Your Witness

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Disciplining experts

It gives me no pleasure to draw attention to judicial criticism of expert witnesses. However, the instance we report in this issue (see page 7) is important, if only because it is the first occasion on which a High Court judge has sought to get an expert disciplined by professional bodies for failing in his duty under CPR.

The case raises a number of questions.

(1) The expert may have been mistaken in the opinions he expressed, but it nowhere appears from the judgment that he did not honestly hold them. In such circumstances, did he deserve quite such a public drubbing as he received on this occasion?

(2) The criticisms of the expert all related to his conduct as an expert witness. His skill and conduct as an architect were not in question. In these circumstances, was it appropriate that the criticisms should have been referred to the Architects Registration Board or the Royal Institute of British Architects?

(3) Is it in the public interest that judges should leave the disciplining of experts to others? How, indeed, could judges hope to do so with experts – and there are some – who are *not* members of a professional body? Would it be more satisfactory to devise a sanction that the courts themselves could impose and that could be used against any expert who is in flagrant breach of his or her duty to the court?

One course already open to the courts is to do as Mr Justice Singer did last year and rule that future applications for leave to instruct a particular expert should not be granted without prior scrutiny by a High Court judge. More controversially, perhaps, courts could consider making a wasted costs order against the expert.

Certainly, having the court impose the sanction would also give the expert the opportunity to appeal the decision straightaway. Is this preferable to having the expert endure long drawn out investigations by one or more professional bodies before being given the chance to show why he or she considers the court's criticisms to be unwarranted or unjust?

One final comment. Although one can appreciate Mr Justice Jacob's irritation at having to hear a case that was so clearly lacking in merit, he made no criticism in his judgment of the claimant's legal advisers or of the Legal Services Commission (LSC) which was funding the action. The former, at least, would have been aware of the weaknesses in the claimant's case, and yet they must have assured the LSC that the case had at least an evens chance of succeeding.

As for the LSC, it is supposed to be operating much more stringent procedures nowadays for ensuring that taxpayers' money is not wasted on undeserving litigation! All in all, it does seem more than a little unfair to have pinned on the expert the larger part of the blame for the case ever coming to trial.

I hope that before other judges rush to follow Mr Justice Jacob's lead, they will give due consideration to some of these issues.

Another new role for experts?

In the last issue we drew attention to a suggestion made by Lady Justice Hale that neutral persons might be appointed to chair meetings of experts. She thought that this could be of particular value in circumstances where clients were concerned about the pressures that can influence debate among colleagues in a narrow area of expertise. Her Ladyship was of the opinion that such a person would probably need to be a lawyer experienced in that field of litigation, but her suggestion prompted one of our readers to float another idea that would definitely require the use of an expert.

Dr Poloniecki is a medical statistician, and he has recently had the experience of advising a firm of solicitors that found itself seriously out of its depth when it came to consider the reports it had obtained from him and a number of other experts. The firm appeared to have selected the experts by a variety of means, without establishing in advance the relevance of their respective expertise. It seemed that the experts' social eminence and court persona might have counted for more.

As a result of this experience, it occurred to Dr Poloniecki that, in substantial cases, solicitors might do better to instruct first of all an expert in the general area, e.g. medicine. This person could then help the firm to identify other experts with the precise expertise the case required. The 'intermediate' expert – intermediate, that is, between the specialists on the one hand and the lawyers and client on the other – might also summarise the specialists' reports for the latter's benefit, drawing attention to any technical points on which they were in conflict.

The Part 35 Practice Direction already makes provision for something of this kind when a court directs that evidence on a particular issue is to be given by a single expert, even though there may be a number of disciplines relevant to that issue. Might there be a case, I wonder, for widening that concept in the way Dr Poloniecki suggests?

Chris Pamplin

Inside

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News

Experts set to lose money as another agency goes bust

Another referral agency goes bust

Chancery Medical Limited stopped trading earlier this year, and at a creditors' meeting on 8 March a resolution was passed for the voluntary winding up of the company. At that date it owed its creditors – mostly experts, of course – a total of £959,000, and it had realisable book debts of £895,000. In other words, unsecured creditors should get something, although how much will depend on settlement of the claims of preferential creditors (chiefly the Inland Revenue), repayment of the company's bank loan and the costs of the liquidation. It seems that the best experts might hope for is a dividend of 85p in the £.

How soon any dividend might be paid to these creditors is equally uncertain. Most of Synapse's book debt was with Irwin Mitchell, but Chancery Medical was owed substantial sums by several law firms. It could take the liquidator as much as 3 years to gather them all in.

Chancery Medical was initially incorporated in June 1998 as Chancery Executive Limited, and changed its name in March 2000. Its sole business was that of arranging medical examinations of people who were making personal injury claims. For 2 years the company traded successfully, but then it experienced a period of rapid growth that, all too soon, got it into difficulties.

The basic problem was one of cash flow stemming from the terms the company negotiated with its customers and suppliers. With the former, it had generally agreed to accept payment when cases concluded, and that was taking an average of 2–3 years. Until quite recently, though, the company had been instructing experts on the basis that it would pay them within 6–9 months. In short, Chancery Medical, like Synapse, was caught in a trap of its own making. There must now be many medical experts out there ruing the day they agreed to accept instructions from either firm.

Comment

As we pointed out in *Your Witness 25*, referral agencies meet a need brought about by a number of factors. These include the introduction of 'uninsured loss recovery' clauses in motor policies, the introduction of conditional fee arrangements for funding civil claims, and, most recently, the removal of personal injury actions from the ambit of legal aid. As solicitors began finding that their margins were being squeezed, they increasingly turned to agencies to obtain the expert reports needed. The problem for the experts is that, for all the difficulties they experience in dealing with solicitors, direct instruction by one offers a much better guarantee that their fees will eventually be paid.

Our advice remains as before: be wary. If you are tempted to accept instructions from a referral agency, check out its credentials first, ideally with colleagues who have worked for it. Above all, do not relax your own terms of business by agreeing fee rates that are appreciably lower than those you normally charge or payment periods that are much longer than you normally expect.

Training and conference update

Academy of Experts

The Academy has a number of courses on offer to experts, from a Foundation course for beginners to CPR compliance and SJE practice. Call 020 7637 0333 for dates, locations and costs.

Association of Personal Injury Lawyers (APIL) and College of Personal Injury Law (CPIL)

APIL and CPIL are joining forces to run a one-day course entitled 'Improve your skills in medico-legal report writing'. Designed specifically for medics, the course aims to provide experts with a full understanding of the CPR requirements of expert witnesses. Fee: £195 + VAT. 6 November, Manchester; 11 December, Bristol. Contact Caroline Rising on 0115 938 8714.

Bond Solon

Bond Solon's annual conference is scheduled for Friday 8 November in London. Fee: £150 + VAT for bookings before 30 June.

Several one-day courses in report writing, cross-examination, courtroom skills and marketing will be run throughout the summer in both London and Manchester. Fees range from £275 to £395 + VAT. Call 020 7253 7053 for details.

Expert Witness Institute (EWI)

The EWI is running two evening seminars in July to discuss the expert 's role and the model form of report. Non-member fee: £30 per seminar. On 13 September, a course offers an introduction to civil and criminal law. Non-member fee: £300.

The EWI's annual conference will take place on 25 September in London. Non-member fee: £250.

Call 0870 366 6367 for more details.

Professional Solutions

Professional Solutions has developed two medico-legal seminars – on report writing and expert evidence. The company also runs seminars on writing proofs of evidence and giving expert evidence for public inquiries. Seminars are run throughout the year and across the UK. Call 020 7356 0838 for further details.

Society of Expert Witnesses

The Society's AGM and annual conference will take place on 18 October in Reading. Members are invited to attend a dinner on the Friday night, as well as Saturday morning workshops. Non-member fee: £189.33 (incl. VAT). Call Teresa Baron on 0845 702 3014 for more details.

Selecting SJEs

In the reports he wrote on his Inquiry into civil justice in England and Wales, Lord Woolf identified the excessive use of expert evidence as a major problem of the system. It was felt that this made litigation more complex, contributed considerably to its cost and was frequently the cause of delay. The solution he recommended was two-fold: that the calling of expert evidence should be placed under the complete control of the court, and that, wherever possible, the evidence should be provided by a single expert.

SJE instructions are still the exception

The Civil Procedure Rules 1998 gave effect to both these changes, and in the 3 years that have elapsed since they came into force, there has been considerable increase in the use made of single joint experts. This much is evident from the series of expert witness surveys that J S Publications has conducted over the past few years. In 1999, barely 30% of the responding experts had any experience of working as a single joint expert. By September 2001, that proportion had risen to 80%.

What is it about the single joint expert regime that is discouraging parties from using them more often?

However, the really intriguing finding from last year's survey was that while, on average, experts were being instructed as a single joint expert 12 times a year, they were being instructed much more frequently on behalf of one party alone – on average 29 times a year. For cases on the multi-track, it is, of course, much more likely that the parties will have been allowed to call their own experts. But 9 out of 10 cases that go to trial are allocated to the fast track, and for them the presumption has to be that single joint experts will be used wherever possible.

Clearly, this is not happening as much as it might. Indeed, Court Service data released last spring showed that in the county courts, party-appointed experts were still being used in over half the cases involving expert evidence. So the question has to be asked, 'Why?' What is it about the single joint expert regime that is discouraging parties from using them more often, or indeed the courts from insisting that parties do so?

Is the appointment system to blame?

One explanation may lie with the means by which single joint experts come to be appointed. The Rules offer no guidance here, since they only stipulate the fall-back procedure should parties find themselves unable to agree on a suitable expert. (This involves the court taking a hand, and parties are understandably averse to letting that happen.) But what method should parties use to select an expert who is mutually acceptable?

The approach usually adopted is that prescribed in the pre-action protocol for personal injury cases, or something very like it. This requires one of the parties to submit to the other a list of one or more experts considered suitable. The other party then has a fortnight in which to object to any of the experts on the list, after which the first party may instruct one of those against whom no objection has been raised.

Note, however, that this is a method for selecting a single expert whom the first party may then instruct. The expert is not being *jointly* instructed, and the first party does not have to disclose the expert's report to its opponent. Furthermore, if the latter objects to all the experts on the list submitted, it is free to appoint an expert of its own, though with the possibility that the side may be penalised as to costs at a later stage.

Fear of proposed SJEs being claimant-biased

For parties directed by a court to appoint a single joint expert, the options are more limited: either agree on one together or have the court decide for you. It's little wonder, then, that litigants sometimes feel they are being pressured into selecting an expert about whom they know too little and in whom they may have even less confidence. Even when more than one name has been proposed, the solicitor receiving the list can be pretty sure that the sender would be happy to appoint any of the experts on it. Yet if their names are unfamiliar, the recipient may have too little time to check out the experts thoroughly. Deciding which may remain on the list then becomes a lottery, or worse.

Practical experience

As one reader described his experience recently:

> 'I have taken instructions as a joint expert, but only one of these cases has so far progressed to a conclusion. In the other cases I think the concept failed because the solicitor for one side approached me first and then tried to sell my suitability to the other, who perhaps feared a less than joint approach as a result. In the case that completed, the solicitors agreed on my name before I was approached. Perhaps this is the root of the reluctance to use single joint experts.'

One can appreciate why a solicitor should want to establish from the very outset whether the expert being proposed for joint appointment would be available, and willing, to be instructed. But it is also easy to see how that can be misconstrued.

Agree on the SJE before first contact?

What do you think?

We would be interested to know if other readers have had similar experiences, and, if so, whether anyone can suggest alternative ways of selecting single joint experts that are more likely to enjoy the confidence of both the appointing parties.

Answering questions

The court controls the calling of expert evidence

CPR 35.1 states that 'expert evidence shall be restricted to that which is reasonably required to resolve the proceedings'. This objective is achieved by putting the calling of expert evidence under the complete control of the court (Rule 35.4). Furthermore, Rule 35.5 provides that that evidence will be given in a written report 'unless the court directs otherwise.' Clearly, though, there are dangers in a court receiving expert reports that have not been scrutinised for inconsistencies and ambiguities and whose authors may not be cross-examined on them. Hence, the countervailing provision (Rule 35.6) enabling parties to seek clarification of an expert's report by means of written questions, the answers to which will then form part of the report (see panel).

As the *Chancery Division Guide* and the *Queen's Bench Guide* both emphasise, the main purpose of the procedure is to help parties understand the reports that have been disclosed to them by their opponents. If, however, questions are put that are oppressive in number or content, or if, without the permission of the court or the agreement of the other side, questions are asked for any purpose other than clarification of an expert's report, the *Guides* warn that 'the court will not hesitate to disallow the questions and to make an appropriate order for costs against the party putting them'.

For a rule that is so simple and straightforward, it is surprising how often experts and lawyers have problems with it. Indeed, to judge from their comments, some of them believe the procedure to be not so much used as abused.

At J S Publications, we first became aware of this in February 2000, following a survey we conducted of readers' experiences while acting as single joint experts (SJEs). Of 60 respondents who had by then been instructed as SJEs at least 10 times, nine thought that the number of questions asked was generally excessive. One surveyor had had no fewer than 54 questions put to him about one of his reports, while an occupational therapist had notched up 76 questions on one of hers. There are, however, special considerations concerning the questioning of SJEs that we will touch on later.

Clarification of reports risks delay and increases costs

It is not just our readers who have encountered problems with the procedure. Instances have been reported in other journals of experts receiving several successive batches of questions. Others have had questions sent to them months after their reports were exchanged. And at least one expert claims to have been asked questions in persuance of the rule by telephone!

Leave it to the lawyers to sort out

It cannot be stressed too strongly that Rule 35.6 was never intended to provide a substitute for cross-examination, still less a means for intimidating an opponent's expert. However, the issue of what constitutes excessive or onerous questioning has yet to be tested in court. When it is, the case will almost certainly be decided on grounds of proportionality. In other words, it will be judged in relation to the amount of money at stake, the importance of the case, the complexity of the issues and the relative financial positions of the parties. Clearly, these are matters for lawyers, not the experts they instruct, and this is why we believe it best that experts leave it to the lawyers to decide what needs to be done about any apparent abuse of the procedure.

There are various courses of action open to a solicitor whose expert has been sent questions that seem excessive in number or otherwise impermissible.

(i) Remonstrate with the solicitor who sent them and endeavour to persuade him or her to modify them.

(ii) Apply to the court to have the questions disallowed.

(iii) Accept the situation and instruct the expert to answer the questions – most likely if the solicitor suspects that the court may be glad to have the additional information anyway.

The issue of cost

In dealing with issues of this kind, two considerations will be uppermost in the minds of the lawyers on both sides, and one of these is cost. The Practice Direction requires that when an expert answers questions put in accordance with Rule 35.6, it is his or her instructing party (and in practice that means instructing solicitor) who must pay the expert for answering them. Though at first sight this may seem odd, it is in fact sensible, since the two are already in a contractual relationship and will have – or, at least, should have – agreed the basis on which the expert is to charge his or her fees.

In any event, as the Practice Direction also reminds us, this does not mean that the client will necessarily foot the bill. If the case is won, the cost of answering the questions should be recoverable from the party that put them. And even if the case is lost, the winning party could still be ordered to reimburse the loser for the cost of having questions answered if the court finds that they were excessive or otherwise out of order.

The risk of delay

The other consideration that should be exercising the lawyers running the case is the effect that asking questions of an expert may have on keeping to any timetable the court has imposed.

Nowadays, the great majority of cases – perhaps as much as 80% of them – are allocated to the fast track. For cases on that track, no more than 30 weeks should elapse between allocation and trial. Typically, in such cases, the court will require that experts' reports be exchanged within 14 weeks of allocation, leaving just 16 weeks for the lawyers to complete all the remaining stages.

Let's consider for a moment what that involves. The party receiving the report of its opponent's expert has 4 weeks in which to consider it, consult its own expert about any aspects it does not understand, and, if necessary (and with the expert's help), frame questions to put to the author of the report. Then, if the party is lucky, it will receive replies to its questions in another month, by which time the trial date may be only 8 weeks away. All this should, as they say, concentrate minds wonderfully on keeping questions short and to the point, and not asking more of them than are absolutely necessary – though, sadly, it does not always do so.

The meaning of 'clarification'

Clause (2) of Rule 35.6 ends with an important proviso that is still, on occasion, overlooked by litigants and their advisers. It enables written questions:

- to be put more than once
- to be put more than 28 days after reports have been exchanged, and
- to be put for purposes other than clarification

if the court gives permission *or the other party agrees*.

The kinds of question that might be permitted but that went beyond clarification was the issue before the Court of Appeal in *Mutch -v- Allen*, a case we reported in *Your Witness 25*. The Court of Appeal ruled that a court is entitled to be provided with all the evidence relevant to its decision in the most cost-effective and expeditious way. To that end, it is legitimate for a party to ask questions of an expert witness in extension, as well as clarification, of his or her report – providing, that is, the question deals with a material point the witness did not cover in the report, even though it was within his or her expertise.

Now questions in extension of the report are permitted

Always seek permission first

Clearly, the issues involved in answering questions are not quite as straightforward as they might seem from a quick reading of the rule or the associated provisions of the Part 35 Practice Direction. For that reason, our advice to experts is that, other than in the most trivial circumstances, experts should *always* establish that they have their instructing solicitor's permission before answering any questions from another party on a report they have written.

If the questions have been submitted via the instructing solicitor and have been forwarded with a request that the expert respond to them, all well and good. Even here, though, there is a possibility that the solicitor may not have appreciated just how much work might be entailed in answering them. In such circumstances, he or she may well appreciate a quick note enclosing an estimate of the time it will take to comply with the request and a reminder of the expert's fee rate. That should produce an equally prompt response either confirming or countermanding the previous instruction.

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Extract from CPR Part 35

Written questions to experts, CPR 35.6

(1) A party may put to -
  (a) an expert instructed by another party; or
  (b) a single joint expert appointed under rule 35.7,
  written questions about his report.

(2) Written questions under paragraph (1) -
  (a) may be put once only;
  (b) must be put within 28 days of service of the expert's report; and
  (c) must be for the purpose only of clarification of the report, unless in any case -
    (i) the court gives permission; or
    (ii) the other party agrees.

(3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.

(4) Where -
  (a) a party has put a written question to an expert instructed by another party in accordance with this rule; and
  (b) the expert does not answer that question,
  the court may make one or both of the following orders in relation to the party who instructed the expert -
    (i) that the party may not rely on the evidence of that expert; or
    (ii) that the party may not recover the fees and expenses of that expert from any other party.

Extract from Part 35 Practice Direction

Questions to Experts

5.1 Questions asked for the purpose of clarifying the expert's report (see rule 35.6) should be put, in writing, to the expert not later than 28 days after receipt of the expert's report.

5.2 Where a party sends a written question or questions direct to an expert, a copy of the questions should, at the same time, be sent to the other party or parties.

5.3 The party or parties instructing the expert must pay any fees charged by that expert for answering questions put under rule 35.6. This does not affect any decision of the court as to the party who is ultimately to bear the expert's costs.

Get permission before answering questions

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Answer questions as quickly as possible

The need for a party-appointed expert to seek permission to answer questions is even greater if questions have been forwarded by or on behalf of his or her instructing solicitor without specific instructions, or if they have come direct from the questioning party. Although the Practice Direction requires that any question sent direct to an expert be copied to the party or parties by whom he or she has been instructed, that does not always happen. Without checking, therefore, there is always a risk that the instructing solicitor may not have seen the questions, or considered the implications of the expert answering them, before the expert begins work.

Answering the questions

Once the expert has been given the go-ahead, the task of answering the questions should be started as quickly as possible. The rule lays down no time limit for this, although in their respective Codes of Guidance both the Academy of Experts and the Expert Witness Institute recommend that the answers be supplied within 28 days.

If the case is on the fast track, though, time will already be pressing. In such circumstances, the parties would doubtless appreciate a faster turnaround than that.

If the expert should anticipate any difficulty in replying within a suitable time scale, both parties should be advised of the estimated delay. They can then be left to consider whether to make a joint application to the court for postponement of the trial date.

Experts should always bear in mind that answers to questions put in accordance with Rule 35.6 automatically form part of an expert's report. They are therefore covered by the Statement of Truth included in that report. In particular, answers must represent the expert's 'true and complete professional opinion'. For similar reasons, experts should be wary of allowing their answers to betray any of the irritation or annoyance they may feel about being asked to 'clarify' a report that they regard as crystal clear. It is for the court to decide whether the questions were necessary and, if it sees fit, to penalise the party asking them.

Answers to questions form part of the report

Finally, when the answers are ready, they should be sent direct to the party that put them. In addition, two copies should be sent to the expert's instructing solicitor, with the request that one copy be forwarded to the court. The expert will no doubt want to enclose with these copies an invoice for the additional work done.

Single joint experts: a special case

Rule 35.6 applies to all experts, whether they have been appointed by one party or jointly by two or more. For single joint experts, though, the demands placed on them by the rule can be more onerous. Single joint experts may well find, for example, that they have several sets of questions with which to contend. Even if only one of the parties puts questions, the single joint expert will need to keep all parties informed of what is being done about them. In particular, the single joint expert should advise the parties of any problems he or she may have about the questions or with answering them as quickly as the parties require. Lastly, of course, the single joint expert should apprise all the parties of the likely cost of answering the questions received, since each will be jointly and severally responsible for paying for this.

As before, our advice to experts for dealing with issues such as these is to let all parties know how matters stand and leave them to resolve any problems that emerge. It is only as a last resort that an expert should do what some authorities recommend and apply to the court for directions to that end.

The pre-action parallel

Most of the existing pre-action protocols encourage the use of single experts to investigate the technical issues of a case before proceedings are issued. The hope is, of course, that the expert's report may facilitate a settlement of the dispute and render proceedings unnecessary. It is important to note, though, that while the expert may be jointly agreed by the parties, he or she will be instructed by only one of them. Furthermore, that party is not obliged to disclose the expert's report to the others, though of course it will normally do so.

Assuming that the agreed expert's report has been disclosed, it is generally held that any of the parties may submit written questions to its author. In the more relaxed regime that pertains at this stage of litigation, the only requirement governing the questions is that they should be relevant. The questions will need to be sent to the expert via his or her instructing solicitor, and none of the protocols specifies time limits, whether for putting or for answering them. The personal injury protocol does, however, require the expert to send answers separately and directly to each of the parties.

One final point. Unlike the procedure for questioning of reports exchanged after proceedings have been issued, the costs of an expert answering any during the pre-action stage will usually be borne by the party asking them. This is logical, because if the protocol being followed achieves its purpose, the dispute may settle there and then, in which event each side will be responsible for meeting its own costs. However, it also means that experts instructed in accordance with a pre-action protocol should ensure that their terms of agreement take account of this situation. Ideally, experts should require their instructing solicitor to pay them for answering all the questions forwarded, leaving the solicitor to recover such sums from the other parties as may be appropriate.

Court reports

Judicial criticism of experts is not a new phenomenon, but these days it seems to be surfacing in judgments more frequently. Usually it is quite urbanely expressed, along the lines of 'I regret to say that I was not at all convinced by Mr X's evidence'. Sometimes, though, it can be vehemently dismissive.

It is to be expected, of course, that where parties have permission to instruct their own experts, the opinions the experts advance will differ. It is the essence of the adversarial system that the court must then decide which set of opinions it prefers. Moreover, it must state its reasons for favouring the evidence of one expert over that of another. It is when the judge concludes that an expert is so lacking in objectivity as to have completely failed in his or her duty to the court that the fur begins to fly. One such case was that of *Gareth Pearce -v- Ove Arup Partnership Ltd and others* which came before Mr Justice Jacob in the autumn of last year.

The action

The case was brought by an architect who had qualified in 1986. His final-year project as a student had been to design a town hall for the Docklands. While still a student, Mr Pearce had worked as a modelmaker for one of the defendants, a firm called the Office for Metropolitan Architecture (OMA). After gaining his diploma, he worked there again, though only for a few months.

OMA was co-founded in the 1970s by the renowned Dutch architect Rem Koolhaas, whose designs have won a number of major competitions. One of his buildings is Rotterdam's Kunsthal, or art gallery, which was built in the early 1990s. Although Mr Koolhaas had ceased to be a partner at OMA by the time Mr Pearce worked there, he continued to take a close interest in the firm and was a regular visitor to its London offices.

The essence of Mr Pearce's case was that on one such visit in 1986, Mr Koolhaas must have seen his drawings for the putative town hall and surreptitiously copied them, for Mr Pearce went on to allege that the design of the Kunsthal in Rotterdam bore such a close resemblance to his for the town hall that it must have been based on those drawings. No fewer than 52 similarities between the designs were pleaded. Since Mr Koolhaas categorically denied making any use whatsoever of the claimant's work, he stood accused, in effect, of perjury as well as plagiarism.

The judgment

The trial of the action took place in October 2001 and judgment was handed down early the following month. In it, Mr Justice Jacob stated his conclusion at the very outset: the allegations had no foundation whatsoever. They were pure fantasy, and preposterous fantasy at that. The case for the claimant had not remotely been made out, even to the point that any of the alleged similarities called for explanation.

How was it, then, that a case so completely lacking in merit could have taken up 6 days of the High Court's time? The defendants had, indeed, sought to get it struck out 5 years previously, and they had succeeded in doing so at first instance. On appeal, though, it had been ruled that the action should proceed to trial. This was partly because tracings of details from the plans for the two buildings had been produced in the Court of Appeal which, when overlaid, appeared to give an exact fit. Another reason was that the test for striking out a pre-CPR case was much higher than it is now. Pre-CPR the applicant had to show that there had been an abuse of process, whereas today it is sufficient to demonstrate that the action has no realistic prospect of success.

However, in Mr Justice Jacob's view, a major part of the blame for the case ever coming to trial – with its attendant cost, waste of public funds and loss, especially, of Mr Koolhaas's professional time – lay with the claimant's expert witness, a partner in a City-based firm of architects, whom we shall call Mr A.

Expert accused of wasting time and public money

The expert witness

That the witness was in for a drubbing was immediately clear from the use of quotation marks in the judge's first mention of his 'expert' evidence. Thereafter, various of his suggestions and opinions are described as 'absurd' or 'unbalanced', much of his report is dismissed as 'fantastic', and overall his evidence is held to be 'biased' and 'irrational'. It would almost seem that in his Lordship's eyes Mr A was incapable of getting anything right.

In the course of a long judgment, Mr Justice Jacob also listed a number of 'blunders' he had detected in the architect's evidence. Notwithstanding the seriousness of the allegation of plagiarism, the witness had not visited the Kunsthal before making his report. Furthermore, he had failed to mention this fact in his report. The witness had never really considered how Mr Koolhaas could have copied the claimant's designs, conceptually or otherwise. He had misidentified features of the Kunsthal when on a site visit with the judge. He had completely misinterpreted an important document in the case. And so on.

His Lordship continued:

> 'So biased and irrational do I find his "expert" evidence that I conclude he failed in his duty to the court… He came to argue a case. Any point which might support that case, however flimsy, he took. Nowhere did he stand back and take an objective view…'

His Lordship then considered the options available to him for dealing with an expert

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Expert accused of failing to take an 'objective view'

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Judge reports 'expert' to professional body

witness whom he deemed to be in flagrant breach of his duty to the court. The Rules were of no help in this, and there was no accrediting body for expert witnesses to whose attention Mr A's conduct could be drawn. But, like most experts, he did belong to a professional organisation, in this case the Royal Institute of British Architects (RIBA). His Lordship saw no reason why his criticisms should not be referred to that body. It would then be for RIBA to decide whether its code of conduct had been broken, and, if so, what sanction to impose. His Lordship did, however, allow the witness 21 days in which to make representations as to why this should not happen.

The aftermath

Representations were duly made on the expert's behalf, but evidently they were not successful in changing the judge's mind. In December, Mr Justice Jacob instructed the defendants' solicitors to forward the judgment and any necessary papers not just to RIBA, but to two other bodies as well. One was the Architects Registration Board (ARB), which maintains the official list of all persons in the UK who are entitled to call themselves architects, and the other was the Academy of Experts, of which Mr A is also a member.

All three of these organisations operate disciplinary procedures and can impose sanctions on their members (or in ARB's case, registrants) for unacceptable conduct or serious professional incompetence. For each of them, too, the procedures involve an initial assessment of the complaint to establish whether, *prima facie*, it involves a breach of the organisation's rules or code of conduct, then an investigation of the complaint and, finally, when all that is completed, referral of the matter to a specially constituted disciplinary panel for a decision as to what sanction should be imposed. All of which takes time!

It is hardly surprisingly, then, that 5 months later none of the bodies considering Mr Justice Jacob's criticisms of Mr A was able to tell us what action, if any, it would be taking. Potentially, though, the sanctions they might impose range from an informal talking to, through a written reprimand (and in the case of ARB, a fine), to formal suspension or even expulsion.

Letters

The new Statement of Truth

Dr Peter Hall, Consultant Psychiatrist, writes:

As ever, you are to be congratulated on the timeliness and comprehensiveness of *Your Witness*: your 'Guidance for Experts' (*YW 27*) is masterly. Would that the Academy and the Institute had the same sense of proportion.

I am writing, however, because the 'new and improved' Statement of Truth which you quote and recommend, while much more rational than the old, seems oddly ungrammatical! Surely it should read, 'I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are. I believe them to be true and the opinions I have expressed represent my true and complete professional opinion'. The 'and' in line 3 of the version you quote seems superfluous and I doubt that either of us would approve of sentences of six lines…

Mr Martin Milling, Consultant Plastic Surgeon, writes:

The language of the new form of words for use as a declaration at the end of expert reports is wholly impenetrable to any ordinary person and really makes very little sense.

The changes in recent years follow the initiative of Lord Woolf, but I am quite sure that he would not sanction this type of language being used in his name. If the lawyers who have looked at this cannot come up with something better themselves, perhaps they should go to Lord Woolf.

It is a sentence up with which I find it very difficult to put.

Comment

I agree: two distinct assertions are being made, and it would have been better had the Rules Committee allowed experts two sentences in which to make them. However, the new Statement seems to have been framed in this way to meet the requirements of the Commercial Court, so maybe the blame lies elsewhere.

What is certain, though, is that it is not open to experts to rephrase the Statement, however tempted they may be to do so. Until the Committee sees fit to revise it again, or Lord Woolf intervenes, the form of words quoted in our last issue (and also reproduced in the 'Guidance for Experts' insert in that issue) is the only one experts may use.

And just to remind you howthe Statement of Truth should now be phrased, here again is the required text, as stipulated in the Civil Procedure Rules:

> 'I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.'

By all means grit your teeth when reproducing this sentence, but use it all the same.

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