or its contents, which were considered relevant to the case and resulted in revised instructions. The Court was supportive of the use of the industry standard research to benchmark this Claimant’s case in addition to the use of publicly available data. Fact was used to support the opinion provided.

Recently the potential of a planned raw material supply was questioned by the Crown Prosecution Service and assessment of the likely viability of the imported ingredients was to be reviewed. By definition the new offer had no track record of its own but there was factual evidence available of the relevant current and potential market sectors, competitors and their current supply channels and consumers. The external market audit indicated that a market clearly exists, detailing its size, growth and value, each of which were quantified in commercially available research. In 2005 the Jury found defendant not guilty. An internal audit would have been able to review in-house resources and the relative competitiveness of the offer.

Choosing one or more Experts?

Understanding the question helps to identify who should provide the answer. Are there several interrelated marketing issues? Here a practitioner with a broad, strategic and operational experience maybe selected. Is there just one issue? Or a very specific industry? Here choice of a specialist from that industry is preferable. Experts on receipt of an enquiry must satisfy both the enquirer and themselves that their skills, experience and contacts are relevant.

Jenny Cotton

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Seminars

Knees and Knecks

At a recent expert forum organised by the Civil Justice Council the proposition was floated that in low value personal injury cases a single report by a GP at a pre-determined fee was all that was necessary. But does this not oversimplify the issues? Two

well-known orthopaedic surgeons will consider the implications for whiplash and knee trauma. Given also their sporting eminence this promises to be an enjoyable as well as educational evening and one that should be on your **'must attend'** list.

Date: 22 September 2005
Venue: BUPA, BUPA House 15 - 19 Bloomsbury Way, London, WC1A 2BA
CPD 1 Hour Rate: Members £25

Case Law Update

A competent expert witness must be aware of the relevant case law affecting their work, as recent cases concerning criminal court procedure and the Phillips v Syme case have shown.

Following the very popular and successful seminar last year, this

seminar will continue where the last one left off, and examine the current cases that are affecting the expert's obligation to the court.

Both Civil and criminal cases will be covered, so whatever your field, this seminar should not be missed!

Date: 20 October 2005
Venue: Irwin Mitchell, 150 Holborn London EC1N
CPD 1 Hour
Rate: Members £25

Experts Protocol

Lord Phillips, Master of the Rolls, launched the Experts Protocol on 22 June 2005. Intended to replace the existing Code of Guidance on Expert Evidence it comes into force on 5 September this year. Drafted by Mr Justice Bean and HH Judge Nic Madge it follows very closely its predecessor

document in order and language, but importantly it reflects all the changes to the Civil Procedure Rules 1998 and it's Practice Direction and therefore constitutes the most up-to-date statement of best practice for expert witnesses. We are delighted that one

of the authors, Judge Nic Madge has agreed to speak.

Date: 24 November 2005
Venue: Irwin Mitchell, 150 Holborn London EC1N
CPD 1 Hour
Rate: Members £25

Courses

Basic Law Course

You have been instructed by solicitors to provide expert evidence and you want to ensure that you can fully reflect your professional expertise in your evidence. But you're not confident that you know enough about the law and you're not familiar with the legal environment in which you'll be operating.

The basic law course will equip you with what you need to know about both civil and criminal law; the roles of judge, jury, barrister, solicitors, the police, and the Crown Prosecution Service; the law of evidence; hearsay and opinion; and disclosure. The University of Liverpool Law Faculty has compiled comprehensive course material which will form a permanent source of information for you.

Date: 5 September 2005.
The Diskus, Transport House, London WC1.
CPD points: 5 hours.

Case notes: Camilla Macpherson, Allen & Overy

Joe Armstrong, Nicola Connor v First York 2005 WL 62205

This case arose from a road traffic accident in which the claimants claimed to have suffered spinal injuries. The issue was whether the forces generated by the impact would have been sufficient to jolt them in their seats and cause those injuries. The single joint expert, a forensic motor vehicle engineer with much experience in matters of this type, considered that there would have been no jolting. This evidence was contradicted by the evidence from the claimants themselves.

At first instance, the judge decided in favour of the claimants, who he considered had given evidence in "a transparently truthful, guileless way". The defendant appealed.

In the Court of Appeal, the case of *Coopers Payen Ltd v Southampton Container Terminal Ltd* was considered at length. This case was reported in the Autumn/Winter 2003 EWI Newsletter and again centred on a situation in which a witness of fact and an expert witness disagreed. The court in *Coopers Payen* gave guidance for dealing with a situation where a single expert gives evidence on an issue of fact on which direct (and contradictory) evidence is also given, and the evidence is equally compelling. The judge must consider whether he can reconcile the expert evidence with the factual evidence, and if he cannot do so, then consider whether there may be an explanation for the conflict or for a possible error by either witness. He must then make a considered choice as to which evidence to accept.

On considering *Coopers Payen*, the first instance judge noted that the court could not sit on the fence, and must therefore make a choice as to which evidence to accept. He concluded that, since he did not consider there to have been fraud on the part of the claimants, whom he found to be honest, then there "must be, although..I cannot say what it is, something which is not accurate in [the expert's] evidence in this particular case. I cannot reconcile the evidence of the expert witness with the witness of fact. I can only say that there must be a possible error."

The Court of Appeal, refusing the defendant's appeal, held that the judge had directed himself

correctly. Brooke LJ, giving the lead judgment, noted that "there is no principle of law that an expert's evidence in an unusual field – doing his best, with his great experience, to reconstruct what happened to the parties based on the secondhand material he received in this case – must be dispositive of liability in such a case and that a judge must be compelled to find that, in his view, two palpably honest witnesses have come to court to deceive him in order to obtain damages." Nor did the Court of Appeal consider that, in rejecting expert evidence, the first instance judge had to be able to explain why that evidence was wrong. If a judge is convinced, on proper evidence, that the claimants are telling the truth, then this may be reason enough for declining to accept expert evidence.

Carol Breeze v Dr Saeed Ahmad 2005 WL 636055

The claimant in this case appealed from a decision of the county court that, although the defendant GP had breached his duty of care to the claimant's partner, the breach had not caused his death and the GP had not therefore been negligent.

In coming to this decision, the judge had heard evidence from two experts. He found the evidence of one of them particularly compelling, particularly since it appeared to be supported by recent literature and two papers in particular. The Court of Appeal found it to be clear from his reasoning that the judge had accepted that the expert had accurately summarised the contents of the papers, that the papers supported the expert's evidence, and this support affected the judge's assessment of the value of his evidence. The absence of such literature on the part of the other expert also undermined his view of her.

In fact, the judge had not seen the papers, nor had the expert had them in court when he gave evidence. The judge therefore had to take on trust what the expert said about them. The claimant argued that there had been no opportunity to demonstrate that the papers were at least neutral and might even have supported the other expert's evidence.

Bennett J, giving the lead judgment, stated that this was a case where (per CPR r.52.11(3)) the appeal should be allowed because the decision of the lower court was "unjust because of a serious procedural or

other irregularity in the proceedings". The judge had placed more weight on the literature than he should have done. The case was remitted for a retrial.

Clearly this case shows the importance of including all the relevant literature. As an expert you need to liaise with your instructing solicitor to ensure that the literature is included in the court bundle.

The Owners and Bareboat Charterers of the vessel "Global Mariner" v the Owners and Bareboat Charterers of the vessel "Atlantic Crusader" [2005] EWCH 380 (Admlty)

This case concerned a collision between two vessels in the River Orinoco in Venezuela. As a result of the collision, one of the vessels, the Global Mariner, sank. It was argued by her owners that the Atlantic Crusader, the other vessel involved in the collision, was entirely or mostly to blame.

In the event, the Admiralty Court held that the Atlantic Crusader was not responsible. The court also took the opportunity to set out the correct practice in collision cases for dealing with the answers of nautical assessors to questions from the judge, in light of the Court of Appeal decision in *Owners of the Bow Spring v Owners of the Manzanillo II* (2004) EWCA Civ 1007, which I reported in the EWI Newsletter for Autumn/Winter 2004. The Court of Appeal had held in that case that a failure to provide counsel with an opportunity to respond to the answers of nautical assessors was incompatible with Article 6 of the European Convention on Human Rights (namely, the

right to a fair trial).

An expert assessor is appointed by the court under CPR r.35.15 to "assist the court in dealing with a matter in which the assessor has skill and experience." Gross J, giving the lead judgment in the Global Mariner case, summarised the "proper practice in all collision cases" as being as follows:

"1. The range of topics on which advice might be sought from the Assessors should be canvassed with counsel by, at latest, the stage of final submissions.

2. Ordinarily, the questions asked of the Assessors by the Judge should not stray outside the range previously discussed with counsel....

3. The questions ultimately put by the Judge.... should be disclosed to counsel before any draft judgment is handed down.

4. Counsel should thereafter be given the opportunity to make submissions to the Judge, as to whether the advice given by the Assessors should be followed...

5. Generally speaking, the interests of proportionality and finality will make it unnecessary to repeat the procedure after the Judge and Assessors have had the opportunity of considering the parties' submissions and any suggested further or revised questions."

He also gave an explanation for this practice: "The aim is to strike the right (and proportionate) balance between the desirable goal of transparency on the one hand and the need to curb the cost and delay inherent in the "ping-pong" of post-bearing exchanges on the other."

INDEPENDENT, IMPARTIAL IN SUPPORT OF THE ADMINISTRATION OF JUSTICE

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