Your Witness

Newsletter of the UK Register of Expert Witnesses, published by J S Publications

Why are the big guns joining in?

So, the Attorney General has asked the Court for permission to intervene in the General Medical Council's (GMC) appeal against the judgment of Collins J in the *Meadow* case. But why? What motives are behind the arrival of the big guns?

The office of Attorney General is an ancient one, with the first reported reference to the Attorney General of England being in 1461. His various functions fall into four broad categories:

(i) legal adviser to Government
(ii) superintending minister
(iii) guardian of the public interest, and
(iv) various roles in relation to Parliament and the legal profession.

The Attorney General has a general power to seek leave of the Court to intervene in any case where the Government wishes to bring any point of public policy to the attention of the Court and where the Crown is not already a party. In this case, the Attorney General must surely be acting to bring some point of public policy to the Court's attention that is not already being put by the GMC. Otherwise, why go to the trouble? So, what might this point be?

When should judges refer experts?

Some think that, having regard for the individual responsibilities of judges under the rule of law and the statutory nature of the GMC, perhaps he is seeking clarification of the basis on which judges can substitute their opinions of what constitutes unprofessional conduct for that of the GMC, a body charged specifically by Parliament to make such decisions.

But to pose that question would be to misread what Collins J ruled. He did not say it was for the court to determine whether or not an expert was in breach of any particular professional duty, but simply that the expert was only to be held to account by a professional body *with leave of the court*.

Collins J says:

> *'But I see no reason why the judge before whom the expert gives evidence (or the Court of Appeal when that may be appropriate) should not refer his conduct to the relevant disciplinary body if satisfied that his conduct has fallen so far below what is expected of him as to merit some disciplinary action.'*

In this statement he is seeking to balance the competing public interests of the proper administration of justice – by protecting witnesses from vexatious or trivial actions arising from their evidence – against an aggrieved party's right of redress should an expert go badly wrong.

It is true that the effect of a judge refusing to lift an expert's immunity will prevent a professional regulatory body making its own determination about whether the expert's conduct was unprofessional. But surely this is the only realistic approach?

Only the judge is in a position to balance the public interest of having access to witnesses unafraid to speak their minds in often difficult circumstances against the public interest that an individual should have a right to seek redress against an expert when his or her conduct *within the context of the case* is thought to be seriously wanting. It is far better that a judge draws the balance between these competing public interests than it be left to a morass of professional regulatory bodies, most of which will, quite rightly, have scant knowledge of, or skill in, balancing competing public interests.

Thin end of a wedge?

Or perhaps the Attorney General takes the view that the judgment of Collins J is the thin edge of a wedge that it is not in the public interest to allow. The Attorney General may say that until the Collins J judgment no one had proposed that the context of professional behaviour could completely exclude examination of that behaviour.

But Collins J did **not** propose that the examination of the behaviour of an expert witness should be completely excluded, only that it must be for the Court to consider whether examination by the relevant professional disciplinary body was warranted within the context of the original court case. There is no blanket immunity here.

Comment from the Attorney General's Office

Rather than speculate further, I asked the Attorney General's Office why he had decided to intervene. I was told that the grounds for the intervention included:

- *this is a major public policy issue relating to the administration of justice;*
- *it goes far wider than the medical profession to expert witnesses across all fields; and*
- *as the Government's senior law officer the Attorney is able to present knowledge of all areas of justice and how expert evidence works.*

That last point makes me wonder if the Attorney General has already put in his application to the Expert Witness Institute (EWI) as an Expert in Wanton Intervention. Does he really think the Court of Appeal needs his help in understanding how courts use expert evidence, any more than the High Court needed it from the EWI?

Chris Pamplin

Inside

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Criminal Procedure Rules

Every report must comply fully with the Rules

In October 2005 the Department for Constitutional Affairs (DCA) commenced its consultation process on proposed procedural rules governing expert evidence in criminal proceedings. It was intended that these rules should form part of the newly introduced Criminal Procedure Rules (CrimPR). The main body of rules came into force on 4 April 2005. However, CrimPR rule 33, which was to contain rules specifically regulating expert evidence, was left blank pending consultation.

Given the high-profile cases in which there had been criticism of the expert's role within the criminal justice system, this whole area was viewed as somewhat delicate. It seems that, whatever rules were to be formulated, there was a general consensus that the Criminal Procedure Rules Committee had to get it right. Referring to the rules in general, the Committee stated that the single code would be designed to be accessible, consistent and bring about a cultural change in how cases were managed.

As participants in the consultation process, we at the *UK Register of Expert Witness* gave keen scrutiny to the draft. The drafting of Part 33 afforded the Committee a unique opportunity to recognise and address past problems in relation to expert evidence. It was also to be welcomed that some attempt was being made to codify all the regulations governing experts in the criminal courts and to bring these under the umbrella of the Rules in the same way as CPR Part 35. So, have they got it right?

Duties of an expert

Draft rule 33(1) defines what is meant by an 'expert' and is unremarkable.

Rule 33(2) deals with the expert's duty to the Court. As drafted originally, the Committee proposed that this should simply read '*an expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise*'. This proposal came as something of a surprise. We had expected that the rule would be broadly analogous with CPR 35 in spelling out that the expert's overriding duty was owed to the Court. In our response to the consultation we said so, and the final draft of rule 33(2) now includes this. The final wording is:

(1) An expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise.

(2) This duty overrides any obligation to the person from whom he receives instructions or by whom he is paid.

(3) This duty includes an obligation to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement under Part 24.

Parties must notify experts when reports are served

Form and content of the report

The form and content of the expert report is dealt with in rule 33.3. The requirements are broadly analogous to those for expert reports in civil cases. However, it demands that there should be two 'Rolls Royce' reports covering the expert evidence in detail and written with the expectation that the report will be placed before the court. This is so even if at trial 75% of the evidence is not disputed. The care with which expert reports need to be written in order to comply with the rule means that costs are inevitably increased.

In the civil arena, the majority of cases settle before reaching court and an expert's report is often used as a negotiating tool to bring about settlement. Accordingly, in response to the Legal Services Commission consultation paper, *The Use of Experts*, November 2004, we asked: Is it necessary for reports used in this way to be as detailed as those that will go before the court? If not, then an increase in efficiency and a reduction in costs could be achieved by ensuring experts are instructed to prepare an initial 'reconnaissance' report at an agreed cost – proportionate to the quantum of the case – that would allow the parties to seek a negotiated settlement. Only in the small number of cases that did not settle would the additional expense of a full report, for use in court, need to be incurred.

Although this was envisaged as a useful tool in civil cases, we believe this model could be adapted for use in the criminal justice system to enable agreement to be reached on some parts of the expert evidence at an early stage. The Committee did not adopt this suggestion. Consequently, every report prepared by the expert will have to comply with the rules, no matter what aspect of the evidence is disputed or at which stage in the proceedings it is prepared.

Notice of service

Rule 33(4) creates a specific requirement on parties to notify an expert when his or her report is served on another party.

Pre-hearing meetings of experts

Rule 33(5) deals with provisions for pre-hearing discussion of expert evidence. It states:

(1) This rule applies where more than one party wants to introduce expert evidence.

(2) The court may direct the experts to –

(a) discuss the expert issues in the proceedings; and

(b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.

(3) Except for that statement the content of that discussion must not be referred to without the court's permission.

Here, we feel the Committee has missed a real opportunity to address some fundamental difficulties with expert evidence.

The provisions made for pre-trial meetings of experts are welcomed. They will lead to a better,

and earlier, assessment of expert evidence and also save time by highlighting weak prosecution cases or forcing an early plea by the defendant. This view was supported by 90% of the experts who responded to our survey. However, more than one expert reported that unless the current 'gladiatorial' culture in the criminal justice system can be changed, there is little chance of meetings of experts working in practice.

It is our view, though, and also that of the majority of our survey respondents, that the Committee could have taken this a step further. Many of the problems and controversies surrounding expert evidence in criminal cases have centred around its nature and admissibility, particularly in difficult or novel areas. There has been a strongly voiced opinion from many commentators (including *Your Witness*) that some mechanism is needed for an early review of such evidence. Many proposals have been advanced, ranging from a full-blown pre-trial review of expert evidence (along similar lines to the American model following the ruling in *Daubert*, see *Your Witness* 37) to the more radical suggestion that experts be taken out of the courtroom altogether and complex technical evidence be heard in a pre-trial setting with the lawyers present but no jury. This approach, it has been suggested, would deal with the 'cult of personality' that can develop at trial, as exemplified by the case of Professor Sir Roy Meadow. While this last is, perhaps, too radical an idea for the present, it is disappointing that the draft Rules have made no attempt to grasp the nettle. In this respect they lack the vision and imagination necessary to bring about real reform in this troublesome area.

Taking experts out of the court

The failure of science in the courtroom arises because of the fundamental differences between science and law (see *Your Witness* 37). In our response to the consultation we commented that there is 'a fundamental incompatibility between what science can offer and what the English legal system seeks. And that is "certainty". The courts want it; science cannot provide it. For any hypothesis to be scientific it must be capable of being proved wrong – if only the falsifying evidence could be found. "Falsification", as it is known, means science can never provide absolute certainty'. Most judges, quite reasonably, have only a layman's knowledge of science and hypothesis theory. So how is the scientific evidence to be evaluated?

One solution was proposed by Professor Geoffrey Beresford Hartwell of the University of Glamorgan Law School in his response to our proposed submission to Lord Carter's Review of Legal Aid Procurement (see *Your Witness* 42). He suggested that the Court itself could consider appointing an expert with an understanding of the subject to chair pre-trial meetings, from which a record of agreement and disagreement could be prepared for use in court. It would be that rapporteur's findings (he or she would be a Special Assessor, perhaps, with powers to direct further enquiry where appropriate) that would be the evidence in court, unless circumstances were exceptional. The extra cost of the Special Assessor would be offset by the saving in court time. An additional benefit would be that a jury would hear a distilled version of the expert evidence without the distracting effect of cross-examination on highly technical subjects.

Can expert meetings work in such a gladiatorial arena?

In some respects this scheme is not too far removed from the French model. As with the English system, French litigants must produce sufficient evidence for their action, but when dealing with disputes involving technical issues French commercial judges can appoint *experts judiciaires.* These are court-appointed 'surveyors' whose role is to assist the court in deciding facts that require specialist knowledge.

Whilst there can be no simple answer to the problem and no quick-fix solution, it appears that the Committee has dodged the question entirely. In our response to the consultation we recommended that '*the Rules Committee considers whether the radical power to allow for pre-trial agreement of expert evidence should and could be included within Part 33*' (a proposal supported by 81% of survey respondents). We also proposed that consideration be given to '*whether it is desirable to formulate additional rules to bring Daubert-style assessment of scientific evidence into the criminal justice system*'. Regrettably, the rules as now drafted make no effort to tackle these important issues.

SJEs in the criminal arena

Rules 33(7) and (8) allow for the instruction of single joint experts (SJEs). In this respect the Committee seeks to mirror the intentions of the Civil Procedure Rules with the aim of saving court time and public money. Originally it was envisaged that an SJE could be appointed in respect of all parties, but the final draft limits this to experts instructed by co-defendants. This is, of course, likely to be far less controversial.

If we are to have a single expert in criminal proceedings, it would be far better to have a court-appointed assessor, rather than an SJE. It is more natural for the independent and objective expert to sit alongside the judge, rather than in the no-man's land occupied by the SJE in the civil system. However, any move towards this seems, for the moment, to have been shelved.

SJEs can be appointed for co-defendants only

The mountain laboured...

Overall, the proposed CrimPR 33 will leave most experts under-whelmed. It is fair to say that the outcome of the consultation was anticipated with some eagerness (not to say trepidation), but now that the beast is finally out in the open it does appear to be something of a mouse.

Experts and disclosure

It's quite clear: record, retain and reveal

Few can be unaware of the problems that arose in the Sally Clark case from the failure of the prosecution to disclose the existence of a toxicology report on one of the Clark children. It was this sheet of paper that was ultimately to lead to the quashing of her conviction.

One result of this was that the Attorney General, as part of his investigation into Shaken Baby Syndrome cases, ordered a review of the legislation that controls the disclosure of evidence in criminal cases. At the same time there was a consultation carried out by the Crown Prosecution Service (CPS) under the chairmanship of the Director of Public Prosecutions (DPP) which dealt with procedures for instructing expert witnesses.

Following consultation, the results of the review chaired by the DPP were issued earlier this year in the form of *The Crown Prosecution Service Disclosure Manual*. This applies to all investigations commenced on or after 4 April 2005.

Disclosure Manual and Guidance for Experts

The CPS will forgive the observation that the Manual is a bit of a hotch potch of regulations. In essence it draws together the relevant rules and guidance relating to disclosure (see box).

So far as expert witnesses are concerned, the CPS has produced a Guidance Booklet for Experts (*Disclosure: Experts' evidence and unused material – Guidance Booklet for Experts*) which they say provides 'comprehensive guidance setting out what prosecutors should expect from the expert witnesses they instruct'. This has been designed to identify the steps experts have to take when dealing with material in their possession which is 'relevant to the investigation in question', emphasising the need for them to record, retain and disclose that material to investigators and prosecutors.

The separate guidance for prosecutors and police officers covers situations in which the competence and credibility of an expert is an issue, and includes specific mechanisms for the revelation by experts of material relevant to this. An expert will now be required to complete a certificate of competence and credibility and must also sign a declaration that he or she has fully complied with disclosure obligations.

Duty to the Court overrides duty to the CPS

Rules and guidance relating to disclosure

[1] Criminal Procedure and Investigations Act 1996

[2] Code of Practice drawn up under s.23 of the Criminal Procedure and Investigations Act 1996

[3] Parts 25–28 of the Criminal Procedure Rules 2005

[4] Criminal Procedure and Investigations Act (Defence Disclosure Time Limit) Regulations 1997

[5] Attorney General's Guidelines on Disclosure

[6] Criminal Justice Act 2003

Disclosure duties on experts

The duties and obligations of experts are now set out in Chapters 36 and 37 of Part 2 of the CPS Disclosure Manual. 36.1 states that:

> *'The test for disclosure of unused material is the same in relation to material generated by an expert as for all other types of unused material. If unused material relating to an expert witness is relevant, the police must reveal it to the prosecutor and, if the material meets the disclosure test, it must be disclosed to the defence…'*

The obligations of the expert are summarised in the manual as being to 'record, retain and reveal'. The manual makes the point that experts who are not directly employed by the police are third parties and, as such, are not bound by the obligations set out in the 1996 Act[1]. Consequently, the CPS seeks to impose these obligations as part of the *contractual relationship* with the expert. When a member of the prosecution team instructs an expert, they are required to ensure that the expert understands the obligations placed upon them through the contract.

A duty that overrides any professional duty

This does, however, create a potential conflict: the expert owes an overriding duty to assist the court and, in this respect, the expert's duty is to the court and not to the prosecution team. This potential conflict is dealt with in the Guidance Booklet. It affirms that the expert's duty is owed to the court, but that part of that duty includes the obligation to assist in ensuring that the prosecution team can comply fully with their statutory disclosure obligations. The booklet, interestingly, says that these obligations take precedence over any internal codes of practice or other standards set by any professional organisations to which the expert may belong.

What material is covered?

The Guidance identifies the material to which the disclosure rules are designed to apply. The definition is a simple one:

> *'During the course of any investigation material is generated. Some of it is used as evidence and other material is not used. The material that is not used as evidence is known as unused material, to which the disclosure regime applies'.*

The Guidance goes on to say that:

> *'... unused material is material that is relevant to the investigation but which does not actually form part of the case for the prosecution against the accused. Even though the material may not be used as evidence, it is important that for the purposes of disclosure this material is retained. It is not for you to determine whether the material generated in the course of an investigation is relevant to the investigation'.*

The effect of this, then, is that the primary duty of disclosure remains with the prosecutor. However, the expert witness, as part of his or her overriding

duty to the court, is under an obligation to assist the prosecutor in meeting the disclosure requirements. The materials the expert is required to retain, record and, in due course, reveal include materials that are relevant to the investigation but which do not actually form part of the prosecution case. It seems that the key word here is 'relevant', and that would be no more or less than was already required by the 2003 Act[6].

The so-called 'Golden Rule' of disclosure was that enunciated by Lord Bingham in *R -v- C & H* (February 2004), when he said that 'fairness requires that full disclosure should be made of all material held by the prosecution that weakens its case or strengthens that of the defence'. The test is an objective one and is grounded on what is 'reasonable'. However, the guidance makes it plain that an expert witness is no longer to be trusted to exercise his or her own judgment in deciding what falls within this definition and what is and is not relevant. As we have never advocated that experts should take this kind of legal decision, we are happy to see official prohibition of such an approach.

Indexing unused material

Instead, the guidelines require that an expert must now compile an index of all unused material, and a specimen index is given in the Guide. The expert's report must contain declarations that such an index has been kept and confirmation that the expert understands and has complied with his or her duty to the court to record, retain and reveal material. The booklet does not offer the expert any guidance in identifying materials other than the broad definition given above, and it seems to have removed any discretion that might previously have existed (if any).

It will be noted that the obligation is only to list unused material. There is no requirement to produce an index of used material. The expert will record, though, all material relied upon in the report, and is required (i) to record the receipt, and onwards transmission, of all used material and (ii) to describe any examination of such material that has been carried out.

The burden of compiling such an index is one that many experts might find onerous and time consuming. It would, however, be dangerous to shorten the exercise by leaving anything out or for the expert to apply any self-imposed test for reasonableness or relevance. Paragraph 3.1(1) of the Guide states that '*you should retain everything, including physical, written and electronically captured material, until otherwise instructed and the investigator has indicated the appropriate action to take*'. The advice to experts is that they should take instructions from the prosecutor before discarding or destroying anything.

If this were not onerous enough, the guidance has a further sting. In some cases an expert will need to start compiling an index of unused material before any investigation has begun and even before any instructions have been received from a prosecutor. The guide gives examples of these circumstances as where:

- as a pathologist, the outcome of a 'routine' post-mortem suggests to you that death has been caused under suspicious circumstances;
- as a medical practitioner, you find injuries that are not consistent with the alleged cause;
- as a fire scene examiner, you believe a fire to have been started deliberately.

It appears to us that the review has missed the opportunity of laying down some really useful guidance for experts. Moreover, we wonder whether it addresses the real problems of 'blanket disclosure'.

Experts must NOT decide what is relevant

Breaking down the attrition mindset

The Attorney General himself identified that in heavy cases prosecutors might spend up to 80% of their time looking at material the prosecution has no intention of relying upon and to which the defence may barely refer. Defence lawyers are being paid rates upwards of £70 an hour or more to read through thousands of pages of documents which may never see the light of day in court.

The defence tactics in some cases are often to force the disclosure issue. Indeed, it has become a feature of many large cases to insist on disclosure of large quantities of material which it is said the prosecution (or a third party) has. Such applications for disclosure lead to other satellite litigation which sometimes justifies staying the whole proceedings without the case ever coming before a jury. It is clearly the aim of the guidance that prosecutors should play a greater role in deciding on the relevance of material and identifying this in the disclosure statement. They are not required to list everything. On the contrary, they must guide the defence to the relevant material and not hide it amid endless lists of irrelevant materials.

But what of the scientific evidence? Are prosecutors able to decide on the relevance, or otherwise, of such material? We suspect not. But the reason experts should not be left to make an objective decision in relation to this is that the courts require the prosecution to go through a proper disclosure exercise and to actively consider which materials satisfy the criteria for disclosure. This, it is hoped, will put an end to the current war of attrition between prosecution and defence teams in relation to disclosure of unused materials.

As it stands, you would be wise to retain and record all materials generated or used during an investigation, no matter how insignificant they might be. However, your overriding duty to the court and your obligation to assist the prosecutor in complying with the disclosure obligations mean that you should be proactive in helping the prosecutor identify the documents that fall within the accepted definitions of disclosable material.

Keep everything, and index it!

Travel expenses in criminal cases

Travel time can be claimed, but payment remains discretionary

The payment of travel time allowances to expert witnesses in criminal cases has, until recently, been unremarkable. But all this has changed following the recent case of *Vogel -v- Leeds District Magistrates Court* CO/2857/2005, a decision of HJ Calvert-Smith in the Administration Court.

Vogel -v- Leeds District Magistrates Court

This case concerned a vet who attended in his capacity as an expert veterinary witness to give evidence in relation to a cruelty to animals prosecution brought by the RSPCA. The vet lived at some distance from the court and claimed a sum of £100 per hour plus VAT for time spent travelling where this exceeded 1 hour. This, he said, was his usual fee and it had been paid to him in previous cases, apparently without dissent, by the determining officer.

In this case Mr Vogel's application for travelling time was refused. He sought leave for judicial review of this decision to the Administrative Court. In refusing leave, HJ Calvert-Smith, referring to the 1986 Regulations[1], said:

> *'The Regulations are clear. Payments to an expert… are at the discretion of the court. They may be made as follows:*
>
> - *For attending to give evidence (Reg. 20)*
> - *For work necessary in connection with preparation of that evidence (Reg. 20)*
> - *For necessary overnight absences (Reg. 21.1)*
> - *For travel in respect of actual fare paid (Reg 24).'*

Professional or expert?

The judge went on to draw a distinction between claims made by a *professional* witness and those of an *expert* witness. The former 'which include veterinary surgeons (Reg. 15), may claim for travelling time which the court may grant in its own discretion but are subject to a different regime in respect of their other fees.'

The vet, in this case, was attending court to give expert evidence, not as a professional witness asked to attend as a witness of (technical) fact. It was, therefore, entirely proper that he should have made his claim for payment of fees in his capacity as expert.

Justices' Clerks' Society – Take I

The decision of HJ Calvert-Smith was circulated to all members of the Justices' Clerks' Society (JCS) in their News Sheet No: 16/2005. It seems that the effect of this circulation has been to remove the whole question of travelling allowances (other than the cost of tickets, etc.) from the determining officer's discretion. According to the judge, the exercise of discretion must necessarily be limited to those areas specifically identified in Regulations 20, 21 and 24. As these do not mention travel time, any claim made for such time will be refused.

Whilst this may be a correct interpretation of the rules, albeit on a strict construction, we do not think that this can have been the intention of the draftsman. The general discretion permits (indeed, requires) the determining officer to consider each case individually and to have regard to 'particular circumstances'. The published Guide[2] makes it clear that the scales are not intended to fix either a minimum or maximum allowance, and that they may be departed from as necessary (although it is acknowledged that such cases will be rare).

Justices' Clerks' Society – Take II

It comes as no surprise to us to learn that the way in which the JCS interpreted the decision in *Vogel* has caused them lots of problems. So much so that in March they published News Sheet No: 05/2006 in which they tell us that such were the problems that they approached the Department for Constitutional Affairs (DCA) with a view to addressing the issue.

The DCA response was that the application for judicial review was rightly refused on the grounds that payments to experts are at the discretion of the court under Reg. 20 but that:

> *'... it would be wrong to adduce from [the Vogel] case that payment for time spent travelling to and from court should not be claimed.'*

The DCA went on to say that in its view attendance at court to give evidence under Reg. 20 can extend to time spent travelling because this is within the terms of guidance given in para. 4.4 of the DCA *Guide to Allowances*. This states:

> *'The attendance fee should reflect the total time involved that day, that is, including travelling and waiting time, and also any extended hearing time. The scales of guidance reflect attendance based on the normal court day and local travel, and should be adjusted upwards if longer journeys are undertaken or the attendance stretches significantly beyond the usual court sitting time.'*

With this reply in hand the JCS felt able to offer courts the following alternative take on the importance of the *Vogel* case:

> *'Courts may therefore conclude that the decision in Vogel could be narrowly construed as simply upholding the right of determining officers to use their discretion under the Regulation, rather than as determining that time spent travelling to and from court cannot be claimed.'*

Fetid but not fettered!

So, if you have trouble claiming travel allowances in respect of attending a criminal court to give expert evidence, be sure to find out whether the determining officer is labouring under the mistaken impression that his or her discretion is fettered by *Vogel*. If so, refer the officer to JCS News Sheet No: 05/2006 for chapter and verse on why your travel claim deserves full consideration.

Both News Sheets from the JCS are available in the court report section of our on-line library: look for *Vogel -v- Leeds District Magistrates Court*.

Footnotes

1 Costs in Criminal Cases (General) Regulations 1986

2 Guide to Allowances under Part V of the Costs in Criminal Cases (General) Regulations 1986

Wollard -v- Fowler

We referred briefly in our last issue to the unreported case of *Wollard -v- Fowler*. This was a decision of Costs Judge Seager Berry sitting in the Supreme Court Costs Office on 14 December 2005. The case involved a dispute over the costs incurred by a medical reporting organisation (MRO) and the status of such costs under the fixed costs regime for motor accidents governed by CPR Part 45. We have since obtained a copy of the judgment and can now report the case in detail.

The principal points of dispute concerned the levy by the MRO of a fee – in addition to the expert's fee – of:

- £25 for obtaining the GP's notes
- £25 for the hospital notes, and
- £160 as the agency fee for obtaining the medical report.

(You can find full facts of the case in the *Court Reports* section of our website at *www.jspubs.com*.)

The issue to be decided was whether Mrs Wollard could recover the full amount charged by the MRO for providing her solicitor with a medical report and medical records as a disbursement under the fixed costs regime in Part II of CPR 45.

Competing rules

CPR Part 27, which deals with the Small Claims Track, provides at rule 27.14 that the court may order any party to pay all or part of a sum, not exceeding the amount specified in the practice direction, for an expert's fee. The current maximum is £200. There was no argument between the parties regarding this.

CPR Part 45 deals with the fixed costs in road traffic cases, and specifically with the recovery of disbursements at rule 45.10. Both sides agreed that Part 45 had been drawn in wider terms than Part 27 and that Part II of CPR Part 45 (the fixed costs regime) had been introduced at a later date to reflect a negotiated settlement after discussions moderated by the Civil Justice Council.

'Rough and ready'?

Council for the claimant argued that the fixed costs regime was intended to provide 'fair remuneration based upon a rough and ready formula'. He submitted that, judged by that criterion, the costs claimed (including the MRO element) were reasonable and 'would normally be considered to be within the appropriate bracket of costs for this type of claim'. The issue for determination, he said, was whether the costs of obtaining the records and the report included the costs of the agency. Such costs, he argued, were not *in lieu* of profit costs but were a disbursement. The test was one of reasonableness as set out in the judgment of the Senior Costs Judge in *Claims Direct Cases Tranch 2 Issues* (2003). It appears to us that this is a weak and somewhat specious argument and it seems that this view was shared by Master Seager Berry.

Can't convert profit costs into disbursements

The judge accepted that the wording of CPR rules 27.14 and 45.10(2)(a) was different and that the latter had been drafted at a much later date than the former. However, he was unable to accept the claimant's submission that if Parliament had considered agency fees to be unrecoverable the position would have been made clear in the rules. The rule refers specifically, he said, to disbursements and not, for example, to 'further charges' or 'additional costs'. In his judgment it was not possible to transfer what would otherwise be a profit costs element of work when carried out by a solicitor into part of a disbursement claimed by a solicitor where the amount of fixed costs is limited to the formula set out in CPR rule 45.9(1).

Finding in favour of the defendant, Master Seager Berry declined to extend the meaning of 'disbursement' in CPR rule 45.10 to include, *in lieu* of profit costs, an element for work carried out by an agency that solicitors would otherwise have claimed as profit costs. The regime had not stated that such recovery was permissible. The level of profit costs was fixed under the rule by a defined formula in CPR rule 45.9(1), and the ceiling on costs imposed by that rule could not be exceeded.

How it used to be

In passing, it is worth pointing out that all agency charges were prohibited from recovery in the Small Claims Court (for cases involving less than £5,000) under the old County Court Rules.

In *Tunmore -v- George* (Current Law (1999) *CLY* 536) the claimant had been injured in a road traffic accident. Liability was admitted and the claimant's damages were settled pre-issue. The claimant issued proceedings for £175 in respect of the fees of the GP who prepared the report on the claimant's injury. The GP had been paid only £75, and £100 had been claimed by the MRO for obtaining the medical report. The claimant argued that the agency fee was recoverable because it was 'in respect of the fees of an expert'. The District Judge allowed only £75 and disallowed the agency fee because the MRO was doing the work a solicitor would normally do and charge for. That case was, of course, decided before the present rules were formulated. Accordingly, it has no authority in current law. It is, nevertheless, a point of interest that the thinking of the court in the earlier case seems to have been followed.

On appeal

The claimant in *Wollard* has appealed against Master Seager Berry's ruling and this was heard on 12 April 2006. As we go to press, the judgment is still awaited. As matters currently stand, we maintain the view that the simplest way to avoid potential difficulties is for solicitors to stop using MROs and to contact their chosen experts direct. Hardly rocket science!

MRO fees disallowed as disbursement

Appeal ruling imminent

Services for registered experts

Expert witnesses listed in the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 54). You can read them all on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, privilege, disclosure and fees. When you need clarification, the Factsheets should help. If not, call us for assistance on 01638 561590.

Court reports – FREE

Accessible freely on-line at **www.jspubs.com** are details of many leading cases that touch upon expert evidence.

ForeSight – FREE

Written by expert witnesses, *ForeSight*'s mission is to help experts help lawyers to use expert evidence more effectively. Could you contribute an article?

LawyerLists

How would you like to have a database of 13,126 (and counting...) litigation lawyers at your fingertips? Based on the litigation lawyers on the *Register*'s Controlled Distribution List, *LawyerLists* enables you to purchase top-quality, recently validated mailing lists of litigators based across the UK. Now you can have fast, easy, flexible and cost-effective access to top-quality address data for litigation lawyers. Getting your own marketing material directly onto the desks of key litigators has never been this simple!

Register logo – FREE to download

All experts vetted and currently listed may use our undated logo to advertise their inclusion. A dated version of the logo is also available bearing the year of most recent recommendation. Successful re-vetting in 2006 will enable you to download the 2006 logo.

General helpline – FREE

We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for assistance, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2006 dated logo. The results of the re-vetting process are published in summary form in the printed *Register*, and in detail in the software and on-line versions of the *Register*.

Profiles and CVs – FREE

As part of our service to members of the legal profession, we provide free access to more detailed information on our listed expert witnesses. At no charge, experts may submit:

- a **profile sheet** – a one-page A4 synopsis of additional information
- a **CV**.

Extended entry

At a cost of 2p + VAT per character, an extended entry offers experts the opportunity to provide lawyers with a more detailed summary of expertise, a brief career history, training achievements, publishing record, etc.

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Why not enhance your on-line and CD-ROM entries with a head-and-shoulders portrait photograph?

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If corporate branding is important to you, for a one-off fee you can badge your on-line and CD-ROM entries with your business logo.

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As well as saving you money, multiple entries offer improved geographical and expertise coverage for multi-site firms. If your company has several offices around the UK combined with a wide range of expertise, call to discuss the options.

Web integration – FREE

The on-line *Register* is also integrated into other legal websites, effectively placing your details on other sites that lawyers habitually visit.

Surveys and consultations – FREE

We bring together the largest community of expert witnesses in the UK. Since 1995, we have tapped into this community, through our survey work, both to build up a body of statistics that reveal changes over time and to gather data on areas of specific and topical interest. If you want a say in how systems develop, take part in the surveys and consultations.

Professional advice helpline – FREE

A valuable benefit for those experts who opt for the Professional service level is our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment and commercial legal issues.

Software

Drawing on over 19 years' experience of working with the expert witness community, we have designed a suite of task-specific software modules to help keep experts informed.

Discounts – FREE

We represent the largest community of expert witnesses in the UK. As such, we have been able to negotiate with publishers and training providers to obtain discounts on books, conferences, training courses and videos.

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