Your Witness

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Medical expert witness revalidation

A recent call to the *Register* Helpline raised the question as to whether a retired doctor, who no longer treats patients and is just writing medico-legal reports as an expert witness, needs to be revalidated and, if so, how that can be done. It's not the first time this issue has arisen, but until now we have not published any specific guidance because the General Medical Council (GMC) has been singularly unhelpful in resolving the matter.

However, there is now some quite detailed guidance from the Royal College of Physicians (visit *fflm.ac.uk/revalidation/faq/* for full details) which concludes that if you want to continue examining patients for medico-legal reports, and to do clinical negligence work, it would be wise to retain a licence by revalidation. So how does one achieve that end without access to a 'responsible officer'?

The only way I have come across to revalidate after retirement is to join the Independent Doctors Federation – point your web browser at *www.idf.uk.net/appraisal-revalidation.aspx*. Apparently it can arrange your appraisal along the same lines as recommended by the GMC and will then recommend you (or not!) to the GMC for revalidation.

Professional indemnity insurance

In light of the *Jones -v- Kaney* ruling, it was clear that adequate professional indemnity insurance cover would become more or less essential for experts. Working with *Lockton Companies LLP*, we put together the *UK Register of Expert Witnesses Professional Indemnity Insurance scheme*, insured by RSA and underwritten by Mapledown (a subsidiary of Lockton). It was created specifically to offer insurance for expert witness work.

The *UK Register of Expert Witnesses Professional Indemnity Insurance scheme* can be taken out to provide additional cover if you already have insurance in place for your non-forensic work, or to offer new cover if your work is entirely forensic. Alternatively, if you wish to obtain cover for all your work, forensic and otherwise, this can be considered too on a bespoke basis.

Now there's a **valuable additional feature** to the scheme: the option to buy a **single run-off policy when you retire from active expert witness work**. A one-off premium, negotiated at the point of retirement, will provide 6 years' protection against any nasty 'sting in the tail' claim that might arise. The policy will see most cases reach their statutory limitation period, after which, generally, no further claim can arise.

Having insurance means that the insurer will be able to manage any claims on your behalf, and in the worst case settle the claim should that become necessary. In other words, any claim against you no longer needs to deflect you from productive work, or keep you awake at night!

This scheme is exclusive to members of the *UK Register of Expert Witnesses* and provides cover from £500,000 upwards. Point your web browser at *www.jspubs.com* and click on the *PI Insurance* link for full details.

Avoid weasel words from lawyers on fees

Another recent call to our Helpline ended up with *Debt Collection for Expert Witnesses* pursuing the debt so the expert could get his money. The crux of that matter came down to the words the solicitor used in respect of the expert's fee – '*our client will be responsible for your reasonable fees*'. These are weasel words!

No expert should accept this offer on face value because there is no way of knowing that the client either has funds to settle the account or, more importantly, has agreed to do so.

Just consider, in what capacity does the solicitor make the claim? In making that claim, is the solicitor purportedly acting as an agent of the client? And, if so, on what terms? For the client to be liable, there must be privity of contract between client and expert – experts often don't even know where the client lives! Does any documentary evidence exist to prove that the client knows anything of what is being said? If so, is what has been agreed about any limits on the amount or the time scale for payment known to the client? I could go on, but you probably get the point!

It is in an expert's own interest to find out at the start of any instruction who is to pay the bills. There should be no ambiguity here if the expert wishes to avoid unseemly arguments later on.

The best bet is for the instructing solicitor simply to say that the *solicitor's firm* is responsible for the fees. If the solicitor is a sole practitioner and signs the acceptance of terms in person, the words 'I will be responsible' are acceptable, but not otherwise.

If the solicitor wishes to pass on responsibility for your fees, it is up to you to find out who is to be responsible... and to ensure that person knows of the liability and has the means to pay.

Finally, no expert should agree to be paid by the solicitor's client unless a contract almost identical to the one entered into between the expert and the solicitor has been signed by the client, and the expert has ensured appropriate due diligence has been undertaken.

Chris Pamplin

Inside

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Insufficiently expert?

Experts must not stray outside their areas of expertise...

In *Pool -v- General Medical Council*, the High Court considered the appropriate sanction for a psychiatric expert witness whom the General Medical Council (GMC) subsequently found did not possess sufficient expertise. The case poses some fundamental questions about how one's expertise should be delineated.

Background

In brief, Dr Richard Pool, a psychiatrist employed as a consultant within a private secure hospital, was instructed by solicitors for the Health Professions Council (HPC) to act as an expert witness in psychiatry. The proceedings were an HPC Panel hearing relating to a paramedic's fitness to practise. The paramedic had a diagnosis of personality and post-traumatic stress disorders.

The paramedic objected to the expert evidence on the basis that Pool was not an expert. The HPC Panel determined that Pool did not have sufficient expertise in the field of personality disorders and, as such, excluded his evidence. The paramedic referred Pool to the GMC.

The crucial criticisms made against Pool were that he had insufficient expertise in the area of personality disorders and he had not held a substantive post in the NHS. At the relevant time, Pool was listed on the GMC's Specialist Register in the category of Psychiatry in Learning Disability, but not in the category of General Adult Psychiatry.

Against this criticism, Pool argued that he had gained sufficient expertise in general adult psychiatry through his work to enable him to be regarded as an expert in the case. The courts have long accepted that expertise can be obtained through both formal education and experience. In effect, Pool was arguing that his claim to expertise in general adult psychiatry was based on experience gained through his professional career as a psychiatrist.

At the GMC

... but is it always obvious where the boundary lies?

The GMC Panel rejected Pool's argument that his professional experience of general adult psychiatry was sufficient to qualify him as an expert in that area of psychiatry for the purposes of the case. The Panel stated (para 17):

> *'The panel accepts that you have considerable experience in the treatment of women with personality disorders. However this is not in community settings and is not focused on their occupational functioning'.*

The Panel also heard some criticism of the report, including that it failed to adequately explain the reasons why Pool stated the paramedic's fitness to practise was currently impaired, what aspects of her work he considered were impaired, and how long that impairment might last.

That final point was very significant in the view of the GMC Panel because Pool's opinion – that the paramedic's fitness to practise might be wholly impaired for at least 2 years – had the potential to devastate her career as a paramedic:

> *'The panel considers that to put oneself forward as an expert witness requires more than clinical experience and knowledge. It also requires the ability to produce an adequate report and to give oral evidence in an authoritative and convincing manner. This panel finds that your written report fell short of what is required and that your evidence at the HPC hearing regarding your experience and expert status was confusing and unclear. This panel does not consider that you conducted yourself at the HPC hearing as an expert witness should when giving evidence.'*

The HPC Panel rejected Pool's arguments that his work experiences qualified him as an expert in the field of general adult psychiatry. Accordingly, he had failed to restrict his opinions to matters upon which he was suitably qualified to comment or of which he had direct experience. On this basis, the Panel found Pool's fitness to practise impaired by reason of misconduct and imposed a 3-month suspension.

On appeal

Pool appealed the GMC Panel decision on the grounds that:

- the decision that he was not an expert in the field of general adult psychiatry was incorrect, or the Panel failed to provide sufficient reasoning;
- the finding that he failed to restrict his opinion to matters on which he was suitably qualified or of which he had direct experience was incorrect, or the Panel failed to provide sufficient reasoning; and
- the finding that his report was inadequate, in that he failed to provide sufficient reasoning for his opinions, was incorrect.

On the first ground (that Pool was not an expert in general adult psychiatry), the Court's opinion was that the GMC Panel had fully considered Pool's experience. Furthermore, the Court held that the Panel was correct in the conclusions it reached that Pool was not on the Specialist Register in the category of General Adult Psychiatry and he had not completed any higher professional training. In short, Pool's qualification, training and clinical experience did *not* equip him to classify himself as an expert witness in general adult psychiatry. At paragraph 33 the Court said:

> *'The question was whether he could, legitimately, describe himself as an "expert" in the field of assessment of the fitness to practise of an individual carrying out a particular role in the workplace. The Appellant was, simply, not an expert in that area'.*

While the GMC Panel's reasoning could have been fuller, the Court found that the essential question as to why it reached the decision it did was sufficient.

It was also held that the GMC Panel was entitled to find that Pool had failed to give

adequate reasons for his professional opinions and failed to display an adequate understanding of the role and responsibilities of an expert witness. This was a conclusion that the GMC Panel was permitted to make and had given adequate reasons for this conclusion.

The sanction

Turning to the sanction, the Court noted that the GMC Panel found the misconduct to be serious in that there is a 'strong public interest in ensuring that doctors do not act outside their competence'. Accordingly, the Panel was entitled to take the view that some sanction was required. However, the GMC Panel's decision that conditions were not workable, and therefore that the suspension of Pool's registration was necessary, was flawed for two reasons.

First, the GMC Panel found that Pool lacked insight, but that his misconduct could be remediated by the gaining of insight. The GMC Panel said that a 3-month suspension would allow Pool sufficient time to develop that insight. The Court held that these statements were contradictory. On the one hand, the GMC Panel determined that it could not come up with suitable conditions to attach to Pool's practice certificate because of his lack of insight, but then thought that he could remedy this deficiency during a 3-month suspension. The GMC Panel did not explain why a condition prohibiting Pool from acting as an expert witness at fitness to practise hearings for 3 months would not be appropriate.

Second, the suspension for 3 months was disproportionate given that the sole concern was that Pool had, on a single occasion, held himself out as an expert in relation to an assessment of a healthcare professional's fitness to practise. There was no criticism of any other aspect of Pool's work as an expert witness in the field in which he did have expertise or of his clinical practice. The sanction imposed barred him from working as a clinician, and therefore was disproportionate to the misconduct the GMC Panel had found proven.

The Court replaced the Panel's decision with an order that Pool must not accept expert instructions to act as an expert witness for 3 months.

Conclusion

It is tempting to see in the High Court's confirmation of the GMC Panel's finding that Pool failed to fully reason his opinions and to display an adequate understanding of the role and responsibilities of an expert witness. But there are some important points raised by this case.

The first is a narrow issue concerned with GMC Panel hearings: GMC Panels must remember that proportionality applies just as much at the sanction stage as it does earlier in the proceedings. Any decision on the sanction must be based on reasoning that shows the clear correlation between the sanction imposed and the misconduct proven.

The broader issue is that, despite an assumption by many to the contrary, the boundary of an expert's expertise is generally quite fuzzy. Just how are experts supposed to delineate what falls inside, and crucially outside, their areas of expertise? This is not a new question, but with the ability now for expert witnesses to be sued by disgruntled litigants, and professional bodies such as the GMC taking ever more powers to regulate practitioners, it has never been more important.

When Professor Sir Roy Meadow turned his hand to explaining multiplication of probabilities one can imagine he likely felt sufficiently expert to explain to the jury how the 1:73,000,000 number arose. After all, he had doubtless covered basic statistics very early in his own scientific education.

To the lay reader, the idea that a psychiatrist who works daily in psychiatric practice with adults is not, through experience, an expert in general adult psychiatry may seem a bit counter intuitive. But the technical meanings given to everyday words by specialist communities commonly confound the rest of us: who'd have thought a tiny thing like an electron could be described as being 'massive'!

Of course, the expertise required in a case is often determined by the instructions given. In Pool, if the solicitors for the HPC did not specify, perhaps because they did not know, that what was needed was an expert who was listed on the GMC's Specialist Register in the category of General Adult Psychiatry, then how much blame lies at Pool's door if that criterion is found to be paramount? Or should Pool himself have known that inclusion on such a list would be necessary?

Given that the courts will admit expertise gained from *either* education or experience, we will continue to face the problem of how individual experts are reliably to define the extent of their expertise. The core expertise gained through education will normally be obvious, but the boundaries of what expertise has been gained through experience will often be blurred. What is the solution? Some kind of over-arching expert witness accreditation system that predetermines which expert can take on what case? Let's hope not!

The Civil Procedure Rules (CPR) already have the solution. Various CPR pre-action protocols have processes designed to ensure that basic challenges over an expert's claim to expertise can be dealt with very early in proceedings. They work by exchanges of lists of possible experts, together with their CVs. If that procedure had been followed in the HPC proceedings, then Pool's deficit in the view of the paramedic could have been dealt with before a report was even written.

GMC should not have removed expert's practice certificate

References

[1] *Pool -v- General Medical Council* [2014] *EWHC* 3791 (*Admin*).

Maths on trial

There's a long history of mathematical misuse in court

Math on Trial is an excellent book that catalogues the use – or perhaps that should be misuse – of mathematics in the courtroom. While the publication is well worth reading in its entirety, the purpose here is to summarise the ten common mathematical errors the authors distil from the legal casebook.

As the authors say, 'despite their ubiquity… most of these fallacies are easy to spot'. In this two-part series we aim to offer your very own fallacy-spotting crib sheet.

Error no 1: Multiplying non-independent probabilities

Sally Clark was a solicitor who in 1999 was found guilty of the murder of two of her sons. At trial, Professor Sir Roy Meadow, a leading paediatrician, gave evidence for the prosecution. It was his introduction of a published statistic on the likelihood of two cot deaths occurring in one family – given as 1 in 73 million – that is the focus here.

When two events are unrelated, the probability of both events occurring is simply the probability of each event occurring multiplied together. So, if a woman is pregnant with a single child, she has a 1 in 2 chance of having a girl. (*Actually a 50% chance of a girl is only approximately true, but let's not allow biology to distract us!*) With two children born at different times, the probability that both her children are girls is $(\frac{1}{2})^2$, which is 1 in 4. But this simple and common enough calculation is only valid when the two events are *independent of each other*.

So what's the problem when such an approach is used in cot death cases? Answer: there is **no way of knowing that the events are independent**. Cot deaths should properly be classified as *Sudden Infant Death Syndrome* (SIDS), and the crucial point is that *the death is unexplained*. If it transpires that there is an underlying genetic cause, a common environmental cause or, *in extremis*, the mother has been killing her babies, the events are most definitely not independent. In such circumstances, the simple multiplication of probabilities will significantly underestimate the likelihood of both events occurring.

Maths does not always help in the search for justice

The lesson to learn here is the need to **be sure events are truly independent before using the multiplication of their probabilities** to work out the chance of all the events happening.

Error no 2: Unjustified estimates

The case of Los Angeles resident Janet Collins, in which a fleeting glimpse of an assailant led to wildly unjustified estimates of physical traits in the local population, is used to exemplify error no 2. Put simply, it is the tendency for a number – any number – to add an air of scientific credibility to an argument.

The frequency with which numbers placed in the public domain are plain wrong – whether intentionally, accidentally or through ignorance – is shocking. For example, the authors of *Math on Trial* cite a 2010 Conservative party report that stated under the Labour government 54% of girls in the ten most disadvantaged areas of England became pregnant under the age of 18. The statement was wrong; the correct figure was 5.4%. The Conservatives swept aside the misplaced decimal as unimportant in the overall conclusion of the report! Clearly unjustified estimates weaken our ability to assess the numbers we are given.

We have considered this kind of mathematical error before. *Dressing up guesses as science* (*Your Witness* 62) looked at identifying shoe prints by comparison with a database compiled by the Forensic Science Service. The court found the quality of this database to be so poor that any attempt to assess the probability that a given shoe could have made a particular mark based on figures relating to shoe distribution was inherently unreliable.

So lesson 2: **always check that estimates are properly grounded in reality**.

Error no 3: Getting something from nothing

In another US case, Joe Sneed was convicted of murdering his parents on the basis of a probability calculation. Not only did the calculation make error nos 1 *and* 2, but it also introduced a probability estimate based on *not* finding any matches in the sample examined!

How one should treat the findings from a sampling exercise is highly dependent on the distribution of the feature being sought in the overall population. The prosecutor in the Sneed case was trying to calculate the probability that two people would share a number of physical traits, known movements and actions around the locality and, crucially, share the same name.

On that last element (a shared name), the prosecutor turned to the phone book. The court examined several telephone directories from the south-western United States. The target surname was not found in any of them. With the examined directories containing around 1.2 million names, the prosecutor estimated the frequency of the surname in the general population to be around 1 per million.

The absence of the surname in the sampled directories gives very little information about the frequency of the name across the whole country. This is because that sampling approach makes the unjustified assumption that surnames are evenly spread across the country. As anyone with a large extended family and an uncommon surname will know, that is simply not true. One cannot draw any conclusion more precise from not finding the name in any of the telephone books than to note the name is not very common.

The lesson to learn here is that **if the court is to know how it should treat the result of a sampling exercise, it must know the distribution of the item of interest in the whole population**.

Error no 4: Double experiments

The court's handling of the case of Meredith Kercher's murder in Italy highlights the next error: the belief that running a test a second time on the same item will provide no more evidence than did the first test.

Suppose a positive blood test gives a 60% probability that a suspected illness is really present. If the first test comes back positive, you can be 60% sure the illness is present. What can be concluded if the test is repeated and another positive result obtained? Are you still 60% certain, or are you even more certain?

Running a test twice can give far more information than one might think. Take two coins, one fair, the other weighted so that it comes up heads 70% of the time. Choose one coin. After the first toss lands heads, the maths tells us we can be 58% certain the coin is weighted. Tossing it again and getting heads now tells us that there is a 66% chance the coin is weighted.

In the Kercher trial, the judge made the error of assuming that a repeat DNA test on tiny samples of DNA taken from the supposed murder weapon – we have looked at Low Copy Number DNA previously (see *Your Witness* 63) and discussed its moderate reliability – would provide no more information than had the first test. The judge said '*… the sum of the two results, both unreliable due to not having been obtained by a correct scientific procedure, cannot give a reliable result*'. That reasoning is to misunderstand the potential for the separate results from two iterations of the same test to add information. As the coin toss example shows, independent runs of a test of moderate reliability can, indeed, in total, give more reliable results.

The lesson here is that **probability is a delicate subject that often runs counter to human intuition**. Used properly, **multiple runs of a test can increase the statistical reliability of an otherwise uncertain test**.

Error no 5: The birthday problem

The improvement in DNA analysis in recent times has increased interest in cold cases. The unsolved case of the murder of nurse Diana Sylvester in California in 1972 is one such. A search of a large database of DNA profiles of convicted criminals in California against a degraded DNA specimen from the murder scene returned a single partial DNA match. What should be made of that match?

The prosecution presented data to show that for a partial match on a specific set of nine out of a possible 13 DNA peaks we can expect to find about 1 person matching out of 13 billion. But the defence presented data to show that in a database of 65,000 DNA profiles, *more than 100 pairs matched at 9 peaks*. What's going on? How can a chance of finding a single match out of 13 billion people – a very small chance indeed – be reconciled with finding 100+ pairs of people who match at 9 peaks in a database of 65,000 people?

The answer lies in the number of people you need in a room to have a better than evens chance of two of them sharing the same birthday. To the surprise of many, the answer to that question is 23. But that is only if you do not fix the birthday you are seeking. If you fix the shared birthday to, say, 1 January, the room gets much more crowded – you'd need 253 people. This is because you cannot now pair everyone with each other.

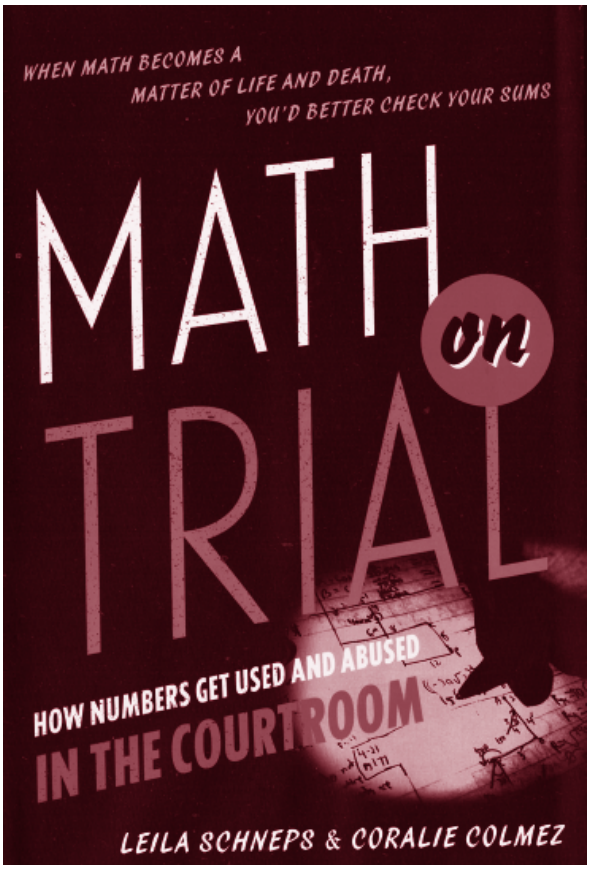
What the 1 in 13 billion probability is measuring is *pairs of individuals*, and the number of pairs of individuals in a population is far higher than the number of individuals. With 65,000 people on a database, the number of pairs is ~1.5 trillion. At a match probability of 1 in 13 billion, you would expect to get 116 pairs of individuals who match!

So lesson 5 is: **beware two propositions that sound similar but are actually quite different**.

Coming up next time...

In the next issue we will look at:

- Simpson's Paradox, which occurs when trends mysteriously vanish
- the conviction of Lucia de Berk as a serial killer of children based on retrospective thinking
- the power of very large numbers to confound us poor humans
- the significance of the fact that mathematical models are always simplifications of the real world, and
- the fact that unlikely events are not always uncommon.



Probabilities, estimates and sampling all cause problems

References

[1] *Math on Trial* [2013] Schneps, L & Colmez, C. Basic Books. ISBN 978-0-465-03292-1

Assessing the assessor

CPR permits expert assessors to sit alongside judge

The Equality Act 2010 is consolidating and amending legislation. One interesting aspect for the expert witness is that it continues and unifies provisions for the appointment of assessors who sit alongside the judge to assist the court in discrimination cases. Some of the earlier legislation, such as the *Equality Act (Sexual Orientation) Regulations 2007* (SI 2007/1263) (EASOR), were silent on the appointment of assessors, and it was EASOR that took centre stage in *Cary -v- Commissioner of Police for the Metropolis*.

The treatment about which Mr Cary complained predated the 2010 Act and so fell under EASOR. However, the court turned to the 2010 Act and, in so doing, has given useful guidance on the procedures to be followed when considering the appointment, qualifications and expertise of assessors, regardless of when the action giving rise to the complaint occurred. Furthermore, the court clarified how the skills necessary for the assessor should be determined.

Background

Mr Cary claimed that in February 2007 he was subjected to homophobic abuse by his female neighbour. Both he and the neighbour reported the incident to the Metropolitan Police Service (MPS). There had been a history of disputes between the two individuals. She had been convicted of an assault on Mr Cary occasioning actual bodily harm – an incident when she broke Mr Cary's jaw – aggravated by homophobic abuse. Upon initial investigation the police decided to take no further action.

Mr Cary lodged a complaint about the MPS investigation, the outcome of which was that the Directorate of Professional Standards for the MPS dismissed all aspects of the complaint. Mr Cary then appealed to the Independent Police Complaints Commission (IPCC), which ordered that the MPS reinvestigated. The result of the reinvestigation was a further rejection of all Mr Cary's complaints. Cary appealed once again to the IPCC, which rejected Mr Cary's complaint.

No guidance on how to select assessors!

Mr Cary then brought a claim of discrimination on the grounds of sexual orientation discrimination against the MPS Commissioner and the IPCC. His complaint against the MPS was that he was directly discriminated against by the two police sergeants investigating his complaint because they treated him less favourably on the grounds of his sexual orientation than they would have treated a heterosexual person.

Case management

A county court claim was started and case management directions where decided that provided for Mr Cary's case to be heard before a circuit judge sitting with an assessor. Mr Cary's solicitors requested that two assessors be appointed and pointed out that the case involved homophobia. Six days before the trial date, the parties were informed that one assessor had been appointed and her name provided. No details of her qualifications were given and she arrived at the trial unaware that there would be any objection to her sitting as an assessor in the case. As Clarke LJ put it:

> *'The problems that have arisen in this case stem largely from... failures to comply with the Practice Direction to whose existence and terms none of the parties appeared to have directed attention before the trial.'*

Appointment of assessors

While there were various Acts and decisions from previous cases brought to the court's attention in *Cary*, for the current purposes the most important is the guidance contained in the Civil Procedure Rules (CPR). Practice Direction 35 (PD35) (Experts and Assessors) supplements Part 35 of the CPR and states in section 10:

10.1 An assessor may be appointed to assist the court under rule 35.15. Not less than 21 days before making any such appointment, the court will notify each party in writing of the name of the proposed assessor, of the matter in respect of which the assistance of the assessor will be sought and of the qualifications of the assessor to give that assistance.

10.2 Where any person has been proposed for appointment as an assessor, any party may object to that person either personally or in respect of that person's qualification.

10.3 Any such objection must be made in writing and filed with the court within 7 days of receipt of the notification referred to in paragraph 10.1 and will be taken into account by the court in deciding whether or not to make the appointment.

10.4 Copies of any report prepared by the assessor will be sent to each of the parties but the assessor will not give oral evidence or be open to cross-examination or questioning.

However, the fact that the Equality Act 2006 gives the Equality and Human Rights Commission (EHRC) the power to issue Codes of Practice on matters covered by the 2010 Act was also important. *Cary* considered the 2006 Code of Practice which states that assessors will be persons '*of skill and experience in discrimination issues who help to evaluate the evidence*'.

At trial

The trial began with Ms Bennett as the sole assessor. Mr Cary objected to the assessor on the basis that CPR35 had not been followed and no details of her qualifications had been provided. Bennett presented her qualifications on the second day of the trial. These demonstrated some experience of dealing with sexual

discrimination complaints and negotiating policies on sexual harassment. She had also been a lay member of the employment tribunal for 12 years, which included sitting on some sexual orientation cases. Mr Cary maintained his objection on the basis of her lack of experience in same-sex sexual orientation discrimination.

The trial judge, while concerned about the absence of any guidance on the meaning of 'qualification' used in para 10(1) of PD35, found that there was no valid objection to the assessor. The judge commented:

> *'Assessors provide assistance to the court as they have particular life experience which can be brought to bear in receiving, understanding or evaluating evidence in relation to particular matters – in this case sexual orientation discrimination. Their function is much more limited than, for instance, a lay or wing member of the employment tribunal whose role encompasses that expertise plus a responsibility, with others, for making the final decision. I fully accept [the] submission that different forms of discrimination cannot all be lumped together and treated the same; that persons may be expert in identifying and challenging one manifestation of bias or stereotypical thinking in one area, but not necessarily in another. Nonetheless, if someone has been appointed – as Ms Bennett has for the past twelve years as a lay member in the employment tribunal hearing all forms of discrimination cases – then in my view that is sufficient qualification for the purpose of assisting as an assessor in a discrimination case.'*

Accordingly, in the absence of any clearer guidance from the practice direction, Bennett was found to be a suitable assessor as a result of her appointment as a lay member of the employment tribunal.

On appeal

Mr Cary appealed. He argued that the assessor in a discrimination case should have a more specialised role that would add to the judge's own expertise. The assessor, Mr Cary argued, should be someone with skill and experience in sexual orientation issues and lay membership of the employment tribunal was simply not sufficient. Despite efforts by Mr Cary's legal team to get to the bottom of Ms Bennett's appointment, the circumstances surrounding that appointment remained unclear to the Court of Appeal.

In essence, the question before the Court of Appeal was how the appointment of assessors could meet the guidance from the EHRC that '*assessors should have special skills and experience in relation to the particular protected characteristics in issue*'.

The Court of Appeal, however, refused to lay down a specific rule about what specific expertise an assessor should have in respect of the specific type of discrimination at issue. Instead, the Court of Appeal said:

> *'The test now applicable in relation to all types of discrimination is that the assessor should be a person of skill and experience "in the matter to which the proceedings relate". Parliament deliberately chose that criterion in relation to all forms of discrimination (the preamble to the Act recited that one of its purposes is to "harmonise equality law") and did not include the special knowledge/experience condition previously applicable in race cases even in relation to those.'*

In dismissing the appeal, the Court of Appeal's final guidance was that when:

> *'... determining whether a person has skill and experience in the matter it is, first, necessary to identify "the matter" and then to decide whether the putative assessor has the necessary skill and experience in relation to it. In some cases it may well be necessary for any assessor to have a particular expertise.'*

Further, Clarke LJ commented that while someone facing an allegation of discrimination may often say they would have acted in the same way even if the protected characteristic were not present:

> *'... an ability to discern whether people are deceiving the court [is] an advantage in an assessor, as is experience of the sort of masks, pretences and protests that those who discriminate often put forward and of the way in which unconscious bias or stereotyping can operate. This is a skill in evaluation and analysis which can be honed by the experience of dealing with complaints of discrimination in, for instance, the workplace, and/or listening to and adjudicating upon tribunal cases in which discrimination is alleged and disputed. It is a skill which, generally speaking, does not appear to me to need to be divided into rigid categories.'*

Conclusion

Cary provides important guidance on the experience and expertise assessors are expected to have to be able to assist the court in determining a dispute in circumstances when many county court judges may not have experience of such cases.

The judgment in *Cary* suggests four questions that should be addressed at an early stage:

- Is there any reason not to have one or more assessors?
- On what matters will the assistance of an assessor be sought?
- What type of assessor is required?
- Who shall be appointed?

Parties involved in such cases should ensure that objections are raised in good time so that when the court appoints the assessor the trial is not jeopardised because of a dispute over the assessor. Indeed, following *Cary*, a challenge on the basis of an assessor's qualifications and expertise can now expect to face a quite stiff judicial headwind!

Court of Appeal defines assessor appointment procedure

References

[1] *Cary -v- Commissioner of Police for the Metropolis* [2014] *EWCA Civ* 987.

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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Re-vetting

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