Your Witness

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

Are you watching what's happening?

On page 4 we report on the moves being made to establish a Registration Council for Forensic Practitioners. As its name and Home Office sponsorship imply, this body's primary function will be to maintain registers of experts competent to give forensic evidence in the criminal courts.

However, it would appear that its officers may also be considering widening its remit to include on the Council's registers experts practising in the civil courts, and we would question the wisdom of its attempting any such thing on four counts.

- Any system of accreditation reduces choice at a time when Lord Woolf has highlighted that widening the choice of experts should be the priority.
- Lord Woolf himself concluded in his carefully considered Final Report that training should not be compulsory.
- Many of the problems the criminal courts may be facing have, for the civil courts, been swept aside by the Civil Procedure Rules. These place the court firmly in the driving seat. The solicitors in an action are no longer able to choose whatever experts they please, and the procedural judge is empowered to deal effectively with any experts who are 'below-par'.
- Finally, on a purely mercenary note, one inevitable effect of creating an accredited pool of experts is a downward pressure on the fees they can charge.

Our concerns are heightened by evidence provided by the Council's own newsletter that the only expert witness organisations of any kind with which it is in contact are the Expert Witness Institute and Bond Solon Training Ltd. It is possible, of course, that there is an entirely innocent explanation for this. It may be that the Council's officers have every intention of liaising with other organisations representative of expert witnesses before seeking to accredit those practising in the civil courts. In the meantime, we would suggest that members of the Academy of Experts, the Society of Expert Witnesses and – yes – the Expert Witness Institute ought to be asking the officers of those bodies just what is going on!

OSS cop out

No one, it seems, has a good word to say for the Office for the Supervision of Solicitors (OSS). It has long since lost the confidence of solicitors in its ability to deal with the profession's black sheep, there has been renewed criticism from the Legal Services Ombudsman over its handling of complaints from the public, and now the Government is threatening to intervene if matters do not improve.

It is hardly surprising, then, that the OSS should have asked the Law Society if it may be relieved of some of its responsibilities. As we report elsewhere in this issue, the Law Society's Council agreed last month that as from 1 June the Office need no longer concern itself in matters where an alternative remedy is available to the complainant. This means that if you should be chasing for non-payment of your fees you must first of all sue the solicitor. It is only if you secure judgment and the solicitor continues to hold out on you that the OSS will feel obliged to take any action at all.

This would seem to us a sorry cop-out on the Law Society's and OSS's part, but an inevitable one given the mounting pressure on the OSS to justify continuance of its regulatory role. In the meantime all experts should acquire a set of those useful leaflets put out by the Courts Service on making a small claim. You never know when you may need them!

It's survey time again

What is it that experienced expert witnesses most want to know about their fellows? How much they charge, of course. It is also the topic on which experts new to litigation work most frequently question us. To our mind, there is no more useful way of satisfying this demand for information than to conduct regular surveys among our readers and to analyse the results for publication in *Your Witness*. We make no apology, then, for enclosing with this issue a questionnaire on the subject of terms, conditions and charging rates, in the hope that every one of you will complete and return the form to us.

It is all the more important that we achieve a good response on this occasion, because in the 2 years since we last conducted a fees survey the legal landscape has been transformed. There is now widespread, and quite legitimate, concern among expert witnesses as to how the manifold changes in civil procedure and legal aid are likely to affect them. By gathering a substantial body of information at this juncture we can hope to establish benchmarks against which the effects of the changes on expert witness work can be monitored in years to come. Hence the questions about conditional fee agreements, for example, which may have no bearing on what you do now but might well have in a couple of years time.

Chris Pamplin

Inside

Issue 16

News

Law Society rows with Irvine over reforms.

Gloves off

The long-simmering row between the Law Society and Lord Chancellor over his plans for the reform of legal aid came to a head at the end of April with the placing of full-page advertisements in the national and provincial press attacking provisions of the Access to Justice Bill. Lord Irvine retaliated by issuing a press release which insinuated that the Law Society's campaign was motivated by self-interest. He also leaked to several newspapers a letter he had sent to the Law Society's president accusing it of 'irresponsible scaremongering' and demanding an apology. Not getting one, he then announced that he was considering adding a new clause to the Bill that would prevent the Law Society using its income from practice fees to fund 'trade union activities'. The irony of a member of a Labour government seeking to limit such activities was evidently lost on him.

The Law Society's advertisements highlighted a number of situations in which legal aid is currently available as of right but will not be in future unless the Government changes its mind. For people in these situations there would be *less* access to justice, not more. Possible reasons for this might include their inability to obtain (or afford) insurance cover for a conditional fee arrangement, a lack of solicitor firms in their locality with legal aid contracts, or their area office of the Legal Services Commission having run out of money to support their kind of case.

These are not new concerns. They first surfaced 3 years ago when the previous administration unveiled *its* plans for cost-capping legal aid. On that occasion Lord Irvine attacked them as 'unattractive in principle, because legal aid would cease to be a benefit to which a qualifying individual is entitled. It would, in practice, become a discretionary benefit, available at bureaucratic disposal, a benefit which would have to be disallowed when the money ran out or when another category of case was given preference. Legal aid would cease to be a service available on an equal basis nationally, because cases would go forward in one region where identical cases in others, of equal merit, would not.' Which is, of course, just what his critics are saying about the proposals incorporated in the Access to Justice Bill.

No concessions yet from the Government.

The truth is, of course, that the legal aid system is much in need of reform, and its funding has to be brought under some kind of budgetary control. The Law Society's quarrel with the Lord Chancellor is over the means by which he is seeking to achieve these ends. What clearly infuriated Lord Irvine was the fact that the advertisements had been timed to coincide with the start of the Committee stage of his Bill in the House of Commons, and that they had the support of a dozen other organisations representing consumers, the disabled and the disadvantaged. In his press release he claimed that, contrary to what was alleged in the advertisements, legal aid would still be available in all the situations featured. To this the Law Society's response was no less robust: if that is the case, put the matter beyond dispute by amending the Bill to guarantee it.

What the Law Society, the Consumers' Association and the charities have been demanding is that the Bill should stipulate that:

- the function of legal aid is to place those entitled to receive it on the same footing as others who could afford to fund litigation out of their own resources
- the budget for civil legal aid should be both adequate and ring fenced from that for criminal legal aid
- legal aid will be made available in personal injury cases to people who either cannot get or cannot afford legal expenses insurance
- and it should incorporate safeguards for disadvantaged clients.

At the time of writing it is not known whether the Government will accede to any of these demands, but the auguries are not good. During the Second Reading debate in the House of Commons it was made abundantly clear that the Government intended to reverse in Committee all the changes forced upon it during the Bill's passage through the Lords. Among these was the inclusion of a 'purpose' clause defining its overriding objective in much the same terms as the first of the guarantees set out above. A Conservative amendment introduced in Committee, which would have written into the Bill an objective equating 'access' with 'the widest possible choice of provider or services', was similarly voted down. The same fate awaited a Liberal Democrat amendment championing the interests of litigants who might be discriminated against on grounds of race, sex or disability. In the end, the Government allowed no changes to be made in Committee that it had not itself proposed.

As the Report stage of the Bill will not be reached until after this issue of *Your Witness* has gone to press, it is still possible that the Government may yet back down. What is certain, though, is that some battle lines have now been drawn which are destined to be fought over long after the Bill reaches the Statute Book.

More on conditional fees

Conditional fee agreements (CFAs) are regarded as an opportunity by most large firms of solicitors but as a threat by smaller ones. This is one of the conclusions reached by forensic accountants BDO Stoy Hayward following a survey of 150 solicitor practices.

The survey found that, for the firms questioned, the average success rate of CFAs was 98%. BDO attributes this astonishingly high result to 'good screening' on the part of solicitors, although others might term it 'cherry picking'. It is also

the case that virtually all of the agreements the solicitors had handled so far related to personal injury claims, for which good success rates are the norm. Despite this, only 58% of the firms questioned by BDO thought that CFAs would make their practices more profitable, and a mere 15% of those with fewer than six partners expected CFAs to generate more work. Most of these smaller practices feared that they would be squeezed out of the market by the larger ones. Little support here, then, for the Lord Chancellor's oft-repeated assertion that CFAs benefit the legal profession as a whole.

Another surprising finding was that only half of the firms questioned had got around to devising risk assessment procedures for CFA cases, and that fewer still were monitoring the success they achieved with them. Again, this is no doubt because firms were confident of winning the cases anyway. Those without proper procedures would have been in much greater danger of coming unstuck had more of their CFAs related to non-personal injury claims.

The fact is that many solicitor firms have yet to gear themselves up to conducting cases under CFAs across the whole range of civil disputes for which conditional fees are now permitted. When eventually they do so, a lot more of them will become aware of the need for expert help in assessing the claims they are considering taking on. For experts it may yet turn out to be the case that as one door – legal aid – closes, another will be opening.

No win, no fee – and (?) no premiums

Meanwhile, slowly but surely, the insurance industry is coming forward with new 'after-the-event' policies to underpin CFAs in personal injury cases. There are now nine firms in the market, of which much the largest is Royal SunAlliance. They joined the fray in March with 'Pursuit', the most notable feature of which is that the premium, like the solicitor's success fee, becomes payable only if the claim succeeds. Should the case be lost, the insurer meets most of the costs incurred by the claimant's solicitor – as well, of course, as any the defendant may be entitled to recover.

There is, however, a downside to this new policy. Unlike the scheme sponsored by the Law Society, called Accident Line Protect, which allows the proposer's solicitor to evaluate the strength of the claim, Royal SunAlliance insists on assessing this for itself. What is more, it charges a non-refundable fee of £200 for doing so. Given that with Accident Line Protect the premium for insuring road traffic cases is a flat £95.68, and that for other personal injury cases is £161.20, it is not immediately apparent why litigants (or their solicitors) should opt to make a still larger up-front payment **and** run the risk of their proposal being turned down.

Another company that has recently entered the market is Amicus Legal. The novel feature of its 'after-the-event' policy is that it covers the cost of medical reports obtained before a claim is filed, even in circumstances where the decision is then taken not to proceed with the case. This should facilitate compliance with the pre-action protocols that now apply to personal injury cases by enabling claimants' solicitors to obtain such reports promptly without having to worry whether the client can afford for them should the case go no further. Like Royal SunAlliance, Amicus Legal insists on screening proposals itself, but it makes no charge for doing so.

Smaller legal firms feel the CFA pinch.

But perhaps the most innovative of the new schemes is that launched by Greystoke Legal Services. Called Law Assist, it provides litigants with an insurance-backed bank loan to cover the cost of obtaining legal advice, experts' reports and even the insurance premium. If the action succeeds, the loan would be repaid out of the damages awarded to the client; if it does not, it would be claimable under the Law Assist policy. In these circumstances the only cost the client would incur is an initial assessment fee of just under £40.

The range of schemes now available is such that most people with good personal injury claims should be able to pursue them on a CFA basis at little or no initial cost to themselves. This goes a long way towards allaying the fears on that score which have been expressed by critics of the legislation now before Parliament. There are, however, still some categories of personal injury claim for which obtaining cover is likely to remain difficult, and there is a whole range of other money claims for which affordable policies have yet to be devised. It is only when the insurance industry has proved itself capable of catering for them that Lord Irvine will escape the criticism that in this respect, too, his reforms have actually reduced access to justice.

The OSS under siege

While many of the complaints fielded by the Office for the Supervision of Solicitors (OSS) concern the fees charged by solicitors to their clients, a lot of others have to do with money owed by solicitors, whether to counsel, experts or others instructed on a client's behalf.

As all experts should know, when a solicitor instructs them he or she assumes personal responsibility for paying their proper costs, regardless of any delay the solicitor may experience in getting paid by the client. This much is laid down in the Law Society's *Guide to the Professional Conduct of Solicitors* with which all practising solicitors are supposed to abide and the Law Society's regulatory arm, the OSS, is supposed to enforce.

More after-the-event policies launched.

Hitherto, our advice to experts chasing solicitors for the non-payment of their fees has always been to complain first of all to the senior

Continues on page 7

Accreditation... here we go again!

EWI's membership ambitions revealed.

Until 10 years ago the police relied mainly on the Home Office's Forensic Science Service to provide the expert evidence they required. Then the Service was made a government agency and had to start earning its way and competing for work with independent forensic scientists. Many of these independent experts are, of course, top-notch: but sadly not all. Doubtless it was this that prompted the Home Secretary to promise in May 1998 financial support for the establishment of the Registration Council for Forensic Practitioners (RCFP).

Registration Council for Forensic Practitioners

In the past 12 months the Council's Chairman, Professor Evelyn Ebsworth, and its pre-Executive Board, have drafted a constitution for the new organisation, drawn up a code of practice for forensic practitioners and established five working groups. Their March newsletter (available on the Royal Society of Chemistry web site at www.rsc.org/members/forensic.htm) defines the new Council's objectives as:

> '1. to establish, uphold and encourage consistent high standards for the competence, qualification and conduct of forensic practitioners, thereby promoting public awareness of and confidence in the application of science to proceedings in courts, tribunals and other legal processes
>
> 2. to create and maintain registers of competent forensic practitioners.'

In furtherance of these objectives one of the working groups has been assigned the task of identifying the criteria to be fulfilled for a potential registrant to be considered competent. Another working group has been asked to consider those criteria an expert must satisfy to be judged competent to give evidence in court.

According to its newsletter, the Council is also considering the establishment of two further working groups. One is to look into the accreditation of forensic medical practitioners, and the other, most intriguingly of all, is to consider the issues that might arise from the inclusion on its registers of practitioners in the *civil* courts.

RCFP should be consulting more widely.

The Expert Witness Institute

In all this the Registration Council for Forensic Practitioners would appear to have the support of the Expert Witness Institute (EWI). The EWI was launched at the 1996 Expert Witness Conference organised by Bond Solon Training Ltd, and at that time it clearly aspired to become an accrediting body in its own right. Subsequently it back-tracked on this aim, to the extent of asserting that 'the EWI is against formal "accreditation" for expert witnesses which creates a closed shop'. Now, though, it would seem to be in favour of it once more.

This January, for example, the EWI's Board promulgated a disciplinary procedure to deal with members who, *i.a.*, 'fail to maintain the standards to be expected of a reasonably skilful and careful expert witness'. According to the Institute, this was necessary to demonstrate to a court that its members not only observe the ethics of their own professional calling, and the EWI's own Code of Conduct, but are subject to effective disciplinary rules.

The spring 1999 issue of the EWI's newsletter claims for it an individual membership of 829. However, in the autumn 1998 issue the Chairman of the Institute's Education and Training Committee, Roger Clements, reckoned that the EWI needed to aim for about 5,000 members 'if it is to achieve its fundamental goal'. As if to elaborate on this, Mr Clements went on to say, 'We cannot be exclusive. There should always be a place for an expert who acts only occasionally. But our goal must be that anyone who gives expert evidence at all regularly, or who derives a substantial part of their income from it, should go through proper training.' Clearly, these must be the 5,000 experts the EWI hopes to recruit and train. The question is: How can it hope to secure such a 5- or 6-fold increase in its current membership?

For a partial answer, at least, we need to look no further than the links it is currently forging with the infant Registration Council for Forensic Practitioners. Some evidence of what is at foot can be gleaned from the Council's own newsletter. This helpfully chronicles the meetings its Chairman, Professor Ebsworth, has been having with other organisations and the visits he has been paying to their headquarters and laboratories. Many of the 40 or so organisations he visited in the space of 6 months are, as one might expect, involved directly in forensic work. Of those concerned with expert witnesses, however, just two names are listed: the EWI and Bond Solon Training Ltd. Furthermore, the EWI is the only expert witness organisation included in the 35-strong consultative forum that the Council set up this April, and it comes as no surprise to learn that its representative should be Mr Clements.

Concerns

In view of the known membership ambitions of the EWI and the commercial interests of Bond Solon Training Ltd, we think it right to alert our readers to the links that exist between these organisations and the new Registration Council for Forensic Practitioners. In our opinion it cannot be right that a body sponsored and financed by a government department should, in crucial aspects of its work, deal with just two organisations to the exclusion of all others, especially when these two have an obvious – and to some extent, common – interest in maintaining that arrangement.

Services for experts

As the burst of activity occasioned by the publication of the 12th edition of the *Register* dies down, now is a good time for us to summarise some of the products that J S Publications has been developing for experts listed in the *Register*.

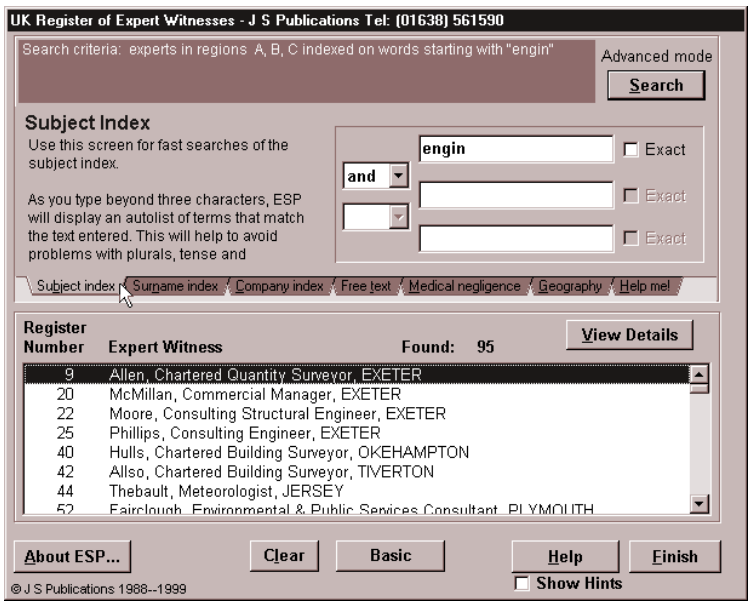
Expert Search Program

If you ever use the *Register* to help you locate other experts, you will find our Expert Search Program, ESP, very helpful. At the click of a mouse button, ESP brings the power of electronic search and retrieval to help you explore the comprehensive subject, surname, company and town indexes of the *Register* in ways which would be time consuming, or even impossible, with the printed indexes.

ESP is a Microsoft Windows application written specifically for the task of making the *Register* more accessible. Its features include:

- Basic or Advanced search screen
- surname and company name search facility
- free text search option
- town/county preference
- complete extended entry text
- on-screen help and hints
- multiple printing selection.

ESP is available on CD-ROM or 3.5” floppy disk and will run on both Windows 3.11 and Windows 95 or later. Cost: £23.50 (£20.00 + VAT).



Factsheet folder

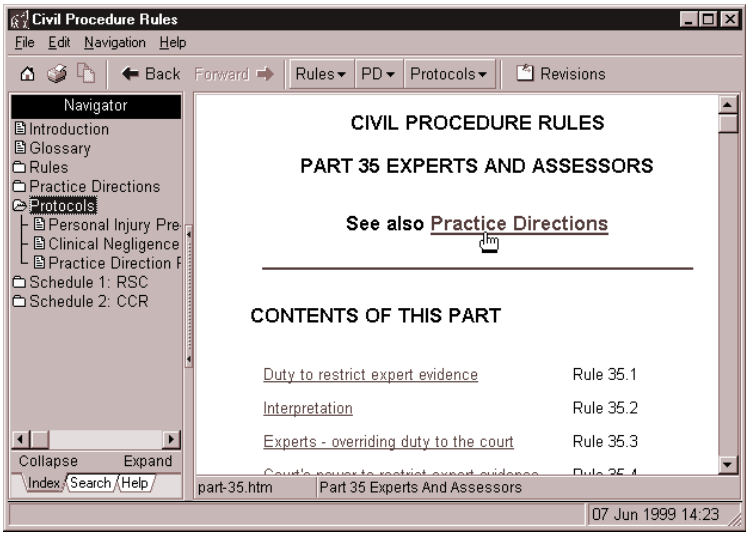
With 35 factsheets now available, and many having to be constantly amended to keep abreast of changes in civil procedure and the legal aid system, we are frequently asked if we could reproduce the whole set in printed form. Accordingly, as well as providing the factsheets free of charge by faxback and on our web site at www.jspubs.com, we have assembled them into a looseleaf binder.

Cost (including updates to 31 December 1999): £30.55 (£26.00 + VAT).

CPR Viewer

The Civil Procedure Rules (CPR) are very important to every professional involved in the civil justice system in England and Wales. Whilst you can download them free of charge from the Lord Chancellor’s Department’s web site, attempting this can be a very trying experience, and because the Rules are being constantly amended, immensely tedious as well!

As a service to experts listed in the *Register*, we have prepared *CPR Viewer*, a small Windows application that provides you with your own copy of the Rules, and keeps them current with periodic updates.



One powerful feature of *CPR Viewer* is its ability to search through the entire content of the CPR simply and quickly. For example, if you want to know if Rule 35.6 (dealing with written questions to experts) is mentioned elsewhere in the CPR you can search for ‘rule 35.6’ and discover that it is referred to in three Practice Directions.

CPR Viewer also offers access to hyperlinks between documents and a comparison facility that allows you to see what has changed between the current version and its predecessor. You can print documents, or copy sections to your word processor. *CPR Viewer* is available on 3.5” floppy disk for both Windows 3.11 and Windows 95 or later.

Cost: £47.00 (£40.00 + VAT) including the 1999 updating service.

Register emblem stickers

All experts listed in the *Register* may use our emblem to advertise their successful application. As well as making the emblem available free of charge on our web site in four common formats (Windows bitmap, EPS, TIFF and CorelDraw! 3), we can also supply transparent stickers in three sizes (diameter 26 mm, 20 mm, 14 mm) at £23.50 (£20.00 + VAT) per roll of 500.

The *Register* emblem

Court reports

Important ruling on outcome of experts' meetings.

Joint statements not privileged

In a ruling made on 1 February this year, Judge Peter Bowsher QC anticipated by almost 3 months an important effect the new Civil Procedure Rules will have on the admissibility of experts' joint statements. (These are the statements expert witnesses can be required to prepare following court-ordered meetings of experts.)

Hitherto, the received wisdom had been that joint statements of this kind were subject to legal privilege, i.e. they could not be introduced in evidence, or otherwise referred to at trial, without the agreement of the parties whose experts had prepared them. Moreover, that was a circumstance that would normally only arise if the parties had previously undertaken to be bound by whatever their experts' agreed.

This understanding of the status of experts' joint statements stems from comments by Judge John Newey QC in the leading case of *Richard Roberts Holdings Ltd -v- Douglas Smith Stimsom*. Judge Newey could claim to have invented the idea of experts meeting to narrow the issues in a dispute. In his judgment in *Richard Roberts Holdings*, though, he was at pains to point out that:

> 'if every order for a meeting of experts were likely to result... in an agreement disposing of all or part of the case without either a party or its legal advisers being consulted, orders for such meetings would be likely to be strongly opposed'

and that as a consequence the usefulness of the procedure would be much reduced.

This, though, was said 5 years before the Woolf Inquiry got underway and, as we all know, the Inquiry led to the adoption of a radically new procedural regime. The emphasis now is on encouraging parties to settle their disputes without recourse to litigation, and it is entirely within the discretion of the court to order discussions between experts to achieve that end. Furthermore, the new Civil Procedure Rules give statutory authority to the common law position that the expert's primary duty is to the court and not to the instructing party.

Joint statements admissible in evidence.

At an earlier stage in the case of *Robin Ellis -v- Malwright Ltd* Judge Bowsher had given directions that the parties' quantity surveyors should prepare a joint statement detailing the issues on which they were agreed and those on which they were not. At the trial of the action, counsel for the defendant sought to use this statement in his cross-examination of the claimant. The claimant's lawyers strongly objected on the grounds that the statement was privileged and therefore inadmissible as evidence. The judge, however, ruled otherwise.

Judge Bowsher pointed out that the purpose of ordering meetings of experts was to limit the issues brought to trial to those truly in dispute. Only in this way could the action be fought with least cost to the parties and the taxpayer. That objective could not be achieved if agreed statements limiting the issues were inadmissible as evidence.

In support of this view, Judge Bowsher cited comments made by Lord Justice Chadwick in the Court of Appeal hearing of *Stanton -v- Callaghan* (see *Your Witness*, issue 13), which showed that he, too, regarded an agreed experts' statement to be an 'open' document, i.e. not protected by privilege. It was the *content* of the discussions that was privileged, not their outcome – and this, indeed, is the extent of the protection that the new Rules afford.

Judge Bowsher also observed that a joint experts' statement, although admissible as evidence, was not binding on parties in the same way as would be a contract between them. He accepted, though, that as an open document its terms could have important consequences, especially for the party whose expert had conceded the most. It was, of course, precisely because Mr Callaghan had done this that Mr and Mrs Stanton felt constrained to settle for so much less than they had originally claimed against their insurers – and why they had then sought to sue him for negligence.

Expert evidence not necessary?

We are indebted to Mr Peter Clement for drawing our attention to yet another case in which the Court of Appeal has questioned the need for expert evidence. The appeal was heard in February last year but not reported until September, and then only in *Health & Safety Bulletin*.

Hawkes -v- London Borough of Southwark arose out of an accident sustained by a carpenter, Mr Hawkes, who was installing doors in a block of flats owned by his employers. The doors were both heavy and awkward, and they had to be carried up a steep staircase. While manoeuvring one of them round a landing, Mr Hawkes was knocked off balance, fell down the stairs and injured his right foot. He subsequently sued the council, alleging both breach of a statutory duty to assess the risk of injury the job entailed and negligence under common law.

At the initial trial of the action the judge decided that while the employers were indeed in breach of the relevant regulations, had Mr Hawkes's supervisor carried out a risk assessment he would still have sanctioned Mr Hawkes doing the work on his own. At the same time, though, the judge accepted the evidence of an engineer, called as an expert witness on Mr Hawkes's behalf, that the risk of injury would have been reduced had two men been assigned to the job. Since these findings were plainly inconsistent, the Court of Appeal reconsidered the evidence afresh and, in the

Court reports (continued)

event, allowed Mr Hawkes's appeal with costs, with damages to be decided later.

The Court of Appeal's detailed findings on liability need not concern us here, except to note that it decided that the provision of a second worker to help carry the doors would have been the appropriate way to reduce the risk of injury to Mr Hawkes. What should concern us, though, is the criticism the Court levelled at the expert evidence called on his behalf.

The Court agreed with the counsel for the employers that this was not a case for expert evidence. The trial judge was quite capable of assessing the risk in question, and factual evidence about the weight and dimensions of the door and stairway was all that was required. Evidence as to the mechanical forces involved in lifting a door and to trade practice *might* have been admissible, but although the witness was a qualified mechanical engineer, he had little experience of accident investigation. He was in any case not entitled to express an opinion as to whether safety regulations had been breached since that, too, was for the judge to decide.

In the course of their judgments Lord Justice Henry opined that the expert's presence reflected the 'better-safe-than-sorry approach' of current practice, while Lord Justice Aldous weighed in with the familiar mantra that unnecessary expert evidence increases the length and cost of litigation.

It is difficult not to sympathise with Mr Hawkes's solicitor when faced with these strictures. After all, if the judge at first instance had not accepted the expert evidence he had heard, he might well not have reached conclusions, the inconsistency of which gave rise to the appeal and resulted, ultimately, in Mr Hawkes winning his case.

Furthermore, although one might hope that a judge would be better able than any witness to interpret legislation, the content of safety regulations can appear dauntingly technical to any layman. It would be crass to pretend that on occasions courts do not benefit from having their effect explained by experts, and that Mr Hawkes's case might have constituted just such an occasion. In any event, the old common law rule debarring witnesses from giving evidence on an 'ultimate issue' does not apply to expert witnesses, since the Civil Evidence Act 1972 expressly permits them to do just that.

Under the new Civil Procedure Rules courts are required to limit expert evidence 'to that which is reasonably required to resolve the proceedings'. Now that procedural judges have begun to exercise their powers of case management, there should be less cause in future for questioning the need for such evidence at a later stage. It is to be hoped, though, that they will not go as far as the Court of Appeal would seem to be suggesting, and seek to restrict the ambit of the expert evidence they allow to be called. It is surely perverse for a court to acknowledge a need for expert help in reaching its decision and at the same time to deny itself the benefit of the expert's knowledge or experience on all relevant matters within his or her expertise.

Was the trial judge capable of assessing the risk?

There remains the question of the appropriateness of that expertise to the matter before the court. Although in *Hawkes* the judge at first instance had no difficulty in accepting the expert evidence of a mechanical engineer, the Court of Appeal considered him to have had insufficient experience of accident investigation for his evidence to have been of assistance to it.

In the context of case management, procedural judges may well find themselves in some difficulty here. Although the new Rules require that a party applying for permission to call expert evidence must identify the field it is to cover, they acknowledge that at that stage it may not be practicable to name the expert who is to provide it. In any case, even if the party were able to name the expert, it is highly doubtful whether the judge would be able to determine at such an early stage in the proceedings just how appropriate his or her evidence might prove to be. The onus must lie, as it always has, on the party's solicitor in selecting in the first place an expert with the appropriate knowledge or experience for the task in hand.

Not, of course, that this relieves the chosen expert of any responsibility in the matter. Experts should never accept instructions knowing, or even suspecting, that they lack the knowledge, experience or skills – or time, even – to carry them through properly. If they were to do so, and as a result the case was lost, they would be at risk of being sued for negligence. It is to be hoped that this will be one of the topics covered in the promised experts' protocol when eventually that appears.

Continued from page 3

partner of the firm; if that should fail, then to report it to the OSS for continuing breach of professional standards. Not any more, though.

Such has been the rise in the overall number of complaints reaching the OSS that last year it was taking an average of 6 months for any complaint to be allocated to a caseworker, let alone investigated by one. To help alleviate this near-impossible situation, the Law Society's Council agreed last month to relieve the OSS of any involvement in matters where an alternative remedy is available to the complainant. These include disputes between solicitors, disputes between solicitors and their employees and – yes, you've guessed it – those concerning the non-payment of experts' fees.

OSS gets off the hook!

The only option that remains for experts determined to make defaulting solicitors pay up is legal action. The question that remains is whether, for the sum involved, taking them to court is worth the hassle – and that, of course, is something only you can decide.

Factsheet Update

Factsheet 12: 'Legal Aid and its Reform' is being thoroughly overhauled in the light of provisions contained in the Access to Justice Bill. The revised factsheet will be available on the faxback system from 30 June.

The faxback number is (01638) 565809. Factsheets are also available on our web site, or can be purchased as a complete set in a binder at £30.55 (£26.00 + VAT).

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Conferences and courses

The Society of Expert Witnesses

The practical consequences of the new Civil Procedure Rules was the main topic for discussion at the Society of Expert Witnesses' spring conference. It was held this year at the University of Warwick and was attended by over 150 members, non-members and guests. The day's programme was arranged in two parallel strands, with five short sessions intended primarily for experts new to litigation work and one that was definitely for the more experienced among them. However, the three main sessions were common to all.

At the first of the plenary sessions delegates heard John Peysner, of Nottingham Trent University, discussing the conceptual basis of the new Civil Procedure Rules, which he described as 'a cultural revolution in the way we conduct litigation'. Sharing insights he had gained running a simulation exercise for the Lord Chancellor's Department, Mr Peysner explained the importance of the new pre-action protocols and the differences between the fast-track and multi-track systems. He described the court's new powers to control cases and to allocate time and resources in accordance with the principle of 'proportionality'. Finally, he spelt out why major changes in the way litigation is financed – such as 'no-win, no-fee' agreements – will ensure that the new Rules have a real and lasting impact.

Mr Peysner was followed on the rostrum by a member of the Law Society's Civil Litigation Committee, Tony Cherry, who dealt in a lively and entertaining way with Part 35 of the Civil Procedure Rules. This, of course, is the section that deals specifically with experts and assessors. Mr Cherry spoke in turn about each of the rules in Part 35, discussing both their interpretation and their likely impact. He pointed out the areas of uncertainty and stressed those where experts must be especially on their guard.

A subsidiary theme of the conference was 'avoiding problems – how to ensure that expert witness work runs smoothly'. Two experienced members of the Society gave professional advice on how to provide a better service and function effectively in the new Civil Procedure Rules environment, whilst two local solicitors offered some valuable insights by describing the services they require from an expert.

The day ended with an open forum session, in which delegates took a further opportunity to explore issues raised earlier in the day – and to draw attention to several problems that had been overlooked by the two main speakers. A full transcript of the Society's conference can be found on their web site at www.sew.org.uk.

The Society's autumn conference will be held at the Manchester Conference Centre, Weston Building, on Friday 15 October 1999. The programme is yet to be finalised, but many members have already asked for sessions on 'Woolf – the first six months' and on the role of the single joint expert. For further information call the Society on 0345 023014.

More courses

Medical & Legal Training Services are repeating the full-day course on 'Report Writing after Woolf' which they premiered with such success in London this April. The re-run takes place in Birmingham on 15 July, with five speakers under the chairmanship of consultant orthopaedic surgeon, Mr Richard Cherry. The course fee of £250 + VAT also covers lunch, refreshments during the day and a wine reception at the close of the proceedings.

Later in the year, on 27 October, Medical & Legal Training will be back in London with an updated report writing course. It will be based on the same format as the others but with additional features. There will be a District Judge on hand to review the handling of cases under the new Rules, and a session devoted to the problems that have arisen during the first 6 months of their operation.

For further details please contact Medical & Legal Training direct on 0121 449 7098 (fax 0121 442 4850).

SJE training 'coup'

A well-timed piece of marketing, making dubious use of the Law Society's name, by a London-based expert training company sparked controversy, confusion and uproar in the expert witness community this April (*Dispatches* of the Society of Expert Witnesses, May 1999).

While the confusion was being sorted out, hundreds of experts undertook the single joint expert training on offer. All the main expert training companies are now offering such courses, so they've all benefited from the marketing acumen of the original training company.

However, given the advice of Mr Tony Cherry (Solicitor and a member of the Law Society's Civil Litigation Committee) at the recent Society of Expert Witnesses conference – that because so much of the CPR would only become clear in practice, experts would be best advised not to be a single joint expert unless they particularly fancied a career as a guinea pig for the next 6 months – one wonders just what the training companies are finding to say beyond a simple recitation of the Rules!

Environment resource on-line

An expert listed in the *Register* (Dr Phil Smith of Aquatic Environmental Consultants) has set up the 3E database of ecological and environmental experts on the world wide web. Most of the 3E database members are consultants rather than expert witnesses, but they may be a useful additional resource of information. The 3E database, at www.3eltd.com, can be searched by country, language skill and specialisation.