Your Witness

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

Fixed costs for clinical negligence

According to civil justice minister Lord Faulks, the Government is investigating the extension of fixed recoverable costs across all civil litigation, including how to deal with differences between different types of litigation. His announcement came as Law Society Chief Executive, Catherine Dixon (formerly head of the NHS Litigation Authority), said she was 'astounded' that the Government would contemplate introducing fixed costs for clinical negligence claims worth up to £250,000. The Law Society, the Association of Personal Injury Lawyers (APIL), the Society of Clinical Injury Lawyers and the charity Action against Medical Accidents have joined forces to develop a scheme for fixed costs for claims up to £25,000.

The Government had wanted to introduce fixed recoverable costs from October 2016. However, the public consultation that the Department of Health was due to begin early in 2016 has still not commenced, and Ben Gummer, when a Health Minister (he has now been promoted to Minister for the Cabinet Office), acknowledged the delay in a letter to APIL. Responding to the news, APIL said the delay '*... will be a considerable relief to our members who will need time to prepare their businesses, and provide clarity and certainty for clients about changes to how cases are to be costed and conducted.*'

If lawyers think it's difficult to predict costs in such cases, experts will be just as hard pressed to read their crystal balls! When the consultation finally appears, expert witnesses involved in this type of work will need to make strong representations about how the proposed changes will impact on their ability to provide opinion evidence in such casees, particularly if the threshold is set as high as £250,000.

Topping up the hot tub

The man who introduced the use of concurrent expert evidence (CEE, also known as 'hot tubbing') to the courts of England and Wales has predicted that its application will grow. In a speech to the London Conference of the Commercial Bar Association of Victoria on 29 June 2016, Lord Justice Jackson said that most of those who expressed opposition to 'hot tubbing' in a recent small-scale survey had no direct experience of it: '*It is striking that the majority of those who are hostile to the procedure are judges or practitioners who have never used it.*'

In Jackson's view, hot tubbing creates more work for the judge. This is because the judge '*needs to read the expert evidence thoroughly and get on top of the issues before the CEE process starts. On the other hand, that is not a bad thing. The judge will have to master the expert evidence sooner or later anyway. If he/she does so before the experts enter the witness box and then adopts the CEE procedure, the process of judgment writing will be much easier.*'

The main purposes of hot tubbing are (i) to improve the use of expert evidence at trial and (ii) to save time, and therefore money.

Jackson LJ is circumspect on the cost-saving issue. He said: '*Although views differ on the question of costs saving, most English judges and practitioners agree that CEE leads to a saving of time at trial. Since trial time is the most expensive component of litigation, this is a valuable saving. Solicitors who are striving to bring the actual costs of litigation closer to the approved budget should give serious consideration to proposing the use of CEE.*'

Until now, it has been the Technology and Construction Court that has made the widest use of hot tubbing. However, Jackson LJ noted with approval that it was employed recently in a competition law matter. In *Streetmap.EU Ltd -v- Google Inc.* [2016 *EWHC* 253 (Ch)], Mr Justice Roth found that not only did it save time, but it also helped highlight the differences between the experts.

There is currently a Civil Justice Council working group (chaired by Professor Rachael Mulheron) reviewing the use of the hot tub in the light of experience to date. If the review concludes that there are ways to improve the hot tub procedure, we will let you know.

Requests for 'screening' reports

A recent enquiry on our helpline concerned a request from a law firm to prepare a 'screening report'. Our expert was interested in what was expected in a screening report and how he was supposed to set a fee.

There is a growing market for lightweight 'screening' reports. Mostly they are used simply to help a potential litigant make a decision. As such, they are not court-compliant reports, and the expert is working as an **expert advisor** rather than an expert witness. As an expert advisor, an expert does not have any particular, and no overriding, duty to the court and is completely free to offer advice on any matter within his or her competency, such as exploring the strengths and weaknesses of a case and how it might be presented in the strongest way... not something an expert witness would ever do!

As to the cost, the usual approach is to set a fee (based on some agreed amount of time) and for experts to restrict themselves to such time frames.

Chris Pamplin

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The Brexpert witness

What does Brexit hold for experts?

In the lead up to the EU Referendum we reported briefly on one of the few pieces of EU legislation that was partially designed to have specific application to expert witnesses (see *Your Witness* 83). This was the *Taking of Evidence Regulation (Regulation (EC) 1206/2001)* which, amongst other things, was intended to simplify matters for experts operating in cross-border proceedings. In this, our first post-Brexit vote issue, we take a broader view of the possible implications for expert witnesses of Britain's exit from the EU.

Over the many years of Britain's EU membership there have been numerous EU directives, regulations and conventions, all of which have impacted on cross-border litigation in Member States, e.g. the recognition and enforcement of judgments across borders, the determination of jurisdiction, the obtaining and taking of evidence, the investigation of civil and criminal cases and the availability of sanctions. Alongside these wider issues there are also regulations in place governing such matters as legal assistance, money laundering, legal professional privilege and the European Arrest Warrant. New provisions will have to be put in place to cover all of these, but what exactly is likely to change, and when, is currently unclear.

Of course, as matters stand, nothing at all has been changed by the referendum result. The terms of the UK's withdrawal have yet to be negotiated and, until this takes place, the *status quo* is maintained. However, while some measures already incorporated into national legislation might not pose too many difficulties, there are others that will require some careful thought and negotiation.

Existing EU law

Britain's membership of the EU has created a situation where a vast mass of EU legislation has been incorporated into UK law over a long period. This law will remain in place unless expressly repealed. Experts whose fields are affected by EU directives and regulations (and these extend to almost every facet of our manufacturing, commercial and working lives) will need to monitor any amendments closely. Assuming there is a political will to do so, the task facing civil servants and parliamentary draftsmen in making such changes is colossal, and the speed of change is likely to be ponderous.

There'll be little immediate change

Given that some EU law (such as the *Data Protection Act 1998*) forms part of UK primary and secondary legislation, it is very unlikely that the UK government will rush to repeal any part of English law emanating from the EU without giving long and serious consideration to what would replace it.

Other EU regulations that apply directly to Member States will probably cease to be applicable unless the UK agrees to preserve them, but it is not unlikely that the majority of these regulations will simply be adopted so that they continue to apply, unless changed specifically by UK domestic legislation. This would be similar to the model used by a number of former British colonies on gaining independence.

New EU law post Brexit

The extent to which new EU laws will have effect in a post-Brexit UK will depend on which exit model the UK adopts. If it negotiates the Norwegian model and becomes part of the European Economic Area (EEA), the terms of the EEA Agreement would mean that EU legislation would continue to be incorporated into English law with regard to those matters covered by the Agreement. However, if the UK adopts the World Trade Organisation (WTO) model, it would be free to negotiate its own agreements, relying solely on rights and obligations under WTO rules, and not be obliged to adopt EU laws and regulations unless it wished to do so.

The retention or adoption of EU law would pose its own interesting issues because the European Court of Justice (ECJ) currently has sovereignty over UK courts on points of European law. Whether the decisions of the ECJ will continue to carry any weight or authority with UK courts is uncertain but appears doubtful. Almost certainly, however, parties will no longer be able to appeal the decisions of a UK court to the ECJ, and the Supreme Court will revert to being the court of final decision. While some litigants and lawyers may bemoan this, many will welcome the saving in time and expense this will represent.

Jurisdiction and enforceability of judgments

The European regime applies, with certain exceptions, to civil and commercial cases, and aims to provide legal certainty and predictability. Its purpose is to address the issue of jurisdiction and to simplify the reciprocal recognition and enforcement of judgments between EU Member States.

The main provisions of the European regime are contained in the *Recast Brussels Regulation: Regulation (EU) 1215/2012* and the *EU Service Regulation*. Under the regime, it is generally accepted that court proceedings should take place in the Member State in which the defendant resides. Reciprocal arrangements mean that service may be made, without leave, on parties domiciled in other Member States and, generally, the decisions of one court may be enforced in the jurisdiction of all others. Outside the regime it's likely that service will be slower, issues of forum and law less certain, and enforcement more complicated. The UK will therefore have to negotiate agreements that will preserve, at least in the main, reciprocal arrangements.

That said, there are already conventions and treaties in existence that are broadly similar to the *Recast Brussels Regulation* and apply between EU Member States and some Non-member States. These include the 2007 *Lugano Convention* (currently in force between the

EU, Switzerland, Norway and Iceland). It is similar to the current EU regime and, if the UK accedes to it, it is possible that there may be little significant change in the existing arrangements. Alternatively, the UK might attempt to negotiate separate bilateral or multilateral agreements with Member States, although these are likely to be harder to negotiate and less certain in application. Brussels will, no doubt, lean on Member States to prohibit the negotiation of separate agreements, at least in the short term, while Article 50 negotiations are under way.

It remains to be seen what approach will be taken in relation to the taking of evidence, including expert evidence, in cross-border litigation. There is no doubting that the *EU Taking of Evidence Regulation* has greatly simplified and assisted in the taking of such evidence, and it is to be hoped that some similar arrangement will be adopted post Brexit.

Contractual choice of law and jurisdiction

Although the European regime provides the general rule that the court where the defendant is domiciled should have jurisdiction, it is subject to exceptions, e.g. cases involving employment, consumer or insurance contracts, where public policy curtails the choice of jurisdiction to protect the 'weaker' party. Consequently the European regime gives autonomy to the parties to make contractual agreements regulating the forum for the settlement of disputes and the applicable national law.

Currently, UK courts are a favourite choice of jurisdiction, particularly the London commercial courts. This is due largely to their reputation for impartiality, the quality of the lawyers and judiciary, and their wide experience of international commerce cases. This preference represents a substantial benefit to all those who make their living from work in the commercial courts, including, of course, many expert witnesses who deal with cross-border disputes in such fields as energy, patents, construction, shipping and international freight. If the UK is to retain its leading role as a venue for the determination of commercial disputes, steps will be required to ensure that clauses giving exclusive jurisdiction to English courts continue to be effective.

The UK, particularly London, is such a large centre for commercial litigation that most observers agree nothing is likely to change, at least in the medium term. As with everything else, it is simply a matter of negotiating some effective mechanism to ensure that commercial agreements to submit disputes to the exclusive jurisdiction of the English courts will become no less effective. This could be by negotiating a separate membership of the existing *Recast Brussels Regulation*, or, perhaps more likely, reverting to the *Brussels Convention* or unilaterally signing up to either the *Lugano Convention* or the *Hague Convention on Choice of Court Agreements*. However, the uncertainty in the interim may lead other European legal centres, jealous of London's position, to attempt to steal work while they can. While this is a slight concern for advocates and experts who work in this field, we would suggest that the UK's position is robust enough to withstand such opportunistic poaching.

Moves to retain existing measures through other means likely

English contract law is largely unaffected by Brexit and likely to continue to be widely used as the law of choice in many commercial contracts. The courts of EU Member States will, in any event, still be bound to decide choice of law in accordance with the *Rome I* and *Rome II Regulations*, which apply to laws of jurisdictions outside the EU as much as those within. Post Brexit, the UK can pass legislation that will reflect the current EU regulations or, by default, fall back on the existing *Rome Convention* which contains similar provisions for contractual choice of law agreements.

An unholy mess?

Nothing perhaps is insurmountable, but there are myriad anomalies that Brexit will create in our legal system. For example, *EU Regulation 600/2014* currently requires disputes relating to financial market transactions between EU and non-EU parties to be submitted to a court in an EU Member State. Where both parties wish the case to be heard in the UK, UK courts will presumably consider that they are not bound by this and will disregard the Regulation. How this will sit with other EU courts, and how it will affect enforceability of judgments, is debatable.

Regard must also be had to the EU Directives with direct application to how our courts and legal institutions function. These include *Directive 2010/64/EU* on the right to interpretation and translation in criminal proceedings and the *Right to Information Directive 2012/13/EU*. The latter applies to all suspects and defendants in criminal proceedings and confers:

1. the right to know your rights (Arts 3, 4 & 5)
2. the right to know the case against you (Art 6), and
3. the right of access to the evidence against you (Art 7).

Brexit will also cast some uncertainty over the UK's relationship with institutions such as the ECJ and the European Court of Human Rights, and its adherence to the *European Convention on Human Rights*, incorporated into domestic legislation by the *Human Rights Act 1998*. Strictly speaking, these are Council of Europe rather than EU institutions, but how, if at all, they will be affected by Brexit is yet another uncertainty. Directives and conventions such as these have been absorbed into our own justice system and relied upon over many years, and may have no direct equivalent in our own constitution or domestic court rules. Consequently, there will be many issues to be assessed and holes to be filled. Those to whom the task falls are not to be envied.

However it pans out, there'll be plenty of extra work

Experts and contingency fees

Object lesson in how not to remain independent

It has long been a doctrine of the common law that **parties should not enter into champertous arrangements** with regard to litigation. (A champertous arrangement is one where a person not a party in litigation funds the litigation in consideration of a share of the winnings.) It is based on the public interest in protecting purity of justice. This public policy prevents a person who is in a position to influence the outcome of litigation having an interest in that outcome. Consequently, the Court will not consent to the instruction of an expert under a contingency fee agreement (CFA) save in very rare and unusual circumstances.

In *Factortame*[1] it was acknowledged that an expert would often be able to influence the outcome of litigation in a way that the funder, or even the lawyer conducting the litigation, would not. Thus, providing evidence on a contingency fee basis could potentially give an otherwise independent expert a significant financial interest in the outcome of the case.

There is often a fine line between what amounts to a champertous arrangement and what does not. Rarely, however, has there been such a blatant example of conduct that clearly crosses this line as that of Dr Lawrence Adler, whose case came before the Medical Practitioners Tribunal in May this year.

Dr Adler before the MPT

The allegations against Adler were that between 2004 and 2008 he prepared medical reports upon instruction for the purposes of personal injury claims and that during the course of this he:

- entered into **CFAs** with those instructing him, whereby he agreed not to be paid for his work if his report did not result in a settlement for the claimant
- had a **financial interest in the outcome of the cases** for which he prepared reports
- **failed to disclose to the settling insurers or settling solicitors the fact that he had entered into a CFA**
- **failed to act in accordance with his professional obligations** as an expert witness
- **entered into an agreement by which he lost his independence** as an expert witness, and
- **entered into arrangements which had the potential to undermine the good repute of medical expert witnesses**.

The matters alleged were numerous and included the case of a motorist (CA) who had claimed on his insurance for damage to his car, having been involved in an accident on the M25 in 2006. CA said that, although he had never met nor been examined by Adler, two medical reports had been written without his knowledge in 2008. He claimed that these reports had been prepared in connection with a personal injury claim made in his name but about which he had been completely unaware until he received a cheque in 2011.

Although CA recalled a conversation with his solicitors in which they are said to have encouraged him to make a claim, he didn't because he had not been injured. Following receipt of the cheque (which he had not cashed), he investigated the matter. A file was unearthed in his name including documents that he said contained his forged signature, false addresses and entirely fictitious reports of injuries he had not sustained. It was apparent from the file that Dr Adler had lodged an invoice with the solicitors for £350.

CA reported the matter to the police, the Solicitors Regulation Authority and the Ministry of Justice. Adler admitted writing the medical reports but claimed he did so honestly. He said he had examined a patient he believed to be CA and had filed a report based on what he was told.

Further allegations were made concerning the case of CB, a 19 year-old shop assistant who had been involved in two unrelated road accidents with motorists between 2007 and 2008. It was alleged that Adler had produced two reports, each containing different information, and in particular apportioning the extent of the injuries CB suffered differently depending on which insurer the report was for. By doing so, Adler had tailored his conclusions in a bid to maximise payouts from the two insurance companies. Adler said he assumed each insurance company would have seen both reports and denied deceit.

It was further alleged that (i) Adler had altered his conclusion in relation to apportionment as expressed in his report without clinical justification, and (ii) he had entered into CFAs with two law firms and on some occasions had agreed to waive his fee if the claimant was not successful, or the solicitors decided not to pursue the case. It was alleged that **by entering into CFAs he had gained a financial interest in the outcome of the case and his actions were therefore incompatible with his professional obligations as an independent expert witness**.

Expert accepted CFA terms

At the outset of the proceedings, Adler admitted via his counsel that he had entered into CFAs and that, in relation to these arrangements, he had agreed not to be paid for his work if his report did not result in a settlement for the claimant. He further admitted that he had produced two separate reports that differed from each other in relation to their content. Consequently, the tribunal found that the allegations were proved in relation to those matters.

The tribunal ruled that the allegations that Adler had prepared separate reports to maximise liability and had provided a conclusion in relation to apportionment without clinical justification were not proved. However, the allegations that he had, at the request of those instructing him, altered his conclusion in relation to apportionment as expressed in one of the

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References

[1] *R (on the application of Factortame Ltd) -v- Secretary of State for Transport, Local Government and the Regions* [2002] *EWCA Civ* 932.

HCPC exonerates Prof Ireland

Readers may recall the furore caused by the publication in 2012 of a report by psychologist Dr Jane Ireland, '*Evaluating Expert Witness Psychological Reports: Exploring Quality*'. Professor Ireland, a forensic psychologist at the University of Central Lancashire (UCLAN), led research for the Family Justice Council (FJC) which claimed to show that:

- 20% of expert psychologists were working beyond their area of knowledge
- around one-third had no experience of mental health assessments, and
- some 90% of experts were not in current practice.

The research concluded that around 65% of expert reports in the study were of either 'poor' or 'very poor' quality.

Tabloid expert bashing

Professor Ireland's report was expressed to be an interim one and acknowledged that its qualitative methodology was one that precluded the possibility of knowing if its findings were representative. There has also been much debate as to the extent to which her report had been peer reviewed and whether her findings were endorsed by the British Psychological Society (BPS) and FJC. Be that as it may, the report found its way to reporters at the *Daily Mail* and *Channel 4 News* who, in keeping with the vogue prevailing in 2012, used it as the basis for some 'expert bashing' hack journalism. Notwithstanding the low-brow and sensational nature of the media treatment, the reporting of Professor Ireland's findings was undoubtedly damaging to the reputation of psychology expert witnesses.

Conveniently for some, publication of the report came at a time when there were already desires to limit the number of expert psychologists, particularly in family cases, and to reduce the fees paid to such experts. It was reported by *Family Law Week* that the report was soon being used to support these moves and to challenge the validity and credibility of expert psychologist evidence. The report was held up as proof that many experts were unqualified, biased and too ready to act as 'hired guns'. Indeed, it was not long before Family Bar practitioners reported it being cited in court, and lawyers and judges referring to the 'Ireland Standard'.

It is, however, the case that concerns had been expressed prior to the report about some aspects of the work being carried out by expert psychologists; Professor Ireland's report just happened to be one of the first pieces of independent research undertaken in this area. For her research she was given unusually wide access to papers, including numerous expert psychologists' reports, from three undisclosed courts in England and Wales. However, according to a letter written by the Secretary to the FJC, Professor Ireland's report was never formally adopted or published by the FJC. Instead, the FJC commissioned a further report which was subsequently carried out by Coventry University.

Some experts were angered that Professor Ireland's report had been released to the Press before formal publication, and before any meaningful peer review of its contents and findings had been undertaken. Indeed, according to an article published in the *New Law Journal*, the report was publicised in the *Daily Mail* on the same day that *Channel 4 News* aired a special report '*based on a series of discussions with Professor Ireland and the FJC, which began in August 2011 before her report was written and submitted*'. The ire of experts was exacerbated by the way the Press made use of the material, which was undoubtedly rather biased.

There ensued a somewhat acrimonious battle in the correspondence pages of newspapers and journals between those who felt that the reputation of their profession had been damaged needlessly and those who supported the report's findings. At the same time, a number of complaints were made to the Health and Care Professions Council (HCPC) concerning Professor Ireland personally. She was accused of misusing data, reaching conclusions that were not justified and threatening fellow psychologists with legal action if they did not withdraw complaints and comments made about her research.

Background to the report

It is worth considering the background to the report. The research proposal was first discussed in the Experts Committee of the FJC in 2008, and Professor Ireland was asked to submit a proposal to the Projects Committee of the Council. This, in itself, has given rise to questions concerning the lack of transparency in the relationship between Professor Ireland and the FJC, of whom Professor Ireland was a member. According to the FJC, the issue first arose because of '*anecdotal evidence suggesting a level of concern about the quality of some psychologists' reports used in expert evidence in family proceedings*'.

Professor Ireland submitted a proposal and it was considered by the Projects Committee and then approved by the FJC's Executive Committee. The proposal then went through the procurement and Data Access Panel (DAP) processes required by the Ministry of Justice. The DAP does not itself examine ethical elements, and required that Professor Ireland sought ethical approval from UCLAN. Professor Ireland had indicated that the research proposal was given ethical approval by UCLAN to ensure that '*the privacy, dignity and integrity of subjects was protected by the design*'.

The FJC part funded the study, and the report was submitted, as agreed, for review and with an option to publish. The FJC has indicated that various drafts were seen by four academic and professional reviewers who took the view that

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Tabloids use pre-publication report to 'expert bash'

Author hauled before professional regulator

Getting a fairer deal from legal aid

From time to time we become aware of articles written by expert members of the *UK Register of Expert Witnesses*. The following piece, penned by retail fraud expert Richard Emery, considers some of the problems in the way public funding is being used in the criminal courts.

Judges get pay hike, experts get pay cut

In response to a '*widespread feeling of not being valued or appreciated for their work*', the Ministry of Justice (MoJ) has awarded top judges a pay rise that is six times the rate of inflation. Apparently the '*... evidence available suggests that there is an emerging problem with recruitment and retention*'.

So what, I ask, is the MoJ doing about the growing concerns regarding the availability of suitably qualified and experienced expert witnesses who, like High Court judges, need to develop their expertise over many years?

I suggest that the MoJ needs urgently to consider a number of key issues if we are to avoid the serious problem of our well-paid judges no longer being able to rely on suitably qualified and experienced experts when needed.

Fees for reports

In 2003 the MoJ's *Guidance to Determining Officers* set out a range of fees for the remuneration of expert witnesses. It included the words: '*It is intended that the information will be reviewed annually.*'

Reviewed annually – from a starting point in 2003 we have two numbers:

- Inflation has added about 50% to the cost of living.
- Fee rates have been cut by about 28%.

This means that fee rates that should have risen from, say, £100 to £150, have actually been cut to £72, an effective reduction of over 50%. Fair? If top judges feel undervalued, just think how experts feel!

Obligation to attend court

When I prepare an expert report for a legally aided criminal case I also take on an obligation to attend court if needed. Prior authority gives me certainty over my fee rate for preparing the report, but there is no certainty regarding fees for giving my oral evidence.

What's needed is better value for money in legal aid spending

Can the MoJ seriously expect a qualified and experienced professional to attend court for several days for just £226 per day? And what about travel time and last-minute cancellations?

Delivering quality decisions at lower cost

We have to accept that the criminal justice system is expensive to run. But access to justice is also a vital part of our society, so we have to find ways of delivering quality decisions at less cost. I offer four thoughts.

Measure value for money: When Lord Bach announced a '*central working group… to help MoJ gain a greater understanding of the range of work which experts do*' he was actually highlighting the dearth of information that the LAA (or the LSC before it) has about the true value of experts.

As an example, when I get instructed by the defence team in a criminal case, I write a report for which the LAA pays me £2,500. The direct result of my report is either the prosecution drops the case or the defendant pleads guilty, saving the cost of a 3-day trial. I think that this makes me great value for money. But the simple truth is that the LAA has no process for tracking the outcome (or value for money) of the expert reports that it funds. How daft is that?

If judges were required to write a short note to the LAA after every trial to say whether or not the LAA-funded expert report assisted in the case, we would at least have a starting point for the MoJ to understand the contribution experts are making.

Better case preparation: At a recent court management hearing the judge was justifiably annoyed with the Police and CPS for serious failures in case preparation. The Police claimed that the CD I had been given (through the defendant's legal team) contained everything that I had requested, but it didn't. The officer was forced to admit that she had not actually checked the contents of the disk, so it could have contained anything! A Wasted Costs Order against the CPS may help the defence team, but it's still wasted costs coming out of the public purse.

Early assessment: In a case of alleged retail fraud, I identified a serious flaw in the Electronic Point of Sale system that, in my view, invalidated vital evidence. Rather than waste LAA-funded time preparing a full report, I wrote a letter to the instructing solicitor explaining my findings. This letter was forwarded to the CPS (with my approval), but when asked about it at the next court management hearing the prosecuting barrister admitted to not having read it. Having read it, following the hearing, the CPS decided to drop the charges. Why was the letter not considered earlier?

Trial management: Why did a trial that was scheduled for 4 days take 7? The answer... simply poor management of the court's time. All parties were ready at 10:00 each day; we never started before 11:00, and on some days it was even later because the judge was dealing with other matters. The case needed only 20 hours of court time, but it ended up being spread over 7 days rather than 4 because of the delayed starts. Surely there must be better ways of managing the court's time?

Conclusion

If the MoJ insisted that:

- the **LAA measured value for money instead of price**
- the **prosecution did better case preparation**
- there was **early assessment of expert evidence**, and
- the **courts found a way to better manage trial time**

then, perhaps, we would have a system better able to deliver access to justice.

Richard Emery, Retail Theft & Fraud Expert

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reports and had been complicit in an attempt to mislead and possibly defraud two insurance companies were held to be proved.

With regard to the CFAs, Dr Adler told the tribunal that it was his belief that he did not need to inform the settling solicitors or insurers of the basis on which he had been instructed. He said that this belief was based on having read other doctors' medico-legal reports. He said he had not been instructed by his solicitors to include this information in his reports, nor had he received formal training or guidance on preparing the reports.

The tribunal considered that the settling solicitors and insurers would have found it of vital interest to know the financial basis on which Adler had been instructed: he had a financial interest in the claim, and that could have affected his independence and thus would have affected the weight placed on the opinion. Dr Adler accepted this view and admitted to the relevant paragraphs of the allegation, which were found proved.

With regard to the changing of the report in the way he had, the tribunal found that Dr Adler had acted in breach of his attestation as an expert witness and of his duty to the court. In the view of the tribunal, Adler had known what he was doing when he made the changes and had therefore acted dishonestly.

Bringing the profession into disrepute

The tribunal concluded that Adler's conduct had brought the profession into disrepute. He'd acted as an expert witness when his independence had been compromised, both by accepting instructions under a CFA and by the nature of his relationship with the solicitors. It determined that his fitness to practise was impaired by reason of his misconduct. The tribunal suspended Dr Adler's registration for 6 months.

The tribunal was aware that the activities of Dr Adler had been the subject of a police investigation previously, but that in 2011 criminal proceedings against him (together with 13 others, including several lawyers and an insurance broker) had collapsed due to lack of evidence.

The tribunal noted that there was a wider context to what had been occurring at the law firms than was the subject of the allegation before it. Nevertheless, the tribunal considered that there was clearly something 'fishy' going on in Adler's arrangements with his instructing solicitors at the time. Solicitors, of course, together with medical reporting organisations, are not subject to the same constraints as expert witnesses. Unlike experts, they are permitted to enter into CFAs... indeed, they are encouraged to do so. Thus their interests are not necessarily the same as those of the expert. **Experts should be vigilant in their dealings with solicitors, and resist any inducements that might be offered to stray from their overriding duty to the court**.

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the report would require some amendment before the Council should publish it. Professor Ireland made a number of amendments but, ultimately, the FJC declined to exercise the option to publish the work. However, the FJC did not consider that the report was their intellectual property and had no powers to prevent the report being promulgated by UCLAN on its own website. In the opinion of the FJC, the document published by UCLAN was in the nature of a summary only, and the Council invited the authors to submit a full write up of the paper for publication in a peer-reviewed journal; we can find no evidence that this has yet happened.

Distancing itself from the published document, the FJC concurred that it did not meet the usually recognised criteria for peer-reviewed publication. It also commented on the limited methodology of the study, and has neither promulgated nor recommended the use of the 'Ireland criteria' for expert witnesses. The Secretary to the FJC pointed out at the time that the Council had been developing consensus-based standards for experts and was due to publish these for consultation soon.

Ireland exonerated

The HCPC finally scheduled a fitness to practise hearing for 25 May 2016. Responding to the allegations against her, Professor Ireland acknowledged that she made use of court documents without informed consent but claimed that such consent was not required. She denied that she failed to properly redact personal and sensitive information from her research, denied her methodology was flawed, denied she failed to declare a conflict of interest and denied her conclusions were unsubstantiated.

The HCPC gave its decision on 7 June, when it dismissed the case against her. It found that there was no case to answer in respect of all but one of the fitness to practise charges, with the remaining one found not proved. The HCPC has not published the full text of its decision, and neither has it so far given any indication of its intention to do so. This outcome does little to redress any of the damage done by the reporting of Professor Ireland's findings. Rather it suggests that, at least in the eyes of the HCPC, her conclusions were not flawed (in so far as they were supported by the data relied upon).

In any event, the issues raised by Professor Ireland's report have already been, at least partially, addressed, not least by the publication in January 2016 of the joint FJC and BPS guidance '*Psychologists as expert witnesses in the Family Courts in England & Wales: Standards, competencies and expectations*'.

What is perhaps the most regrettable factor in this whole episode is the manner in which a serious, but essentially **pre-publication, report found its way to a largely uninformed Press, who then proceeded to treat it as a fully accredited, peer-reviewed piece of research**.

HCPC finds Prof Ireland has no case to answer

Media handling of the report a source of regret

Services for registered experts

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

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 68). 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.

Court reports – FREE

Accessible freely on-line are details of many leading cases that touch upon expert evidence.

LawyerLists

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 2016 will enable you to download the 2016 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 2016 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, you may submit:

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

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

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

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

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Use multiple entries to offer improved geographical and expertise coverage. If your company has several offices combined with a wide range of expertise, call us to discuss.

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

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Terminator enables you to create personalised sets of terms of engagement based on the framework set out in Factsheet 15.

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Since 1995, we have tapped into the expert witness community to build up a body of statistics that reveal changes over time and to gather data on areas of topical interest. If you want a say in how systems develop, take part in the surveys and consultations.

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If you opt for our Professional service level you can use our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment, etc.

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Our *Expert Witness Year Book* contains the current rules of court, practice directions and other guidance for civil, criminal and family courts. It offers ready access to a wealth of practical and background information, including how to address the judiciary, data protection principles, court structures and contact details for all UK courts. And with a year-to-page and month-to-page calendar too, you'll never be without an appointment planner.

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