Your Witness

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

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Issue 47

March 2007 © J S Publications

Little Books series launched

I am pleased to say that we have now published the first two books in our new series of practical guides for busy expert witnesses. The *Little Books for Experts* series distils the experience of two decades of working with thousands of expert witnesses into books designed to help experts fulfil their primary duty to the courts whilst making choices that protect their own interests. We have learnt the lessons from the mistakes of others, now you can learn them too!

Expert Witness Fees

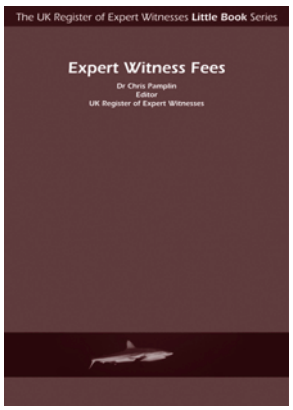
Little Book 1 deals with expert witness fees. Why do so many experts fail to use a written contract? How much do experts charge for their work? From binding contracts to essential terms, this book offers lots of practical advice and guidance to help experts tie down their instructing lawyer or agency. Armed with this knowledge, experts will also be able to minimise the risks of delayed payment, stay on top of debt chasing and proceed with a DIY small claim.

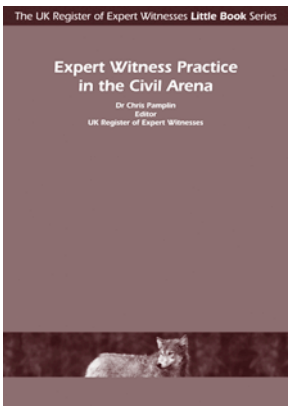
Civil Practice

Little Book 2 focuses on expert witness practice in the civil jurisdiction. It is designed as a practical guide to the complex array of rules and guidance for expert witnesses as they interact with the civil justice system in England and Wales. In recognition of the isolation borne of their independence, this book is written with the interest of the expert firmly to the fore. It encourages experts to fulfil their overriding duty to the court, and their professional duty to others, while making choices to protect their own interests.

The *Little Books* do not offer an academic treatise on the subjects. Instead, they provide highly readable, down-to-earth practical guidance on the issues that really matter to practising expert witnesses.

You can read more about these *Little Books* on the *Register* web site (browse to *www.jspubs.com* and follow the *Little Books* link on the right-hand side of the screen), and view sample pages too.





Each *Little Book* costs £35.00 + P&P and can be ordered through our secure on-line ordering facility, by calling us on (01638) 561590 or by writing to us at the address shown on page 8.

GMC consultation – closes 27 March 2007

The GMC has finally put out to consultation its revised guidance for doctors undertaking expert witness work. The guidance is brief, general and for the most part unremarkable. However, it does raise a few concerns. For example, at paragraph 2 it requires doctors to 'make clear the limits of your knowledge or competence' as if this is a black-and-white issue. In my experience, boundaries are not nearly so clear. To take a topical example, Sir Roy Meadow has been excoriated for explaining to the court the mechanics of multiplying probabilities – as he was a doctor and not a statistician. Yet, I would expect any graduate scientist to feel quite within his area of expertise to undertake this task for the court – it must surely be covered in every introductory statistics course in the land.

At paragraph 12 it requires doctors to take 'all reasonable steps to access all relevant evidence'. Guidance would be most welcome as to how a doctor is to square that requirement with the recent Department of Health recommendation that medical records ought not normally be considered in personal injury claims valued at less than £10,000!

Finally, at paragraph 16, the guidance appears to place a duty upon the doctor to recognise when material is covered by legal privilege. So must doctors now take law degrees as well as medical ones?

You can participate in the consultation on-line by visiting *www.gmc-uk.org* and going to the news section. But be warned... the GMC has come up with a fiendish registration process. Alternatively, you can access the consultation document directly from our home page at *www.jspubs.com* without all the faff!

Law School survey

Finally, I have enclosed with this issue a questionnaire prepared by Penny Cooper at the City Law School, City University. The research is looking at the current state of expert *witness* teaching and learning, and hopes to come up with some guidance on how provision for expert witness training can be improved. That is a worthy goal and I hope you will find a spare 10 minutes to let Penny have your thoughts.

Chris Pamplin

Experts under Scottish law

Expert evidence must be oral testimony in Scotland

Expert evidence is treated somewhat differently under the law of England and Wales compared with that of Scotland. Indeed, since implementation of the Civil Procedure Rules (CPR) in England and Wales, the roles are becoming increasingly divergent.

Oral evidence and expert reports

The most startling difference is that in Scotland expert evidence can only be given by oral testimony, while in England and Wales the giving of oral evidence is rare. Furthermore, in England and Wales the expert's written report is his evidence-in-chief, whereas in Scotland it serves only to give advance warning of what his evidence will be. Consequently, the expert report in England is addressed to the court, being the entity to whom the expert owes his overriding duty. In Scotland, though, the report is addressed to the party.

In England, once disclosed, the expert report becomes common property and may be used by any party at trial. Furthermore, the Practice Direction to CPR Part 31 permits the other party to inspect any documents referred to in the report. Neither is true under the Scottish jurisdiction.

Privilege

Witness statements in England and Wales, once properly served, will stand as evidence-in-chief and may be referred to in the oral examination and cross-examination of witnesses. If the maker of the statement is not called, then his statement will generally be admissible as evidence for either party. In Scotland, however, statements (known as 'precognitions') may not be so used and remain privileged.

Joint instructions

Joint instruction of a single expert is rare in Scotland, but there is a well used procedure in Scottish civil courts for lawyers to submit a 'joint minute' of the evidence on which both sides agree.

The Whitehead case

The Scottish Court of Sessions has highlighted this dichotomy in the treatment of expert evidence in the case of *Whitehead*.[1] This case tested the status of the expert report in Scottish law and of the documents referred to therein.

Background

In a personal injury action, the 'pursuer' (claimant) had instructed two experts and lodged their reports with the court. The reports had referred to precognitions given by the pursuer and other witnesses to the pursuer's solicitors. In Scottish law these documents would normally attract privilege, but the defendant sought their disclosure on the following grounds:

1 Rule of Court 27.1.(1) requires a party to an action in the Scottish courts to lodge any document upon which the pleadings are founded. It was argued that, since the documents should have been annexed to the expert reports (the reports having formed the basis of the pursuer's pleadings), they should have been lodged with the court.

2 It is the duty of all experts to disclose their sources of information so that their conclusions can be properly tested.

3 Any privilege attaching to the documents had effectively been waived by disclosure of the reports.

4 Although it was accepted that the statements could not be put to the witnesses when they gave their evidence, it was submitted that there was nothing to prevent them being put to the expert witnesses to test the merits of the conclusions the experts had reached.

The pursuer maintained that the documents remained privileged and were not disclosable. It was pointed out that the expert reports were not evidence but merely amounted to fair notice of what the expert evidence might be. It was further denied that there had been any waiver of such privilege and that the court could not, and should not, order disclosure. Indeed, the nature of the documents meant that they could not legitimately be used as evidence.

Findings

The Court of Sessions concluded thus. In Scotland, an expert report is not evidence in itself: evidence needs to be spoken by the expert. Because the report is not evidence, it follows that there is no absolute entitlement to disclosure of materials that might have been used by the expert to formulate his conclusions. Rule 27.1.(1) does not mean that every document referred to by an expert should be lodged with the court. The rule applies only to documents upon which the pleadings are directly founded.

In so far as the expert's duty is concerned, the Court of Sessions affirmed that an expert appearing in the Scottish courts owes no greater duty to the court over and above those of any other witness under oath. Once an expert is in the witness box, his evidence will depend purely upon what is asked. The expert is not required to furnish information in relation to what is not asked. The testing of his evidence will involve an analysis of his oral evidence, not 'probing it with questions or using other forensic skills'.

The court went on to confirm that there is no waiver of privilege in confidential material by a party merely disclosing its existence to its own expert. The court agreed with the pursuer's submissions that the laws of Scotland jealously guard the confidentiality of the solicitor–client relationship and have always been keen to preserve the confidentiality of documents prepared in contemplation of litigation.

This case serves to highlight some of the very important differences between the ways expert evidence is treated in different parts of the UK.

Case reference

[1] *Amy Whitehead's Legal Representative -v- Graeme John Douglas and Another* [2006] CSOH 178.

Opinion or fact?

It is common that directions for trial will limit the use of experts to one per party per issue (or even to one SJE). But this must be balanced with the need to ensure so-called 'equality of arms' and a party's right to justice. There may also be circumstances when a party may wish to call an expert to give evidence of fact (as opposed to opinion evidence). In this case, there is always a grey area in determining what is expert opinion and what is evidence of fact. How rigid, then, should the court be in adhering to directions that would otherwise have the effect of limiting or excluding such evidence?

A troubled knee

It was precisely these questions that were examined recently by the Court of Appeal in *Kirkman -v- Euro Exide Corporation*[1].

Mr Kirkman worked for Euro Exide. He had an accident at work in which his foot became wedged and he suffered a wrenching injury to his right knee. Mr Kirkman had a history of trouble with that knee as a result of a motorcycle accident some years previously. Indeed, he had already been referred to Mr Banks, a consultant orthopaedic surgeon, who had made a diagnosis of damage to the anterior cruciate ligament. Mr Kirkman's problem with the knee had persisted and he'd been referred back to Mr Banks by his GP shortly before the injury at work.

Following the workplace injury, Mr Kirkman attended hospital and was told to keep his existing appointment with Mr Banks as a follow up. He duly saw Mr Banks who, after an MRI scan, advised that an operation was necessary to reconstruct the anterior cruciate ligament. The operation took place. Sadly, Mr Kirkman contracted MRSA. Despite extensive treatment, he was obliged to submit to an above-knee amputation of the right leg.

Effect of the pre-existing knee problem

Mr Kirkman commenced proceedings against his employer in respect of the accident at work. Liability was not an issue, but the claimant's pre-existing medical condition most certainly was. There was disagreement about whether the claimant's operation would have been necessary in any event, or whether it was attributable purely to the wrenching injury suffered when Mr Kirkman fell into the hole at work.

The claimant initially obtained medical reports from an orthopaedic surgeon, Mr Markham. He also obtained medical reports from Mr Banks. The gist of both reports was that Mr Kirkman would not have needed an immediate operation but for the accident at work, although Mr Banks considered that such surgery might have been necessary within 3–5 years.

The claimant's solicitor also obtained a third report from another orthopaedic surgeon, a Mr Kay, and the defendant company obtained a report from a Mr Parkinson. Following a meeting, Mr Kay and Mr Parkinson reached agreement that the claimant's underlying medical condition made the operation almost inevitable, but that the accident at work had probably brought the date of the operation forward by about 3 months.

'equality of arms' rule should not be treated dogmatically...

At the directions stage, the deputy district judge determined that the issues of causation should be tried separately. Directions were given that each party should be permitted to call one medical expert to give evidence on probable causation. The claimant decided to rely on the report of Mr Kay (which, in any event, quoted extensively from the earlier report of Mr Banks), and to call Mr Banks as a separate witness of fact, as the relevant passage of his witness statement made clear that he would not have advised surgery if it had not been for the accident.

When the claimant sought permission to call Mr Banks it was refused by the district judge on the grounds that Mr Banks's statement clearly contained expert evidence. To admit it would breach the earlier direction that experts should be limited to one per party on the causation issue. However, the judge made an order that included the words:

> *'For the avoidance of doubt the Court does not exclude Mr Banks as a possible witness of fact.'*

Relying upon this order, the claimant asked Mr Banks to provide another report, stating:

> *'I have been asked whether I would have advised Mr Kirkman to undergo surgery following his referral to me in 2001 in the absence of the September 2001 accident. I would not have advised the surgery which Mr Kirkman in fact underwent in the absence of the accident in September 2001.'*

Keeping in mind that this was the statement of a witness of fact, Mr Banks added:

> *'I have been asked by the solicitors acting for Mr Kirkman not to give reasoning for the advice I would have given in the absence of the accident of September 2001 in order to avoid giving opinion evidence. I am fully willing to give my reasons if asked.'*

The admissibility of this evidence remained an issue between the parties, and the district judge made an order that Mr Banks should attend the hearing and hold himself ready to give evidence. She would leave the question of admissibility for the trial judge to decide. However, the defendant was not content with this and appealed to the circuit judge. The defence argued that (i) the question concerned one of admissibility of evidence and this should be determined before trial, and (ii) the parties had agreed to limit the expert evidence to one expert per party; to admit Mr Banks's evidence would have the effect of circumventing the original direction, thus creating an imbalance in the parties' 'equality of arms'. The circuit judge agreed with this view and allowed the defendant's appeal.

... but may have to give way to the need to deal justly with a case

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Court of Appeal gives guidance on how to tell fact from opinion

At the Court of Appeal

Following an appeal by the claimant, this single issue came before Lord Justice Buxton and Lady Justice Smith. From the outset, Smith LJ was swift to point out that the desirability for equality of arms embodied in the CPR was not intended to result in an absolute rule that parties be limited to calling the same number of experts. In her view, this was not a rigid dogma to be applied in every case. The circumstances of a case may dictate that the general rule should give way for the sake of achieving the overriding objective of dealing with the case justly.

She recognised that Mr Banks's original report contained a mixture of factual and expert evidence. As the doctor who had originally treated Mr Kirkman, there were a number of facts of which he was personally cognisant. For whatever reason, the claimant's solicitors had decided not to use Mr Banks as their expert. However, as they still wished to call him to give evidence of fact as the treating doctor, in Smith LJ's view this was a case where it might have been reasonable for the 'equality of arms' rule to be relaxed. She understood, though, that faced with an intransigent district judge, the claimant had set about 'the rather artificial process' of separating Mr Banks's factual evidence from his expert evidence.

The central hub of Mr Banks's redrafted statement was that, if it had not been for the workplace injury, he would not have recommended surgery to reconstruct the ligament. This was the evidence of fact upon which the claimant sought to rely. The defendant, on the other hand, had argued that this was a 'statement relating to a hypothetical situation and as the evidence of a person with expertise, a professional person, it is perforce expert evidence'. Smith LJ did not agree. She said that this was clearly a statement of fact. Mr Banks was here saying what he would have done in a set of circumstances which did not in fact happen. In so saying, he relied upon his knowledge and experience as a professional man but was not expressing an expert opinion.

Tests to help distinguish fact from opinion

In distinguishing between the two types of evidence, she offered the following test. Mr Kay and Mr Parkinson, she said, had no personal knowledge of the facts. They had brought their expertise to bear upon their understanding of the claimant's chronic condition, in the absence of the accident. They expressed a view as to what most competent surgeons would advise, or to put it another way, what it is probable that an unidentified surgeon on whom the claimant attended would have advised. In giving their opinions they were advising as to their understanding of received medical wisdom applicable to the circumstances of this case.

The position of Mr Banks, she suggested, was quite different. He was the doctor who would, in fact, have advised the claimant. He was saying what he would have advised the claimant to do. He was **not** saying that the advice would have been correct, or most competent surgeons would have given that advice, or an unidentified surgeon to whom the claimant presented would have given similar advice. He was speaking only for himself. She accepted that the defendant might attack that advice as being incorrect, but that was not the issue. The only issue was whether the doctor would have given that advice be it good, bad or indifferent.

A second test for the factualness or otherwise of the evidence would be to compare it with the employer's evidence. The employer had stated that if his employee (the claimant) had not been injured, he (the employer) would have promoted him to a more senior position within, say, 2 years. No one would suggest that such evidence is inadmissible or that it is expert evidence, although it is founded upon the witness's knowledge, experience and expertise. The usefulness of the employer's statement is that he has sufficient knowledge of the claimant's qualities and the needs of his own business to be able to give a credible statement as to what would have happened if the claimant had not been injured. Although the evidence depends upon a degree of expertise, it is not expert evidence. Smith LJ could see no essential difference between the employer's evidence and that of Mr Banks.

On that basis, the Court of Appeal was satisfied that the evidence Mr Banks sought to give was factual, and thus allowed the claimant's appeal.

Interestingly, Lady Smith also considered what would happen if, during trial, Mr Banks was drawn on matters that clearly fell outside the scope of factual evidence and strayed into the territory of expert opinion. She endorsed the intention of the district judge's original order. It was, she said, a matter that could properly be left up to the trial judge to decide, who had a discretion to permit such a development. Whether he did so would depend on whether he thought it would be useful as an aid in reaching a just decision.

Open to abuse?

While this decision of the Court of Appeal is both eminently sensible and a timely warning against dogmatic interpretation of the rules, one wonders whether it leaves some scope for abuse. Where circumstances permit, what is to prevent the factual elements of an expert's evidence being separated from his opinion in the hope that, when he gives his factual evidence, the trial judge will permit him to give evidence of an expert nature too?

Naturally, litigation lawyers would not stoop to such Machiavellian tricks – or would they?

Case reference

[1]*Kirkman -v- Euro Exide Corporation (CMP Batteries) Ltd* [2007] EWCA Civ 66.

Assessing risk

Almost every day of our lives we take decisions – big or small, conscious or unconscious – based on our assessment of risk. This might be whether to board the 10.30 flight to New York, buy stocks and shares, cross a busy road or climb the north face of the Eiger. Indeed the assessment of risk is frequently done without giving it much conscious thought. But for some, this is a very technical procedure to which specific rules and formulae are applied.

Take, for example, those responsible for the assessment of risk in the workplace. They will:

- identify a potential hazard and the risk it might pose
- identify the persons who might be at risk
- identify possible control measures to minimise the chances of harm
- consider the training measures that could be implemented to further minimise the probability of accidents
- consider the emergency procedures that could be put in place should the control measures fail
- re-evaluate the remaining risk. Is it still too hazardous an operation? What are the chances of resulting harm or damage? Will additional insurance be required?

What is the metric?

A key difficulty in risk management is in measuring the two quantities required for risk assessment: risk of occurrence and the 'cost' if it happens. How is the risk to be measured? What is the probability of harm or damage and how is that to be quantified?

Risk management would be easier if a single metric could embody all of the information in the measurement. However, a simple ratio of the two quantities being measured will not do. A risk with a large potential loss and a low probability of occurrence must be treated differently from one with a low potential loss but a high likelihood of occurrence.

Financial risks, such as those taken by insurance companies, can often express potential loss in purely monetary terms. However, risk assessment used for public health can quantify loss in a common metric such as a financial value or some numerical measure of 'quality of life'. Often for public health and environmental decisions, the loss term is simply a verbal description of the outcome, such as increased cancer incidence or incidence of birth defects.

A new frontier is emerging...

To deal with these problems a whole new science of risk assessment based on mathematics and statistics is emerging. Much work has already been done, both here and in America, which seeks to set out a scientific basis for the assessment of risk using just mathematics and statistical information. For example:

- The University of East Anglia has a Centre for Environmental Risk researching the relationships between scientific risk assessment, risk policy and its communication, and public perception of risk.
- Cambridge University has created a new professorship, the Winton Professor of the Public Understanding of Risk.
- DEFRA has published a guide to the assessment of risk following what it sees as a decline in public confidence in conventional risk assessment in the wake of events such as the BSE crisis and the Brent Spar controversy.

The aim of much of this research is to put the mathematical evaluation of risk into a practical context and to clarify public understanding of its findings and function. Professor Geoffrey Grimmett, Head of the Department of Pure Mathematics and Mathematical Statistics at Cambridge University, says that part of the challenge is to help people navigate the numbers thrown at them.

Risk assessment can be a highly technical process...

... and it will be coming to a court near you

The courts, too, will benefit from a better understanding of risk assessment. Prof Grimmett points to the cases involving Sir Roy Meadow, where the possibility of events such as Sudden Infant Death Syndrome (SIDS) became an issue for a jury. He believes that the new professorship will help 'disentangle the heightened interest from the statistical level of risk'.

The criticism levelled at Sir Roy in the Sally Clark case was that he had quoted statistics on the likelihood of babies from the same family falling victim to SIDS. In so doing, it was said that he had strayed outside his area of expertise – he was a doctor, not a statistician. The truth, of course, is that Sir Roy, as a scientist, almost certainly had a knowledge of statistics far above that of the average man – more so when one considers that these were statistics specific to his area of research. All he'd been asked to explain was the mechanics of combining probabilities.

However, given the effect such statistics are likely to have on a jury, the difficulty lies in ensuring that a lay audience understands the methodology used when arriving at a statistical conclusion, the accuracy of the results and the practical applications they have to a particular case. It is here that the improving formulae for risk assessment can be put to good use.

We are still a long way from having cases decided on the basis of mathematical probability. But it seems likely that this is an area that will see some growth in the amount of expert evidence admitted, and there will be increasing reliance by parties on evidence of chance and statistical risk. It is well, therefore, that much of the current emphasis is on better public understanding of how risk statistics should be used and interpreted. This is indeed an area in which the court will need all the help it can get.

... and likely to be a growth area for expert witnesses

Court digest

Government calls for expert evidence on issues unrelated to the facts

New procedures contemplated in rape cases

The conviction rate in all cases of alleged rape has fallen from one-third of cases in 1977 to a mere 5.2% in 2004. This, according to the joint report from the inspectorates for the police and the Crown Prosecution Service, is because of a huge increase in the number of attacks being reported. As a result, the government has unveiled proposals for a national network of specialist rape prosecutors.

In January 2007 the Solicitor General, Mike O'Brien, announced proposed changes which he hopes will reverse the trend of proportionately fewer men being found guilty in rape trials. These changes would include the use of video screens in court showing the victim's first interview by police. It is proposed that 'independent sexual violence advocates' should advise victims prior to trial and there should be wider use of specialist rape prosecutors. The government has stopped short of lowering the burden of proof in rape trials. Instead, it has opted for a range of measures designed to assemble the strongest possible case against those accused.

Experts in generalities

Amongst the proposed measures is a wider use of expert witnesses whose function would be to dispel 'rape myths' and better explain to a jury how victims of rape might be expected to behave. This approach is likely to follow the American line, where experts are frequently used to help overcome common misconceptions in relation to, for example, 'acquaintance' rape (also known as 'date rape') and the nature and definition of consent to sexual relationships.

In America, much work has been done to increase awareness of sexual coercion and acquaintance rape. It has been accompanied by important legal decisions and changes in the legal definition of rape. Until recently, clear physical resistance was a requirement for a rape conviction in California. A 1990 amendment now defines rape as sexual intercourse 'where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury.' The important additions are 'menace' and 'duress', as they include consideration of verbal threats and implied threat of force.

The government's proposals, if adopted, will mean that more experts will be used in English courts. Importantly, the proposals allow for experts to opine on matters that do **not** form part of the evidence base in a case. Whether this will result in an increased incidence of conviction remains to be seen.

Employment re-confirmed as no bar to acting as an expert witness

Independence of expert evidence

In previous issues of *Your Witness* we have considered the question of an expert witness's impartiality and independence in cases where the expert is an employee of, or otherwise associated with, the instructing party. This question has, once again, come before the courts in the recent case of *R -v- Stubbs*.[1]

Mr Stubbs was a bank employee who was convicted of conspiracy to defraud. He had been employed by the bank as a password reset clerk on the bank's online banking system. It transpired that, while Mr Stubbs had been on duty, an attempt was made (using his password) to reset the passwords on the accounts of several corporate clients. Following this, transfers totalling more than £11 million were made from two of the accounts. At trial, Mr Stubbs claimed that someone else must have used his password to gain access. Evidence concerning the operation of the system was called from one of the bank's other employees, let's call him 'E'. Mr Stubbs objected on the grounds that E lacked the necessary expertise and independence.

The trial judge, having looked at the intended evidence, ruled that it was admissible. Following conviction, Mr Stubbs appealed the decision on the grounds that the judge had been wrong to allow the evidence. He said that:

1. E's detailed account of the actual activity carried out on the system amounted to inadmissible opinion evidence because he lacked both expertise and independence.
2. The judge should have withdrawn the case from the jury as the evidence was unsafe.
3. The judge had erred by directing the jury that it should satisfy itself that E was an expert before relying on him.
4. There was a real and lurking doubt as to the safety of the conviction.

The Court of Appeal held that the judge had been correct to find that E had sufficient knowledge of the subject to render his opinion of value in resolving issues concerning operation of the banking system. His finding was based on an assessment properly made after hearing the evidence. E's limitations had been explored in depth in cross-examination and placed clearly before the jury. It was accepted that the witness was not an information technology specialist and that his technical knowledge of the system was limited. However, that did not preclude his being regarded as an expert to the extent indicated by the judge. The fact that E worked for the bank did not affect the admissibility of his evidence; it went only to its weight, and it was for the jury to determine whether he displayed any bias or lack of objectivity.

Experts in low-velocity RTA claims

The majority of low-value personal injury claims arising from minor traffic accidents will be heard in the fast track. The effect of this is that the length of the hearing will be strictly limited. Furthermore, the expert evidence will usually be restricted to one joint expert, whose report will be submitted in writing and who will not give evidence in person at the hearing.

Kearsley -v- Klarfeld

In *Kearsley -v- Klarfeld*[2] the Court of Appeal was asked to consider whether it was right to impose such restrictions in cases where the accident occurred at low velocity and therefore causation was a live issue. The claim in this case followed just such a low-velocity collision.

The defendant wished to adduce expert evidence from a consultant surgeon to show that the nature of the impact was such that it was very unlikely that the claimant had sustained an injury as a result of the collision. On the strength of that, and other evidence, the defendant pleaded that the claimant was fabricating his symptoms and he had, in fact, sustained no injuries.

Initially the case was allocated to the fast track. But the defendant wished to have it allocated to the multi-track and requested permission for the experts to give oral evidence. The district judge refused. She considered that the directions being sought were disproportionate: this was a relatively low-value claim and she had to consider proportionality of costs and expense.

On appeal, Judge Tetlow took a different view. He said that fairness dictated in a fraud case that it be investigated properly. The experts should be called to give their evidence orally. He allocated the case to the multi-track with a trial estimate of 2 days.

On further appeal, the court said that Judge Tetlow was right to overrule the district judge for the reasons he gave. The district judge did not adequately address the question of whether the case could be dealt with justly on the fast track, nor did she consider whether, because fraud was alleged, it was necessary in the interests of justice for the experts to attend so that the trial judge could properly unravel the complexities inherent in their contested evidence.

Casey -v- Cartwright

The question came again before the Court of Appeal in October 2006 in the case of *Casey -v- Cartwright*.[3] Early in the proceedings, the defendant's insurers stated that they considered this to be a low-velocity impact case. On that account, causation would be in issue. This position was amplified in the defence which pleaded the impact to have been very gentle – the speed of the defendant's vehicle was around 2 mph. The defence suggested that the force transmitted between the vehicles was insufficient to cause personal injury to the claimant.

The district judge gave the claimant permission to rely on the evidence of Dr Middleman and both parties were permitted to instruct a joint expert, Mr Williams, to deal with the orthopaedic issues. The case was allocated to the multi-track.

The report of Mr Williams stated that there was a wealth of published evidence to the effect that, at impact velocities of between 5 and 10 mph, injury to the occupant of the struck vehicle is unlikely to occur. If it does occur, it is likely to result in symptoms lasting no more than a few days. This is because the forces directly attributable to the impact velocity are modified by the absorption of energy by the two vehicles upon impact, with a resultant velocity change in the struck vehicle.

However, following a case management conference, the judge found that problems had arisen with Mr Williams's evidence which called his objectivity into question. The court found that Mr Williams was unsuitable to act as a joint expert and revoked the permission given to the parties to rely on his evidence.

The defendant appealed on the grounds that any problems with Mr Williams's evidence were capable of being cured and that, in any event, the decision was against the guidance that had been given in *Kearsley*, namely that in low-velocity impact cases parties ought (at the discretion of the case management judge) to be able to rely on oral expert evidence on the causation issue.

The Court of Appeal held that it was only where a defendant contended that the nature of the impact was such that it was very unlikely that the claimant suffered any more than trivial injury, and therefore the claimant stood accused of fabricating the claim, that the causation issue would arise. If a defendant wishes to raise the causation issue he should satisfy certain formalities.

1. He should notify the other parties in writing within 3 months of the letter of claim that he considers the matter to be a low-impact case and intends to raise the causation issue.
2. He should expressly identify the issue in the defence, supported in the usual way by a statement of truth.
3. Within 21 days of serving such a defence, the defendant should serve on the court and the other parties a witness statement clearly identifying the grounds on which the issue is raised, and dealing with the defendant's evidence relating to the issue.

Upon receipt of the statement, the court will, if satisfied that the issue has been properly identified and raised, usually give permission for the claimant to be examined by a doctor for the defendant. If the court is satisfied on the entirety of the evidence submitted by the defendant – that he has properly identified a case on the causation issue which has a real prospect of success – then the court will allow that issue to be dealt with at trial.

It is clear that these requirements are very specific and strict in their application. Insurers will need to take careful note because the courts are unlikely to allow parties to instruct their own expert on causation, or permit evidence to be given orally, if these guidelines are not followed.

Raising causation requires certain formalities to be observed

Case references

[1]*R -v- Paul Matthew Stubbs* [2006] EWCA Crim 2312.

[2]*Kearsley -v- Klarfeld* [2005] EWCA Civ 1510.

[3]*Casey -v- Cartwright* [2006] EWCA Civ 1280.

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.

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 2007 will enable you to download the 2007 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 2007 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.

Photographs – FREE

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

Company logo

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.

Multiple entries

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 and training courses.

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