# Your Witness

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

## When 'the court has appointed you'

I had an interesting chat with an expert witness recently who was having a bit of a payment problem in an SJE appointment. He had originally been contacted by a solicitor who told him that he had been 'appointed by the court'. As is often the case, the parties to the action had not seen eye to eye on much. This had led to a situation in which the expert, aware of an impending court date but unable to get the parties to agree his exact remit, had decided to plough on as he thought best 'in accordance with his overriding duty to the court'.

The expert had not used written terms of engagement. When he sent out his fee notes to the two solicitors, one paid up without comment but the other side would not pay because, it was maintained, not all the work the expert had done had been agreed beforehand.

Eventually the expert sued the recalcitrant solicitor and his client in the small claims court. In court, the solicitor maintained that it was his client who was due to pay the expert. In the end, the judge agreed. Now, of course, the expert is trying to enforce that judgment against a client of indeterminate means!

If only the expert had used written terms that created a contract with the solicitor then his life would have been much simpler. Whilst the Law Society will not get involved in wrangles over fees, they are very interested to learn of a solicitor who has a judgment against him! This sort of professional pressure is one of the reasons why contracting with the solicitor, not the client, is generally to be preferred.

But the real point of interest for me was that it became clear that the expert didn't really understand when his duty to the court began. He had thought that being 'appointed' by order of the court imposed an immediate duty on him to act as the SJE in the case. In the civil courts, when such an order is made under CPR Part 35, that interpretation is wrong. The court order only tells the parties who they may instruct. It does not bind the expert to act. If the expert is not suitably qualified or is unable to act for some other reason, e.g. the parties don't agree to his terms of engagement, then he is quite within his rights to decline the instruction. Only once the formalities have been gone through is the expert deemed to have been instructed – and it is only then that the expert's duty to the court arises.

## Terminator

Talking of contracts, according to the series of surveys (our 2007 survey form is enclosed with this issue) conducted by the *Register* (from 1997 to 2005), the number of expert witnesses who use a written form of contract has never exceeded 47%. That leaves over half of all experts claiming not to use a form of written contract.

As every lawyer knows, setting out clear terms for any contract, at the outset, is essential if subsequent problems are to be avoided. The contract between expert and instructing lawyer should be no different. Indeed, the need for expert witnesses to be upfront about their terms of engagement is now a requirement of the CPR. **Section 7.2 of the Experts Protocol requires experts and lawyers to place their professional relationship on a firmer footing by ensuring a contract – ideally written – is in place before any work begins.**

Experts in the *Register* have long had access to Factsheet 15 dealing specifically with terms of engagement (you can find all the Factsheets by visiting *www.jspubs.com* and following the link to the *Expert Library*). But with the recent launch of the *Little Book on Expert Witness Fees*, we have made creating a set of terms even easier.

Point your web browser at *www.jspubs.com* and follow the link to *Terminator* (look under *Resources for experts* on the right of the home page). There you will find a new tool to help you create a personalised set of terms of engagement based on the framework set out in Factsheet 15. It is quick, easy and free. What could be simpler?

## Expert Witness Survey 2007

Speaking of surveys, what is it that experienced expert witnesses most want to know about their colleagues? Well, how much they charge comes close to the top of the list! It is also the question we are most frequently asked by experts new to litigation work.

In my mind, there is no more useful way to satisfy this demand for information than to conduct regular surveys among our readers and to analyse the results for publication in *Your Witness*. I make no apology, then, for enclosing with this issue a questionnaire on your work as an expert witness, your terms, conditions and charging rates, and the trends in your volume of work. I would be grateful if you can find a little time to complete the short questionnaire, anonymously if you prefer, and return it to me in the next few days. Alternatively, you can complete the survey on line. Simply point your web browser to *www.jspubs.com* and click on the *Survey 2007* link. We aim to report the results in the next issue of *Your Witness*.

*Chris Pamplin*

## Inside



**Issue 48**

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*White Paper on Health Service Reforms*

### 'Trust, assurance and safety'

In February 2007 the Department of Health (DoH) presented a White Paper to parliament in which yet another batch of Health Service reforms were put forward for consideration. These latest musings arise out of the disquiet following the Harold Shipman and Beverley Allitt cases, the Ayling, Neil and Kerr/Haslam enquiries and the furore involving Sir Roy Meadow and the General Medical Council (GMC).

The White Paper is entitled *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century.* Had the paper appeared under the banner 'The Regulation of Health Professionals for the Week After Next', it might have been more appropriate, given the preponderance of such documents we have seen over the last few years.

Following on from Sir Liam Donaldson's report *Good Doctors, Safer Patients*, the DoH's *The Regulation of Non-Medical Health Care Professionals* and Dame Janet Smith's *Safeguarding Patients,* this White Paper seeks to arrive at some sort of consensus on the shape any new regulations should take. We understand that there is a further report in the pipeline, *Learning From Tragedy, Keeping Patients Safe*, which addresses the particular issues highlighted by the Shipman case.

The paper acknowledges that there are those who have questioned the need for reform. Some see it as a knee-jerk reaction to a few high-profile cases when, on the whole, health care professionals still enjoy a high level of public confidence. The authors of the paper counter this argument by saying that:

> *'with the knowledge we now have from bitter experience, positive learning and a growing professional and public recognition of the need for change, complacency would be unforgivable and would only delay the essential changes that are needed to adapt to the realities of healthcare in the modern world'.*

They point to five developments which, they say, necessitate such change.

*Five reasons justify proposals for change*

### Changing environment

First, we are told that we live in an age where traditional social deference is increasingly being challenged and questioned by a better-informed and more assertive public. Passive acceptance of authority has given way to a greater tendency to challenge received opinion by a public who are more informed than had previously been the case. Greater media scrutiny, too, of once privately managed difficulties is subjecting the professions to closer examination. There is 'emerging and growing public pressure for the relationship between the health professional and the patient to be an open, honest and active partnership, and a declining public willingness to accept passively and unquestioningly the clinical judgements that are made for them'.

Second, the paper identifies that the ability of medicine to intervene creates ever greater patient and public expectations. Furthermore, the work of health professionals is becoming more complex and specialised. Accordingly, the scope for human error increases, placing growing pressures on health professionals who strive to fulfil their fundamental desire to deliver clinical excellence. This, the authors claim, means that the system of regulation needs to adapt and respond to meet these pressures. It must, they say:

- put in place mechanisms that deal with honest mistakes fairly, supportively and sympathetically
- ensure that professional education adapts so that health professionals are properly prepared for the complexity they face when they enter their profession
- ensure that health professionals keep themselves up to date with the state-of-the-art clinical interventions, and
- provide safeguards so that medics do not feel pressurised to operate outside their safe sphere of competence, either through a desire to deliver the most effective care or through unreasonable patient expectations of what they can do.

The third reason identified is the decline in the traditional doctor–patient relationship, and a recognition that health care is, perhaps, not the personal interrelationship it once was.

Fourth, the White Paper points to the increasing complexity of modern clinical practice which, it says, demands a new and more understanding relationship with professionals about the pressures they face. It states that, where appropriate and justifiable, there needs to be a greater emphasis on remediation, rehabilitation and support for those health professionals who have struggled to cope. It seeks to set out a new settlement for that environment in which:

> *'valued health professionals are given the support and second chances that we all expect, if it is fair and reasonable to do so'.*

Finally, it is stated that, both nationally and internationally, the past decade has seen a series of high-profile and controversial cases. They have sent shockwaves through both professional and public thinking about the future of professional regulation. This, according to the DoH, has led to growing doubt in the public's mind about the adequacy of our arrangements for professional regulation.

### It all comes down to public image

This catalogue is very interesting. There is a clear admission that there is less likelihood that bad practice will go unnoticed because (i) patients are no longer so willing to defer to doctors, or to

accept things with blind faith, and (ii) there is a greater likelihood of reporting in the media. It also assumes that individuals are more likely to complain about the conduct of health care professionals because they no longer know them on a personal level. And there is a discernible slant towards the need for ever greater specialisation, and a recognition that increased complexity brings greater opportunity for error.

Taken as a whole, then, the paper does not identify a decline in the standard of health care, but only seems to address matters of the profession's public image and the trust and confidence of, in the jargon, *consumers*.

Yes, it is true that consumers of health care services are more knowledgeable and more demanding. It is true, also, that matters that could once have been dealt with within the profession itself are now more likely to be exposed in the full glare of publicity. But why should these alone be put forward as reasons for closer regulation of the profession? As with other professions, matters of public confidence are almost always addressed by ever more stringent regulation which places added emphasis on already weighty practice regulations. Whether these do anything to strengthen public trust or merely add to the burden of the individual practitioner and act as a discouragement is a moot point.

### Key recommendations

The main planks of the recommendations contained in the White Paper can be summarised as follows.

- There will be a move to make regulators more independent, such as in the appointment of council members. These will include lay members. Professional members will no longer form the majority. It is proposed that there should be an independent adjudicator for doctors.
- Measures will be instated to ensure healthcare professionals are objectively revalidated throughout their career and remain up to date with clinical best practice.
- GMC affiliates will be created to help deal with more cases at a local level and to ensure independent oversight of revalidation.
- The standard of proof used in fitness to practise cases will be changed from the criminal standard to the civil standard, with a sliding scale.
- There will be a move towards a more rehabilitative approach to regulation. A comprehensive strategy will be developed for prevention, treatment and rehabilitation services for all health professionals.

### Revalidation for all – yes, probably even you!

The paper recognises that modern health care involves multi-layered teams of professionals. However, not to be daunted, it seeks to regulate all professions involved, so as to leave no 'weak links in the chain'. Accordingly, the list of those likely to be affected is lengthy. As well as doctors, nurses and paramedics, it will include dieticians, hygienists, dentists, osteopaths, optometrists, pharmacists, technicians and other similar groups, whether working within the NHS or in the private sector. All of these lucky people are to be given the opportunity to '*demonstrate their continuing fitness to practise through appropriate revalidation arrangements*'.

*No decline in the quality of care found...*

Of particular relevance to expert witnesses is paragraph 7 of Liam Donaldson's introduction to the White Paper, which expressly brings experts within the definition of those to be regulated. It states that, in addition to those who work in the private and independent sectors, those engaged in education and training, research, public health, management, the development of new drugs and medical technology, clinical trials, **expert testimony** and humanitarian work overseas will 'need to be able to participate easily in the new systems'.

Those in developing areas, too, will not be immune. As fringe areas and frontier sciences are developed, the paper seeks to ensure that '*new settings for the work of health professionals*' will fit into the regulatory system without difficulty.

### What revalidation will involve

We are told that these revalidation arrangements will comprise a system for continually assessing and monitoring the performance of individuals. In the majority of cases, relicensing of individuals will be required at intervals. Doctors, for example, will need to renew their licence to practise every 5 years.

To enable '*objective assurance of continuing fitness to practise*', the appraisal process will include '*summative*' elements confirming that a doctor has objectively met the standards expected. Specialist recertification will apply to all specialist doctors, including general practitioners. They will need to demonstrate that they meet the standards applicable to their particular medical specialty. These standards will be set and assessed by the medical Royal Colleges and their specialist societies, and approved by the GMC.

The DoH will discuss with stakeholders ways of ensuring that revalidation can be applied appropriately to all practising doctors, not just those who work in the NHS. This will apply to private consultants and medics who provide services as expert witnesses in court proceedings.

*... so it all comes down to massaging the public image*

### A regulator for the regulators

The burden and expense of administering the regulatory systems is likely to fall on existing professional regulatory bodies. But it is also proposed that there be a role for the recently created Council for Health Care Regulatory Excellence (CHRE). Its responsibilities include:

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*Continued from page 3*

- reviewing the work of the professional regulators
- monitoring and reviewing 'sample' cases
- developing 'common protocols' for investigations
- providing guidance to employers on when individual cases should be referred to the national professional regulator
- working with the GMC, General Dental Council (GDC) and the National Clinical Assessment Service (NCAS) in deciding criteria for identifying when it would be appropriate for doctors or dentists to be referred. (In the case of other health care groups, the burden of assessment is likely to fall on individual employers.)

*Experts operate in a hostile environment...*

### A more listening regulator?

One of the main concerns to arise from the Shipman enquiry was the perception that people were sometimes not listened to when it came to complaints about health care professionals. Consequently, one of the aims of the reforms is to make it easier for such complaints to be assessed and acted upon.

While no one would wish to stifle legitimate grievances, this must be equitably balanced with the right of individuals to be protected from the vexatious or malicious actions of disgruntled individuals. This is particularly worrying when considered alongside the proposals to lower the burden of proof in fitness to practise cases from the current criminal standard (beyond reasonable doubt) to the less severe 'balance of probabilities' used in civil cases.

To temper this, the White Paper seeks to place greater emphasis on the forgiveness of honest mistakes, with more opportunities for shortcomings to be overcome through additional training. A cynic might point to this as a bit of an artifice. The complainant has his pound of flesh and the erring doctor, in best Orwellian tradition, is found to be a suitable candidate for re-education and rehabilitation.

### A slippery slope?

According to the White Paper, the 'sliding scale' burden of proof will allow appropriate weight to be given to the serious implications for health professionals involved in fitness to practise proceedings, which could, in some cases, result in erasure from a professional register and consequent loss of livelihood. The sliding civil scale would, in such cases, be the same as the standard of proof adopted during child protection cases where decisions are taken about permanently removing children from their parents. Indeed, it is the standard adopted by employment tribunals where decisions in respect of employees' jobs and livelihoods are reviewed. The Nursing and Midwifery Council have apparently supported the adoption of the sliding civil standard in their consultation response. One presumes, however, that this sliding scale will operate equally against the practitioner where, on balance, the probability of risk to the public is perceived to be greater than the risk of injustice to the individual concerned.

*... which the proposals don't acknowledge*

Given the difficulties a sliding scale creates, one wonders if the best way to give appropriate weight to the 'serious implications for health professionals involved in fitness to practise proceedings' would be not to fiddle with the burden of proof in the first place.

The DoH's paper on the impact assessment of the proposed reforms states that whilst revalidation is necessary for all professionals, the intensity and frequency need to be proportionate to the risks inherent in each profession and within the individual's scope of practice. Discussions will be had with each profession and its regulator to develop the most appropriate arrangements. The DoH says that it is anxious to ensure that revalidation is seen as 'a welcome addition to improving both patient safety and the performance of health professionals and not as a bureaucratic burden on them'.

### A further nail in expert witness immunity

However, in including expert witnesses as a class to be regulated and providing a mechanism to increase the likelihood of complaints about expert witnesses ending up before professional regulators, one wonders whether the authors of the paper have paid sufficient heed to their own impact assessment!

Expert witnesses operate in a hostile environment. It is in the very nature of adversarial legal proceedings that there will always be one party, at least, that will profit from the undermining or discrediting of the expert testimony. Expert witnesses, as the courts have shown, need to be protected from the possible consequences of this and must be free to give their evidence impartially and without fear. But the White Paper, following on the heels of *GMC -v- Meadow*, may prove to be a further nail in the coffin of expert witness immunity.

Harold Shipman was a bad man; Beverley Allitt was mentally ill; Roy Meadow's opinions were honestly held, albeit erroneously. We suggest that there has been no demonstrable decline in the standards of health care – merely a decline in public perception caused by these and other high-profile cases. In reality, it is this public perception that the reforms set out to address. Indeed, it can be no accident that, in the title of the paper, the word 'trust' is to the fore and the word 'safety' brings up the rear!

It is reported that the running costs of the scheme could be £55 million, or more, per year. So far as any scheme to assess, regulate and control the work of medical expert witnesses is concerned, one is left with the distinct feeling that the money might be better spent elsewhere.

# Peripatetic solicitors

A number of calls to the *UK Register of Expert Witnesses* telephone helpline has drawn our attention to a difficulty that can arise when a solicitor leaves one law firm for another, taking with him a case in which an expert is involved.

### A common place

This is by no means unusual. Lawyers prospecting for a job often boost their chances by promising to bring work and clients with them. They refer to this as 'following'. They can only do this with the approval of both their previous firm and the client or clients concerned. The original law firm will usually come to some agreement with the successor law firm to ensure that both profit costs and disbursements are apportioned between the firms, according to the date on which the work was carried out.

In legally aided cases it will be necessary to transfer the legal aid certificate. It will remain the case, however, that the original law firm will be entitled to receive all legal aid payments for work carried out prior to the transfer of the certificate to the successor law firm.

All of this makes perfectly good sense. The solicitor dealing with the file will be familiar with both the case and the client. If he moves on it would be wasteful of his expertise and familiarity with the matter if someone else had to spend time duplicating work already done. Indeed, on an assessment of costs, time spent by another solicitor might be disallowed by the court for precisely this reason.

### What of the expert?

But where does this leave the expert, or expert advisor, whose contract for services was made with the original law firm? Against whom is the contract enforceable?

The first thing to say is that generally an expert should not be unduly concerned if he learns that the case has been handed to another firm. It is normal accepted practice for a final invoice to be sent to whichever firm has conduct of the matter at the time the invoice is rendered. When the invoice is paid, the expert will not have had to concern himself with the arrangements made between the firms for apportionment or indemnity.

However, difficulty arises when the expert's bill is not paid. The successor law firm says they have not agreed to the fee and the original law firm says they no longer have conduct of the matter and are not responsible for payment.

### Back to basics

The solution is to be found in the basic law of contract. The expert's agreement to act will almost always be with a firm of solicitors rather than an individual partner or employee of that firm. In written contracts containing the expert's terms and conditions, the named party will almost always be the firm and not an individual solicitor. Solicitors who sign such agreements in their own name will usually be taken to have signed for and on behalf of the firm. In those circumstances, it will be the partners in that firm who will be jointly and separately liable. Similarly, in the case of oral agreements, the partner or employee solicitor will be deemed to be contracting on behalf of the firm that has conduct of the case.

For the avoidance of doubt, our *Little Book on Expert Witness Fees*[1] suggests the testamentary part of an expert's contract be worded along the lines of:

> *'I am duly authorised to sign this contract for and on behalf of [name of firm].*
> *Signed ..... (Partner)'*

### Doctrine of privity

The doctrine of privity of contract means that, in general, someone who is not party to the contract cannot sue or be sued in relation to it. So, if work done by the expert was purely in pursuance of the contract with the original law firm, then it is to that law firm that the expert will look to for payment. The only exception to this privity rule is when there are deemed to be Third Party Contract Rights.

The Contracts (Rights of Third Parties) Act 1999 created rights in favour of third parties to enforce the terms of a contract. However, the occasions on which such rights will be deemed to have been created are few and far between. Some might argue that the transfer of a case between two law firms, where there is an expert involved who expects to be paid, might be construed as creating third party rights in favour of the expert as against the successor law firm. However, such a claim will be of doubtful merit. If faced with a dispute, and in the absence of an explicit contract with the successor law firm, the expert would be better advised to pursue the original law firm.

### Put in place a new contract

Solicitors practice rules governing transfer of files between firms require the successor firm to enter into a new retainer with the client. This usually involves:

- sending written terms and conditions to the client, together with a 'client care letter' setting out rates of remuneration, contact details, grievance procedures, etc., and
- asking the client to sign and return one copy by way of acknowledgement.

It appears to us that the expert would be wise to follow suit. When he learns that the file has been transferred to another firm, he should ask that firm to agree to his usual terms and conditions. He should also enquire whether his bill for work carried out to date should be sent to the original law firm or whether the successor firm will undertake to pay all previously incurred costs and disbursements. That approach should ensure the expert is fully protected from the meanderings of the solicitor.

*If an instructing solicitor moves to a new firm...*

*... the prudent expert gets a new contract in place*


**Reference**

[1]Pamplin, C.F. [2007] *Expert Witness Fees.* J S Publications ISBN 1-905926-01-4 Order line (01638) 561590

# Court digest

*Poor-quality photocopies are not acceptable*

### Quality of documents

In *Brian Griffiths -v- DPP*[1] the court was asked to consider the evidential validity of documents served by the prosecution and whether these constituted good service. The case involved an appeal against a conviction for speeding.

The appellant had been convicted on the evidence of photographs taken by a speed camera. The expert technician had arrived at his conclusions from studying the images on his computer screen. Prior to the trial, though, the appellant had only been served with poor quality copies of the original prints. The expert's computer file had not been disclosed.

Amongst other things, the appellant asked the court to rule on whether:

- a print developed from a chemical film in a Gatsometer camera was a record within the meaning of s.20(1) of the *Road Traffic Offenders Act* 1988
- the chain of evidence required evidence from the person who developed the prints
- the service of a set of prints not relied upon at trial complied with s.20(8) of the 1988 Act, and
- the computer file should have been disclosed.

The court was invited to consider that the production of poor-quality prints with the report did not amount to good service of the evidence, as required by s.20(8). Consequently, it should have been ruled inadmissible.

The court held that the photographs were, indeed, a record produced (albeit indirectly) by the camera, notwithstanding the need for the development and printing processes. Whilst it was recognised that the record produced directly by the device was a negative image on the film, it was allowed that this also contained the relevant data which was then readable through a viewer or could be printed onto paper.

s.20(1) of the Act, said the court, should not be limited to records issued directly from the machine. Therefore a print produced from a film out of a Gatsometer camera was a legitimate record produced by a prescribed device. Proof of continuity in the evidence (i.e. from camera to film to print) would not, said the court, assist in the detection of tampering with the photographs. Unless the appellant had specifically raised the possibility of tampering, evidence of continuity would be pointless. However, the court held that if a copy of a document was of such poor quality that it could not be used for the purpose for which it had been served, it did not constitute proper service under s.20(8).

The court took the view that the purpose of s.20(8) was to allow documents to be served 7 days in advance of trial in cases where the prosecution did not intend to rely on their production by a witness in court. In this case, if the prosecution had wished to rely on the expert to produce the photographs, it was not required under the Act to produce them in advance. As the expert had produced the photographs, had connected them to the appellant and proof of continuity was not necessary, s.20(8), said the court, did not apply and the photographs could effectively be served on the day of trial.

The court further ruled that, where the expert concerned had relied upon images viewed on a computer screen to carry out his secondary check, there was no need to disclose the computer file since the photographs were real evidence from which anyone could have carried out that check.

For these reasons, the appeal was dismissed. But the court made it clear that in cases where service was required under s.20(8), any copies of documents should be of sufficient standard to render them fit for purpose; the service of poor-quality copies would not constitute good service. Care should, therefore, be taken to ensure that all copy documents are complete, legible and true copies of the originals. Failure to do so may render them inadmissible in evidence.

### Judge's reliance on expert report

It is clearly incumbent on lawyers for parties to assess properly the merits of an expert report and to ask questions of the expert if the report appears to contain inconsistencies or errors. However, what happens if, at trial, it becomes apparent to the judge or the parties that the report might be erroneous but neither party to the action has previously questioned the evidence? Is the trial judge obliged to take the report at face value and abide by the findings of the expert?

The Court of Appeal was asked to decide this question in *Jonathan Edward Woolley -v- Essex County Council* [2].

*Judges should not rely on lawyers to test expert evidence*

In this case Mr Woolley had been injured whilst riding his motorcycle on a road maintained by the Council. His claim for loss of future earnings relied on an expert report on what he might have earned as a curtain waller (a specialised fitter of large sheets of glass in commercial buildings, for which Mr Woolley had just completed his training). Liability was agreed, and an employment consultant was jointly instructed to report on the wages paid to curtain wallers.

Throughout the expert report he referred to the fact that curtain wallers were very highly skilled and likely to earn in the top centile of earnings for glaziers. However, despite this, in his conclusion to the report, the expert gave the average earnings for glaziers, which was much lower than that paid to the top earners. Effectively, then, he had indicated that Mr Woolley might have been expected to earn higher than the average, but in assessing the measure of loss had apparently failed to take this into account. Surprisingly, neither party called the expert to give oral evidence or asked any questions of him.

At trial, Mr Woolley contended that the expert must have made a mistake in giving the average earnings for glaziers in his conclusion. The trial judge held that, in the absence of any questions put to the expert or any contrary evidence, he had to accept the figure in the report when assessing loss of future earnings. Mr Woolley appealed.

The Court of Appeal held that, when assessing the loss of future earnings, the judge had clearly not been assisted and had been placed in some difficulty by the fact that each party had failed to ask any questions of the expert, particularly given the conclusions and the lack of clarity in the report. If the expert had made a mistake, it might have come to light before the trial if questions had been asked. The court took a rather dim view of this laxness by the parties and their legal advisors. However, it was, said the court, incumbent upon the judge to analyse the expert report and to assess whether the expert had inadvertently looked at the wrong figures when reaching his conclusion. It was wrong of the judge to assume the expert had got it right, and it was clear that the expert must have made a mistake in his conclusion. The appeal was allowed.

The case highlights the need for lawyers to properly assess and monitor the contents of expert reports and to raise questions where necessary. However, it makes it clear that, even in the absence of this, a judge is not bound to accept the findings of an expert in cases where it is clear to him that a mistake has been made.

### When an expert changes his mind

Under Part 35(1) of the CPR the court has a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings. Consequently, once directions have been given it is difficult for a party to adduce further expert evidence unless there are very persuasive reasons for so doing. It sometimes happens, however, that a party that has relied on a particular expert's opinion will come upon considerable difficulties if, after a meeting of experts, the expert revises his opinion, resulting in a severely weakened case. In this situation, should it be possible for that party to seek leave to adduce further expert evidence?

Under Part 35(12) the court can direct a meeting of experts and require a report on what issues are agreed or disagreed, together with a summary of any reasons for disagreement. However, Part 35(12)(5) specifically states that where experts reach an agreement in the course of their discussions, that agreement shall not be binding on the parties unless they expressly agree to be bound by such an agreement.

In *Stallwood -v- David & Anor*[3], Mrs Stallwood appealed against a decision that she was not allowed to adduce evidence from a second expert in a personal injury case following her first expert's change of opinion after the meeting of experts. She had claimed that the extent of her injuries would make it impossible for her to work for more than 3 days in a week – a view her expert had initially supported. As a result of the change of opinion, the claimant's chances of succeeding in her claim for compensation were greatly reduced. The issue before the court was whether there were any circumstances in which a party, unhappy with the revised opinion of their expert following the meeting of experts, could obtain permission to rely upon additional expert evidence.

Judge Teare, hearing the appeal, acknowledged that there was no general reason for the court to refuse permission to call a further expert. However, there was no specific provision in Part 35 to allow a party that was merely unhappy with the changed opinion to adduce evidence from another expert. He drew attention to a note to 35(12)(1) contained in the *White Book* (the biggest selling source of reference on civil procedure) which would allow any party that believed an expert had stepped outside his expertise, or had acted incompetently in reaching agreement, to argue that any agreement should not be accepted by the court.

He further noted that a court was able to allow a party to adduce further expert evidence if it felt there was a good reason to suppose that the first expert had modified his opinion for reasons that could not properly and fairly support his revised decision, and where such a procedure was '*reasonably required to resolve the proceedings*'. Neither of these quite suited the circumstances of the present case, though.

Ultimately, however, Teare J was minded to allow the appeal because the hectoring manner of the trial judge had added to the appellant's sense of grievance. Taken together, he was of the view that the justice of the case merited a second hearing of the application, notwithstanding that Mrs Stallwood had, at no time, asked questions about why the first expert had changed his mind.

Mrs Stallwood was probably quite fortunate in this case that Teare J was influenced in his decision by the somewhat unusual approach taken by the trial judge, who had insisted in constantly interrupting the proceedings and comparing Mrs Stallwood's experiences to his own. His findings in this case probably do not alter the general rule that the mere fact that an expert has changed his mind does not amount to sufficient reason for a party to bring in further expert evidence. It is probably still necessary for that party to demonstrate that the expert was acting outside his area of expertise or that his modified opinion was not fairly supported by the reasons for such modification. To rule otherwise would only serve to needlessly increase the number of experts in the case and raise the possibility of 'expert shopping' which the rules have been designed to avoid.

***Change of opinion does not mean new expert can be used***

**Case references**

[1]*Brian Griffiths -v- Director of Public Prosecutions* [2007] *EWHC* 619 (Admin).

[2]*Jonathan Edward Woolley -v- Essex County Council* [2006] *EWCA Civ* 753.

[3]*Mary Stallwood -v- (1) G H David (2) M Adamson* [2006] *EWHC* 2600 (QB).

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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 55). 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 10,556 (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.

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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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### Web integration – FREE

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### 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.

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Drawing on over 20 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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