Your Witness

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Family Court 'standards' for experts

New national standards for expert witnesses working in children cases have been announced by the Family Justice Council and the Ministry of Justice. They are expected to come into force in April 2014. The text of the standard is as follows:

> Subject to any order made by the court, expert witnesses involved in family proceedings (involving children) in England and Wales, whatever their field of practice or country of origin, must comply with the standards (1–11)
>
> 1. The expert's area of competence is appropriate to the issue(s) upon which the court has identified that an opinion is required, and relevant experience is evidenced in their CV.
> 2. The expert has been active in the area of work or practice (as a practitioner or an academic who is subject to peer appraisal), has sufficient experience of the issues relevant to the instant case, and is familiar with the breadth of current practice or opinion.
> 3. The expert has working knowledge of the social, developmental, cultural norms and accepted legal principles applicable to the case presented at initial enquiry, and has the cultural competence skills to deal with the circumstances of the case.
> 4. The expert is up-to-date with Continuing Professional Development appropriate to their discipline and expertise, and is in continued engagement with accepted supervisory mechanisms relevant to their practice.
> 5. If the expert's current professional practice is regulated by a UK statutory body, they are in possession of a current licence to practise or equivalent.
> 6. If the expert's area of professional practice is not subject to statutory registration (e.g. child psychotherapy, systemic family therapy, mediation, and experts in exclusively academic appointments), the expert should demonstrate appropriate qualifications and/or registration with a relevant professional body on a case by case basis. Registering bodies usually provide a code of conduct and professional standards and should be accredited by the Professional Standards Authority for Health and Social Care. If the expertise is academic in nature (e.g. regarding evidence of cultural influences), then no statutory registration is required (even if this includes direct contact or interviews with individuals), but consideration should be given to appropriate professional accountability.
> 7. The expert is compliant with any necessary safeguarding requirements, information security expectations, and carries professional indemnity insurance.
> 8. If the expert's current professional practice is outside the UK, they can demonstrate that they are compliant with the FJC 'Guidelines for the instruction of medical experts from overseas in family cases'.
> 9. The expert has undertaken appropriate training, updating or quality assurance activity – including actively seeking feedback from cases in which they have provided evidence – relevant to the role of expert in the family courts in England and Wales within the last year.
> 10. The expert has a working knowledge of, and complies with, the requirements of Practice Directions relevant to providing reports for and giving evidence to the family courts in England and Wales. This includes compliance with the requirement to identify where their opinion on the instant case lies in relation to other accepted mainstream views and the overall spectrum of opinion in the UK.
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> **Expectations in relation to experts' fees**
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> 11. The expert should state their hourly rate in advance of agreeing to accept instruction, and give an estimate of the number of hours the report is likely to take. This will assist the legal representative to apply expeditiously to the Legal Aid Agency if prior authority is to be sought in a publicly funded case.

This is all quite high-level stuff and is mostly unremarkable. However, the one area that has caused a bit of a fuss is the implied limit placed on both experts moving into family court work for the first time and those recently retired. Just what is meant by 'appropriate training'? And given the GMC's singular inability to work out how medical experts who no longer undertake clinical work are supposed to revalidate, will recently retired doctors be prevented from taking on such cases?

While I have no issue at all with efforts to raise standards, the far more serious problem facing the family court is the critical shortfall in the number of experts willing to take on any such work at all. The combined effect of atypical, but newsworthy, cases (often not even drawn from family courts) in which doctors are seriously criticised, together with the utterly ridiculous approach to expert witness fee control taken by the bean counters inside the Ministry of Justice, has created a crisis in the supply of suitable experts to the family court.

The President of the Family Division, Sir James Munby, has said that the Family Procedure Rule changes introduced this April have already reduced the number of experts being used in family cases by ~60%. This was expected when the changes were being planned, and Sir James has stated publicly that the judiciary's response to the consultation on fee caps told the Ministry of Justice that this would happen. For the fee caps to have proceeded to such damaging effect on the supply of experts to the family court is beginning to look, as many warned, seriously prejudicial to a fair trial.

New edition

Preparations for edition 27 of the *UK Register of Expert Witnesses* have begun. A draft of your entry for the new edition will be sent in the New Year for you to check, sign and return. **If you will be away during the first half of January 2014** you may wish to contact us now so that we can make appropriate alternative arrangements.

Chris Pamplin

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Conflicts of interest

Existing relationships between experts and lawyers...

The Law can be a small world, and expert witnesses who have worked within it for some time can find that they have established close working relationships with lawyers who regularly instruct them, or even judges who hear the types of case in which they are habitually instructed. Sometimes, such relationships might be viewed as personal friendships, not merely professional acquaintance. Just how close does a relationship need to be to give rise to a valid claim of bias or conflict of interest?

To minimise the risk of an expert witness being accused of bias or a lack of independence, where possible those instructed should:

- have no connection with the instructing party
- avoid instructions from colleagues or friends
- not have out-of-court contact with judges on their cases, and
- take care to be, and to be seen to be, independent throughout.

The leading case on conflict of interest, as applied to expert witnesses, remains *Toth -v- Jarman*[1] (see *Your Witness* 53) in which the Court of Appeal emphasised the importance of disclosing early any potential conflict of interest on the part of expert witnesses. Further guidance came from the case of *Factortame*[2], in which the Court of Appeal stated that, although it was better for an expert witness not to have an interest in the outcome of proceedings, lack of interest was not an absolute requirement. It further stated that the test of apparent bias which would be applied to a tribunal was not the one to apply to expert witnesses. An expert witness will not automatically be prevented from giving evidence on behalf of a party just because that expert witness has some interest in the proceedings. The court will decide, on a case-by-case basis, whether an expert may give evidence.

These previous cases have tended to focus, however, on connections between expert witnesses and one or other of the parties in the case – not on connections between expert witnesses and lawyers. But two recent cases have highlighted the difficulties caused by relationships with lawyers or judges which might give rise to a *prima facie* suggestion of bias or lack of independence (whether on the part of the expert witness or the judge).

... do not automatically bar the expert witness

Expert witness knows the lawyer

In *Proton Energy -v- Orlen Lietuva*[3] there was a dispute about whether dealings between the parties gave rise to a contract. One of the expert witnesses was found to have had a long-standing relationship with a partner in the firm of solicitors instructed by the claimant. Consequently, much of his cross-examination had focused on this relationship and claims that he had not been sufficiently independent.

The expert witness had known the solicitor for 18 years and, for 12 years, the solicitor had been involved in commercial conferences and seminars, which the expert's company arranged for profit. Both the expert witness and the solicitor referred to their connection with one another on their websites. Furthermore, the solicitor had been paid by the expert's company for some of the workshops. It was argued, therefore, that this gave rise to a relationship outside the normal solicitor/expert relationship and that the commercial element, in particular, should affect the credibility of the expert's evidence.

The court found the expert witness straightforward and honest but also forthright. The court also considered that the expert's evidence was preferred over that of the opposing side's expert. Judge Mackie QC observed that, in any event, this was not the worst case of failure to disclose an interest. Solicitors' firms, he said, repeatedly choose the same individuals to act as expert witnesses. It was not unknown that they might, from time to time, work with one another on the lecture and conference circuit, and no doubt entertain each other. However, in the present case, the connection, which included a financial element, was a closer one than usual and should have led the claimant's solicitors to choose another expert witness, or at least to make full disclosure of the link.

Although the expert's evidence was accepted, this was largely down to the quality and persuasiveness of his evidence; in other circumstances, the existence of such a close relationship could have seriously compromised the party's case.

It was right that the expert had been questioned closely on matters relating to the credibility of his evidence. This was a situation that really could have been avoided and, no doubt, the expert's blushes could have been saved if consideration had been given to this prior to his instruction.

Expert witness knows the judge

In another case heard this year a judge had to consider an application that he recuse himself from hearing the trial of a claim on the basis of apparent bias. In *Resolution Chemicals -v- Lundbeck*[4] the judge admitted that the claimant's expert witness had supervised one of his research projects as part of his Oxford University chemistry degree course 30 years previously. The expert's evidence was that he had no specific recollection of the judge. In a letter, the expert had confirmed this and had set out his general practice with regard to students he supervised.

Arnold J acknowledged his discomfort in hearing the application himself, but accepted that this was the appropriate practice. The correct approach, he said, was to apply an objective test. The principle to be applied is whether a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased.

The fair-minded and informed observer

Arnold J identified the key points that a fair minded observer would take into account. These included:

- the fact that many of the participants would already be known to each other, given the specialist nature of matters under consideration
- the expert's own duties to the court under CPR 35, his primary role being to educate the court, his pre-eminence as a scientist and previous experience as an expert witness
- the passage of time since the judge had known the expert, and the judge's change in status
- the judicial approach to objectively assessing all witness evidence, and
- that analogies are unhelpful in cases of this type because they are fact sensitive.

The judge quoted the words of Patten LJ in a family law case[5]:

> *'Where a judge is faced with an application that he should recuse himself on the ground of apparent [bias] it is in my judgment incumbent on him to explain in sufficient detail the scale and content of the professional or other relationship which is challenged on the application. The parties are not in the position of being able to cross-examine the judge about it and he is likely to be the only source of the relevant information. Without this, it becomes difficult if not impossible properly to apply the informed bystander test set out by Lord Hope in his speech in Helow -v- Home Secretary [2008] 1 WLR 2416.'*

Complying with this, the judge set out very fully his recollections of his time at Oxford (which, it appeared, was not a particularly happy one) and his connection with the expert and his then colleagues. He was entirely satisfied in his own mind that his past connection with the expert would not affect his assessment of the evidence. He acknowledged, however, that it was clear from the authorities that what matters is not what he, the judge, thought, but what the fair-minded and informed observer would think.

With this in mind, the judge applied a number of criteria which were subject to an objective test. These included the:

- overall context of the case
- expert's status
- importance of the expert's evidence
- nature and extent of the past relationship
- effect of the passage of time and change of status, and
- specific aspects of the current case

The context of the case was that of a claim for patent revocation. This was, said the judge, a specialist area involving the application of a sophisticated body of law to highly technical facts. The fair-minded and informed observer would appreciate that this was far removed from, say, an allegation of deceit. The observer would also appreciate that, because it is a specialist field, it is one in which many of the participants are known to each other. Thus the judge was well acquainted with most of the barristers, and many of the solicitors, who conduct litigation in the Patents Court. It is also not uncommon for expert witnesses to act in more than one case, and the judge had already had the experience of assessing the evidence of an expert who had given evidence before him in a previous case.

The expert's primary role was to educate the court as one of four expert witnesses called by the parties. Furthermore, what mattered was not his opinion, but the objective reasons he gave for his opinion. In this case, the expert was an eminent scientist, an experienced expert witness and a Fellow of the Royal Society who had been knighted for his services to chemistry. It therefore followed that any issues as to the expert's credibility were unlikely. It also followed that the question for the court to assess would be the extent to which the expert's opinions reflected the common general knowledge and perceptions of the notional skilled person, not whether they were genuinely held or even scientifically correct.

The expert's evidence in this case was of primary importance, speaking to several of the key issues in the case. And in terms of a past relationship, the expert had acted as the judge's supervisor in part of a degree course lasting only 1 year.

The fair-minded and informed observer, said the judge, would note that a little over 30 years had passed since his association with the expert. In that time, he had successively become a barrister, QC and High Court Judge. The fair-minded and informed observer would appreciate that, in supervising a student, the expert had some measure of authority over him, but that, as a judge assessing a witness, he would now have a considerable measure of authority over the expert.

Taking all of these factors into account, would the fair-minded and informed observer conclude that there was a real possibility of the judge being subconsciously biased in his assessment of the expert's evidence by reason of his past association with him? The judge concluded that if he was in any real doubt as to the answer to that question, he would recuse himself. However, having given the matter anxious consideration, he was in no doubt that the fair-minded and informed observer would not conclude that this was a real possibility.

Conclusion

In the somewhat cloistered world inhabited by many specialist experts, lawyers and the judiciary, the issues raised by these two cases provide a useful guide to the degree of proximity that might be tolerated and a reminder of the need to disclose, at the outset, any factors that might give rise to questions of conflict.

The 'informed bystander' test must be applied

References

[1] *Toth -v- Jarman* [2006] *EWCA Civ* 1028.

[2] *R (Factortame Ltd) -v- Secretary of State for Transport, Local Government and the Regions (no 8)* [2002] *EWCA Civ* 932 (*Factortame*).

[3] *Proton Energy Group SA -v- Orlen Lietuva* [2013] *EWHC* 2872 (*Comm*).

[4] *Resolution Chemicals Limited -v- H Lundbeck A/S* [2013] *EWHC* 3160 (*Patents Court*).

[5] in *Re L-B (Children)* [2010] *EWCA Civ* 1118 at [22].

Admissibility of expert opinions in

Is published research admissible without calling the author?

Absolutely! Any shortcomings would go only to weight

In previous issues of *Your Witness* we have considered the use of expert opinion by third parties in related cases and its admissibility. Two recent cases have examined this issue from a somewhat different angle. The question raised was whether expert opinion contained in third-party documents (produced by entirely independent persons and extraneous to the proceedings and the parties) was admissible as evidence in civil cases where the maker of the document was not to be called.

Air crash investigations

In *Rogers -v- Hoyle*[1], an application was made to exclude from evidence a report produced by the Air Accident Investigation Branch of the Department for Transport ('the AAIB'). The case involved a claim by executors of a Mr Rogers, who had been killed when a Tiger Moth aircraft in which he was a passenger crashed in Dorset. The claimant alleged that the accident was caused by the negligence of the defendant, Mr Hoyle, who was the pilot of the aircraft.

The purpose of air accident investigations is the prevention of accidents and not to apportion blame or liability. The crash had been investigated by the AAIB in the course of carrying out its statutory and regulatory duties.

At the date the claim was issued, the report had not been concluded and so no reference was made to it. However, by the time of the reply to the defence, the report was available and the claimant placed reliance on matters within the report and made extensive reference to it.

In response to the claimant's statement of intention to rely on the report, the defendant sought a declaration that the report was inadmissible.

Hitherto, the use of AAIB air accident reports had been fairly commonplace in proceedings of this sort. It appears that, save for one unreported instance, no previous challenges had been made to the admissibility of such evidence, and this was the first time the question had come before the High Court. In this case, the defendant submitted that the report consisted of inadmissible opinion evidence and that this extended to all 'findings of fact' contained in the report, since findings of fact are statements of opinion. He also cited the rule in *Hollington -v- Hewthorn*[2] as authority for the assertion that the findings of another court, coroner, wreck inquiry, disciplinary tribunal, or similar body, had all previously been ruled inadmissible by the courts.

Dealing with the application, Mr Justice Leggatt considered the relevance and content of the report, the extent to which the report contained statements of fact and statements of opinion, and the basis on which those statements had been made. As well as factual evidence, the report contained evidence of the opinions of experts on technical matters, which included aeronautical engineering, wreckage analysis, meteorology, pathology, analysis of flight data, and the piloting of aircraft. The opinions of such experts were incorporated in the report. In some parts the experts were identified (although not by name), and in others they were not. However, he found that the report contained:

> *'... a wealth of relevant and potentially important evidence which bears directly or indirectly on the issues in this action, including the central issue of whether Mr Rogers' death was caused by negligence on the part of Mr Hoyle'.*

He recognised that some of the evidence could be obtained from direct and alternative sources, and some of it could not.

Unnamed expertise still valuable

Of more concern was the fact that none of the statements of fact or opinion contained in the report were attributed to any named individual, and that the report was based on an exercise in evaluating and discarding evidence that was not disclosed. Neither did the report make a disclosure of any unused material. In the judge's view, however, these were all matters that went to the question of what weight should be given to the contents of the report, not to admissibility.

On any view, said the judge, the factual evidence in the report was admissible as the evidence was relevant; the fact that it was hearsay was not a ground for its exclusion. The opinion evidence was also, in principle, admissible in so far as the opinions stated were those of qualified experts on subjects involving special expertise.

Turning to the defendant's objections to the report's conclusions about the causes of the accident, the judge held that it was correct that if these findings involved inferences drawn from facts, then they fell into the category of opinion evidence. The opinions expressed, however, were not those of a lay person. The AAIB was a body with very considerable expertise in determining the circumstances and causes of such accidents, and that gave the findings in the report a special value as the opinions of experts who were, moreover, entirely independent of the parties to the litigation.

Rejecting the defendant's argument in relation to the rule in *Hollington*, the judge agreed with the claimant's assertion that the rule was formulated in relation to judicial findings and could not properly be applied to the AAIB report. What characterises a judicial finding for these purposes is that it is an opinion of a court or other tribunal whose responsibility is to reach conclusions based solely on the evidence before it. There was a material distinction to be made between this and a finding made, as in this case, by an air accident investigator. A judge hearing an aviation case was unlikely to have any relevant knowledge of piloting or aeronautical engineering. There was, in this regard, a

significant difference between judicial findings, which must be based on the evidence adduced by the parties, and the opinions of an expert who is entitled, and indeed expected, to reach conclusions by applying previously acquired knowledge.

Having concluded that the report was, in principle, admissible, the judge went on to deal with the status of the evidence. He did not agree with the claimant's contention that the court had no discretion to exclude it.

He agreed that the report did not fall within Civil Procedure Rule (CPR) Part 35 which gave the court the power and duty to restrict expert evidence that would otherwise be admissible to that which was reasonably required to resolve the proceedings. The term 'expert' in Part 35 is restricted by rule 35.2 to '*an expert who has been instructed to give or prepare evidence for the purpose of court proceedings.*' Thus, although the AAIB report included expert evidence in a general sense, it could not be expert evidence regulated by Part 35, because it had not been prepared for this purpose. It followed that the claimant did not require the court's permission under rule 35.4 to adduce it. The judge pointed out, however, that the court had a wider discretion under CPR Part 32, which gave the court express powers to control the evidence it will receive. In particular, under 32.1:

1) the court may control the evidence by giving directions as to –
a) the issues on which it requires evidence;
b) the nature of the evidence which it requires to decide those issues; and
c) the way in which the evidence is to be placed before the court.

2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

The objections raised by the defendant, which included the facts that (i) the individual experts in the report were not named, (ii) there was no statement of truth, and (iii) there was a failure to disclose unused material, were all considerations the trial judge could take into account when assessing the weight that should be given to statements contained therein. However, in the judge's view, they came nowhere near to providing a sufficient reason for excluding the report from evidence.

Published research

In another case decided this year, *Interflora Inc -v- Marks & Spencer plc*[3], the court came to a similar conclusion in relation to an application to exclude from evidence academic articles of a broadly scientific nature. These included, for example, articles by an eminent academic at the College of Information Sciences and Technology at Pennsylvania State University. The primary objection raised by the defendant was that the statements contained in the documents constituted expert evidence. Accordingly, such statements were only admissible, so it was argued, in accordance with CPR Part 35. The defendant argued, in the alternative, that, even if the articles were technically admissible, the court should exercise its discretion to exclude them.

Considering the application, Mr Justice Arnold came to conclusions broadly the same as those made by the judge in *Hoyle*. He, too, made similar findings in relation to the application of Part 35 which, he said, controlled the giving of evidence by experts as defined in rule 35.2. It did not control the admission of other types of evidence that may be described as expert evidence.

If he was to exclude the academic articles on the ground that their makers were not experts as defined by rule 35.2 and were not to be called as expert witnesses, this would have startling consequences. He took as an example the common situation where an expert witness produces a report under Part 35. If exhibits to that report rely upon articles published in the scientific literature by others, but no expert report is produced from those other individuals, the consequence of the defendant's argument would be that the expert's report itself would be admissible (because it was properly adduced before the court pursuant to the machinery in Part 35) but the material exhibited to it would not. In Mr Justice Arnold's view, that could not be right and he declined to exclude the evidence.

The judge did have two concerns, however. First, is it fair that a party could be permitted to rely upon a selection of the academic literature in circumstances where he did not know what a wider search of the academic literature might throw up and whether there was academic literature that could be produced in rebuttal? Second, he thought that the court '*should be astute to an attempt by parties... to turn the court itself into its own expert*'. The judge said that he felt some:

'... discomfort at the proposition that scientific literature can be put before courts without the benefit of an expert's report to put the literature into context and without the opportunity for an expert to be cross-examined upon the contents of such literature.'

Conclusion

Both cases show that it is possible to adduce third-party expert evidence in a form not governed by CPR Part 35 and in circumstances where the author of the evidence will not be called, and, indeed, may not even be named or identified clearly. Both judgments highlight the inherent problems posed by this approach, however, and make it clear that the court has wide discretion to evaluate the merits of such evidence on a case-by-case basis and to use its powers under Part 32 to control or exclude it, as it sees fit.

Such evidence falls outside CPR Part 35

References

[1] *Rogers -v- Hoyle* [2013] *EWHC* 1409 (*QB*).

[2] *Hollington -v- Hewthorn* [1943] 1 *KB* 587, 594.

[3] *Interflora Inc -v- Marks & Spencer plc* [2013] *EWHC* 936 (*Ch*).

The expert who cried, 'Enough!'

Expert shopping not permitted...

Restrictions on the use of expert evidence and, in particular, the granting of permission to change an expert witness have been matters firmly in the sights of the court in its continuing quest to reduce costs and time. While it is difficult enough to get permission to adduce expert evidence in the first instance, it is still harder to depart from any order or to change experts once permission has been granted.

The court will use its powers to restrict expert evidence in cases where there is a suggestion that a party is 'expert shopping' for someone who will better support its case. Consequently, Civil Procedure Rule (CPR) Part 35.4(2)(b) requires a party to name its expert, where practicable, and, once an expert has been named, the court will not allow departure from this without good reason. Where permission is granted to change experts, the court will usually order a party to disclose any unused expert report obtained before proceedings (see *Edwards-Tubb -v- Wetherspoon*[1] in *Your Witness* 65).

Since April 2013, applications for permission to use expert evidence must include a costs estimate and identify the field and the issues the expert evidence will address. CPR 1.1 has been revised to emphasise the need to deal with cases not only justly but 'at proportionate cost', and CPR 44 is revised to introduce an over-arching requirement for proportionality for the recoverability of standard basis costs.

It will be apparent, therefore, that any application to change or substitute an expert will be fraught with difficulty. Aside from any question of duplication and expert shopping, the applicant must also overcome the costs hurdle and any suggestion of disproportionality. In addition, there is the problem that any agreed costs estimate will be exceeded and the change of expert might also involve changes in the field and issues to be addressed.

Against this background, what are the consequences for the expert and the parties if an expert simply decides that he no longer wishes to act in a case?

... but retirement is allowed!

Enough's enough, let me rest!

This was the question addressed by the court in the recent case of *BMG -v- Galliford Try Construction*[2]. The claimant's architectural expert in that case had been instructed (initially as an expert advisor) 2 years before the parties had begun corresponding pursuant to the pre-action protocol. Following an unsuccessful mediation (at which the expert's evidence had come under close and critical scrutiny), it became apparent that the matter was not going to settle and the case would proceed to trial. By that time, the expert had reached the age of 70 and the trial date was still likely to be some distance away. When he had accepted his original instructions the expert had not expected that the matter would take so long to conclude and indicated that he no longer wished to act. Consequently, the claimant made an application to the court to change expert.

The defendant resisted the application, claiming that this was a case of 'expert shopping' and the real reason for the change was that the expert's evidence had received a rough ride at mediation. However, the court did not accept this interpretation. The court recognised that there might be good and valid reasons for changing experts. In Technology and Construction Court litigation, it is common for the parties to have appointed experts long before proceedings are issued, and sometimes, as in this case, before the pre-action stage. Given the particular facts of this case, the age of the expert and the time elapsed since his appointment, the court was unsurprised by the expert's request. The court found that while the claimant needed the court's permission to call a new expert witness under CPR Part 35, it was appropriate, in this case, to do so.

Following the decision in *Edwards-Tubb*, the order was made subject to a conditional disclosure order in relation to the report prepared by the original expert. This report had been prepared a considerable time before the pre-action protocol correspondence had been commenced and had been provided by the expert in his capacity as expert advisor. Consequently, there might have been a valid argument that this fell outside the provision of CPR 35 and was outside the ambit of a disclosure order. Whether or not the unusual circumstances of this case would have brought it within the ambit is unclear because the argument does not appear to have been raised.

The decision of the court had a somewhat ironic sting in the tail for the defendant. The court took the view that the defendant had acted unreasonably in resisting the claimant's application and that this had caused the claimant to incur disproportionate costs. The defendant was, therefore, found to be in breach of the overriding objective, as amended by the implementation of Lord Justice Jackson's reforms in April 2013. The court was minded to make an order for the defendant to bear the whole costs of the application. In the final order, however, the court avoided what would have been a complicated and issues-based costs order. Instead, it ordered the defendant to pay half of the claimant's costs on the application.

The case serves as a timely reminder that, notwithstanding the 'sound and the fury' often associated with the court's reluctance to grant permission to change experts, the court will do so where there is a justifiable reason. Parties should also take heed of the costs order made and should resist the temptation to oppose applications simply as a matter of course. 'Taking a punt' when there is really insufficient justification for doing so is now likely to result in unwanted costs consequences.

References

[1] *Edwards-Tubb -v- J D Wetherspoon* [2011] *EWCA Civ* 136.

[2] *BMG (Mansfield) Ltd & another -v- Galliford Try Construction Ltd & another* [2013] *EWHC* 3183 (*TCC*).

Kate's five-minute appraisal

Seeing the trip wires before they trip you

Kate Hill, lawyer and trainer, has sat through very many trials. Most have related to healthcare claims and involved expert witnesses. It began to dawn on her that expert witnesses under cross-examination who seemed to be going along nice and smoothly (from the expert's perspective) would sometimes appear to stumble over a seemingly innocuous question. She began to collect expert reports which she annotated to show where the stumbles had occurred. After some years she found time to sift through this mass of data – it took her years to get around to the task because she didn't think she would find anything very useful. She was wrong! While the underlying reports were all medical, the points they raise have general application.

The outcome of Kate's analysis was that most of the trip points fell into one of three types:

- Mixing up fact and opinion
- Incomplete tasks
- Not using plain English

Mixing up fact and opinion

The biggest problem was expert witnesses giving opinions that were not clearly linked back to the facts. Expert witnesses should always apply the rule that **wherever an opinion is expressed, it should be tied to its factual basis in the evidence**. An opinion that is unrelated to the evidence is unnecessary, may appear to others to be a fact rather than an opinion, and will normally be much harder to justify. Likewise, evidence in an expert witness report that is not linked to a subsequent opinion should only be included after careful consideration.

Barristers love nothing better than a floating opinion! Because it is free from any clear connection to the evidence in the case, it is a simple matter for the expert to become accused of roaming outside of instructions or pursuing some pet theory.

On a point of reporting style, it is best to **separate evidential fact from opinion**. Intermingling evidential fact and opinion within the report will make it much harder for others to recognise one from the other, or how the facts underpin the opinions.

Incomplete tasks

Expert witnesses should ensure that **tasks are completed and completely reported**. For example, when an expert witness reports on medical records that say simply 'patient reassured', the expert witness should recognise that the record describes only half the task. It fails to explain why the patient needed to be reassured in the first place, what the concerns were, what explanations were given and how the health professional knew that the patient was no longer anxious.

How about 'patient slept well'? This fails to explain how the judgment was made. Was it made on the basis that the patient was in bed, was snoring, was not moving or was not crying out in pain? Was the patient asked if they slept well? It has been known for this comment to have been made in a patient's notes when she had, in fact, been dead for several hours!

What if the notes report 'risks advised'? This fails to say what risks were mentioned, whether they were of particular importance to the patient's circumstances, if the patient was concerned about any of the risks, or whether alternatives were discussed.

If expert witnesses draw opinions based upon such 'information-free' verbosity, they will find wily old barristers only too willing to expose the weak foundations. If the barristers start generating such nonsense themselves, be very afraid! ('How afraid is that?' is what you should now be asking – uncalibrated superlatives also have no place in expert witness reports!)

Always tie opinions to facts

Plain English

Expert witnesses should be fastidious in ensuring that their **reports are accessible to the lay reader**. In so far as the opinions in the report are based upon technical evidence, such evidence should be rendered into plain English if necessary. This cuts down on communication errors and makes it clear how opinion is linked to fact. It also prevents barristers from making hay in the comprehension gap that will exist between the expert and the lay audience.

Conclusion

Given that the limited feedback most expert witnesses receive from their instructing lawyers is usually restricted to ink colour, legibility, date, time and technical content, it is refreshing to see some meaningful feedback. If you take care to always link your opinions to the evidence, to be complete in your analysis and to use plain English, you should avoid handing an easy cudgel to the cross-examining barrister.

Kate Hill Profile

Kate Hill has been a practising solicitor at RadcliffesLeBrasseur Solicitors for 20 years. During this time she has worked in numerous departments, but chose to specialise in healthcare law. Some 5 years into her practice she started to run training for Radcliffes' clients and in her own right. Kate has proved to be a naturally talented trainer who can communicate with all levels of health professional. She does not use overheads or PowerPoint (she confesses to being unequal to the task of keeping the slides in time with her talk!), and over the years has developed a training style that is interactive and practical. Kate offers a very different approach to the standard legal training provided by solicitors, and it is this difference that has helped her company, InPractice, win clients. She has taken great care to choose trainers (see www.inpracticetraining.com) who also train in this way and are healthcare specialists.

Ensure tasks are complete and fully reported

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.

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Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 64). You can read them all on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, disclosure and fees.

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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. 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 is also available. So, successful re-vetting in 2013 will enable you to download the 2013 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 help, 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 2013 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*.

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