Your Witness

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

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Issue 35

March 2004 © J S Publications

Another MRO in trouble

The beginning of February brought with it the unwelcome news that another medical report organisation (MRO) has run into trouble. Expert Reports Ltd put up a Company Voluntary Arrangement (CVA). This offers to keep the ailing company operating, and to attempt to pay its creditors – who are, of course, mostly medical experts – 70p in the pound. The sting in the tail is that for the experts to be paid, they will have to rely on the rescued company trading profitably in the future. This will, of course, require more experts to extend further credit to the operation! The CVA was agreed at the creditors' meeting on 18 February.

Why do medics support the MROs?

Given the history of instability in the MRO market, and the fact that it is medical experts who end up carrying the financial can when an MRO fails, I have trouble understanding why so many medics agree to work in such a way.

As Mr Evans, a Consultant Orthopaedic Surgeon, puts it:

> *'What can experts do to avoid loss due to collapsing agencies? Simple – have nothing to do with them and they will go away.*
>
> *'I have had at least three solicitors write to me saying that they will use an agency in future. I told them I want nothing to do with that and I still receive instructions from those solicitors directly. I do not think my practice has suffered from this approach.*
>
> *'These firms would shut down earlier, and save experts a lot of trouble, if no one used them.'*

Research conducted recently by the *Society of Expert Witnesses* suggests that many medics do not appreciate how the MRO market works. If you are interested in the detail, the *Society* has published a helpful note on the MRO business model on its web site at *www.sew.org.uk*.

In simple terms, though, the MRO acts to delay the payment of experts by:

- getting experts to agree long deferment periods
- factoring the bills of the solicitors through a third party.

In the process, the MRO adds a mark-up (I have heard of a £400 expert report being billed to the solicitor at £660) and experts are left with long lines of free credit extended to an industry with a troubled past.

Now, it will come as no surprise that solicitors rather like this arrangement. But make no mistake, it is only available to them because medical experts permit it. If medical experts determined to deal only directly with solicitors and not get involved in this commodification of their professional skills, the MRO market would shrink dramatically.

In addition, dealing direct with solicitors has the advantage of enabling medics to develop full professional relationships with instructing solicitors, receive clearer instructions and benefit from the provisions of the solicitor's Code of Professional Conduct Rule 20.01 – namely that solicitors carry **personal liability** for the fees of the expert witnesses they instruct! No such security exists with MROs.

Experts and agents

These events in the MRO marketplace have raised general awareness of the difficulties experts can face in getting paid when dealing through a middleman. One expert wrote to ask: 'Is the solicitor still personally responsible for an expert's fee if the instructions have been sent via a medical report agency?' Leaving to one side the more difficult question of whether Rule 20.01 (see above) would still protect the expert in such a case, there is a route to the solicitor through the law of agency – but only in the event that the middleman is in breach of contract.

Agency law is replete with opportunities for lawyers to muddy the waters. And when it come to getting paid, having endless arguments with solicitors over whether an agency relationship exists is just another way for them to avoid paying you!

However, I include in this issue (see page 6) a guide to agency law. If you find yourself involved with an MRO that has failed to pay you on time, you can consider whether going direct to the lawyer instead is a viable option.

VAT update

The situation with respect to the imposition of VAT on medico-legal reports remains unchanged from December. HM Customs & Excise (HMCE) is involved in discussions with the various interested parties. Some as yet unspecified difficulties have arisen from these discussions, and the latest advice from HMCE is that the matter is not likely to be resolved before June.

So, our advice to medics remains the same as in December. Do not feel pressured into any action just yet. In the meantime, I have prepared a brief summary of the basics of VAT (see page 8) that will help medics prepare for what, in my view, is its inevitable introduction to their medico-legal report work some time this summer.

Chris Pamplin

Cannings: who will carry the can?

Defence does not have to prove the theories of their experts

Previous issues of *Your Witness* have closely followed the debate that has centred around expert testimony in child abuse cases. The high-profile cases of Sally Clark and Trupti Patel called into question the substance and nature of expert evidence relating to Sudden Infant Death Syndrome (SIDS). The recent appeal case of Angela Cannings has brought things to a head.

The Cannings Appeal

On 19 January the Court of Appeal delivered its decision in the Angela Cannings appeal and said that enough was enough. Faced with mounting concerns, the Court called a halt to further prosecutions of parents in cases where expert opinion is divided on the cause of death. Lord Goldsmith, the Attorney General, immediately ordered a review of the 258 cases within the last 10 years in which a parent had been convicted of killing a child under 2 years of age.

A scheme to 'fast-track' cases through the appeals system has been drawn up by the Criminal Cases Review Commission, the body in England and Wales that investigates wrongful convictions. Where convicted parents have not already appealed, they will be fast-tracked to the Court of Appeal and special arrangements made so that they can appeal even if they would otherwise be out of time.

Weighing the evidence

The Court of Appeal has, on occasion, been scathing of the role expert witnesses have played in these miscarriages of justice. The appeal judges have made it clear, however, that in the Cannings appeal it is not the expert evidence that was at fault, but rather what the courts chose to do with that evidence and the weight attached to it. These are difficult cases on which the court needs as much expert guidance as it can get, but it must recognise that this is 'frontier science' and treat the evidence accordingly.

In delivering his judgment, Lord Justice Judge said that he had developed an overwhelming impression, from studying the reports of numerous experts involved in the trial, that 'a great deal about death in infancy, and its causes, remains as yet unknown and undiscovered'. He said that 'we cannot avoid the thought that some of the honest views expressed with reasonable confidence in the present case (on both sides of the argument) will have to be revised in years to come, when the fruits of continuing medical research, both here and internationally, become available. What may be unexplained today may be perfectly well understood tomorrow. Until then, any tendency to dogmatise should be met with an answering challenge'. This reference to a tendency to dogmatism in some experts was the strongest criticism of the experts in the case.

Any tendency to dogmatism should be avoided

Proper direction of the jury

However, it is important to recognise that whilst any tendency to dogmatism in an expert witness is wrong, it should not be possible for an expert's dogmatism to mislead the court. Just because a follower of 'Meadow's Law' might approach a case with the dogmatic view that 'one infant death is a tragedy, two is suspicious and three is murder unless proved otherwise', the criminal court does not – here the prosecution has to prove its case, not the defence disprove it. The direction the trial judge gives to the court is key, and the Court of Appeal was fulsome in its praise of Judge Hallett in this respect, citing the following extract:.

> *'Do not think that when [the defence] called an expert before you [they] are under any kind of duty to prove that expert is right. [They do] not have to establish that any particular incident was natural in causation or that it was due to as yet unknown or unidentified causes. The possibilities are put before you because firstly, we know that babies do sadly die of natural causes, as yet possibly unknown or unidentified, but also there may be many contributory factors as to why a baby may die. So when you hear the evidence called by the defence, very much bear in mind… that [they] do not have to prove that any of the theories of the experts [they have] called are correct.'*

The Court of Appeal pointed out that even the most distinguished expert can be wrong. The very fact that expert opinion was divided reinforced the need for caution at a time when our knowledge is limited and incomplete. In cases such as this, what was confidently presented to the jury as virtually overwhelming expert evidence should now be approached with a degree of healthy scepticism. Trial judges were asked to take account of this analysis of the fundamental approach to cases of this kind, as well as Judge Jack's directions in the case of Trupti Patel.

It is the function of the judge to direct the jury in relation to the evidence. In our criminal justice system, the jury delivers its verdict without providing its reasons. Sir Robin Auld, in his Review of the Criminal Courts of England and Wales, 2001, recommended that the trial judge should give the jury a series of written factual questions, tailored to the law as he or she knows it to be and to the issues in evidence in the case. The answers to these questions should logically lead only to a verdict of guilty or not guilty.

Experts still vital in criminal trials

Responding to questions in the House of Lords on 20 January, Lord Goldsmith pointed out that experts need to be used in many cases. Frequently, without expert evidence in criminal cases, it would not, he said, be possible to bring a criminal to justice. He stressed the importance, however, of experts giving their evidence objectively, dispassionately and impartially. Experts should put their own expert experience before the court, not some personal commitment to a particular cause.

Ramifications for the Family Court

The Cannings Appeal decision also has implications for the civil courts. Harriet Harman informed the Commons about the implications for the child protection services. If it was unsafe to convict parents under criminal law on the basis of conflicting expert evidence, then it might also have been wrong to take children away from parents under civil law on the same grounds, bearing in mind the different burden of proof between the two courts. She implied that, in cases where mothers were not prosecuted for harming their children, but, instead, had them taken away as a result of care proceedings, there would have to be similar reviews where expert evidence had been the basis for the decision.

Harman told MPs: 'We will make sure... any potential injustices in care proceedings are identified and acted on. ... we bear in mind the absolute, utmost gravity and seriousness of those whose injustice is not in the hands of the criminal justice system, but as a result of the family justice system.' These words will undoubtedly have raised hopes among thousands of parents whose children have been taken into care. The cases likely to be reviewed include those of mothers accused of harming their children according to the pattern of behaviour known as Munchausen's Syndrome by Proxy.

Margaret Hodge, the children's minister, has been given the task of drawing up guidelines to identify relevant cases. But early indications are that she will seek to limit the burden on social services. To prevent the spectre of countless files being reviewed, it is likely that the judgment will be found to affect only those cases in which a child died and in which medical experts disagreed about the cause.

Adoptions and the wisdom of Solomon

There is also a fear that, in cases where the child has been adopted, a review of all cases might in some cases result in the child being taken from its adopted parents and returned to its natural parents. However, Andrew Cozens, President of the Association of Directors of Social Services, has called for a measured response. He points out that no child will have been adopted or taken into care 'solely on the basis of expert witnesses'. In a statement to *The Guardian*, Mr Cozens said that the number of cases likely to be affected by the judgment was no more than 100, and all of those were cases that were still being reviewed by the courts. He made it clear, however, that there would be no review of cases in which the children were already adopted, because those could not be overturned.

This is not a view that is necessarily shared by lawyers. In the wake of the Inquiry, we are likely to see a spate of applications arising out of care proceedings taken over the last decade.

Renewed calls for 'Public Judicial Inquests'

What is needed is an early evaluation of the evidence by a team of specialists, and this should be done before there is any suggestion of a criminal prosecution. The medical evidence, so far as possible, should be removed from the adversarial forum and examined dispassionately. The NSPCC has pointed out rightly that the UK has one of the highest infant mortality rates in Western Europe, and that we must face the fact that, sometimes, a child is killed by its parent. It is right and proper that there should be a full and thorough investigation. The NSPCC suggests that when a child dies, a group of specialists be brought together immediately to conduct an investigation. Mary Marsh, NSPCC Chief Executive, has said that the current system fails adequately to review or investigate child deaths. As a result, not enough is known about why children die and what action needs to be taken to help prevent such deaths.

In 2003, the Independent Review of Coroner Services made a number of recommendations. These recommendations included a requirement that Public Judicial Inquests should be held into any child death where it is not possible to say beyond reasonable doubt that the child died of natural causes.

The Review also recommended that there should be standing protocols between all coroners, children's services and child protection agencies governing how they should work together in child death investigations; and a system to ensure all autopsies on children are performed by a paediatric pathologist or a pathologist with specialist paediatric experience.

The NSPCC welcomes these recommendations and calls for their early implementation.

The Foundation for the Study of Infant Death echoes the concerns of the NSPCC. It is calling for infant deaths to be investigated properly by specialist pathologists and new codes of practice to be introduced.

Conclusion

Experts in many fields will acknowledge the possibility that later research may undermine the accepted wisdom of today. That does not normally provide a basis for rejecting expert evidence, or indeed for conjuring up fanciful doubts about the possible impact of later research. However, as the judgment in Cannings has demonstrated, in areas where we are still at the frontiers of knowledge and there is a serious disagreement between reputable experts about the cause of death, and a body of such expert opinion concludes that natural causes, whether explained or unexplained, cannot be excluded as a reasonable (and not a fanciful) possibility, the prosecution of a parent or parents for murder should not be started, or continued, unless there is additional cogent evidence extraneous to the expert evidence.

Even the most distinguished expert can be wrong

Review in 2003 recommended Public Judicial Inquests

Coroner's court reform

Coroners must not apportion guilt, but establish cause

The function of a coroner's court is not to make a finding of guilt but merely to establish a cause. Accordingly, the role of experts in coroner's court proceedings is rather different to that which they perform in other courts.

Expert opinion in the coroner's court

However, there is still plenty of scope for expert opinion in coroner's proceedings as they currently stand. Take, for example, the difficult areas of medical negligence, or the death of a child through the neglect of its parents. In establishing the cause of death, it is necessary to admit such evidence that, if proven, goes beyond dealing with the mere cause of death and does apportion some responsibility for the actions of another individual. This can give the inquest a quasi-judicial function and can call for greater reliance on expert opinion.

'Right to life' and the coronial system

The case of *R (On the Application of Christine Davies) -v- HM Deputy Coroner for Birmingham* (2003) *EWCA (Civ)* 1739 has broadened the scope of the coroner's inquest and highlighted some of its deficiencies. This case dealt with an application for judicial review of a coroner's inquest into the death of a drug-dependent prisoner. The prisoner had died as a result of not receiving his detoxification drug treatment, and it was alleged that, after he became ill, he had not been referred to the prison doctor and there had been systemic neglect by the prison authorities. At first instance the coroner made a finding of accidental death but failed to admit expert evidence as to the quality of the medical care afforded to the prisoner. The coroner had, presumably, taken the view that these matters were outside the scope of the inquest and the competence of the jury.

The prisoner's mother invoked Article 2 of the European Convention on Human Rights. It states, *inter alia*, that everyone's right to life shall be protected by law and that no one shall be deprived of life intentionally, save in the execution of a sentence of a court following conviction for a crime for which this penalty is provided by law. She argued that this imposed a requirement that the death of her son while in custody demanded a full investigation into the circumstances and that the coroner had failed to do this.

Coronial system in dire need of reform

On appeal, Lord Justice Brooke said that the law was in an unsettled state and the English coronial system was currently an inadequate vehicle for the procedural obligations imposed by Article 2 of the Convention. Citing the earlier case of *R (On the application of Imtiaz Amin) -v- Secretary of State for the Home Department* (2003) *UKHL* 51, he said that there had to be a full and effective inquiry into the death at a coroner's inquest if this was realistically the only occasion on which the State could perform its procedural duty. Furthermore, it was open to the jury to return a verdict incorporating a finding of neglect in a broader range of circumstances than was envisaged in *R -v- North Humberside and Scunthorpe Coroner ex parte Jamieson* (1994) *3 WLR* 82 if the case related to systemic neglect. In allowing the appeal, the court held that the inquest alone had the burden of fulfilling the Convention's obligations, and that an inquest which did not canvas the issue of systemic neglect properly or at all did not perform that function. The inquisition was quashed and a new inquest ordered to determine whether systemic neglect was a contributory cause of death.

Professional negligence matters

This decision appears to contrast with that given in *Re Medical Defence Union Ltd and Bascombe -v- Sinclair* (1990*) Hong Kong High Court (Barnett J)* 15/02/90. The case concerned a hospital anaesthetist, Dr Bascombe, who objected to a coroner allowing evidence to be presented at an enquiry on whether he had exercised reasonable care.

In January 1989, in a Hong Kong hospital, a patient underwent a routine operation under general anaesthetic for a fractured ankle. Unbeknown to the anaesthetist and the rest of the staff, the oxygen supply contained nitrogen. The patient died of cerebral anoxia. At the enquiry into the death, the coroner allowed the issue to be canvassed of whether the anaesthetist exercised reasonable care. The verdict of 'lack of care' was left open to the jury, despite concern expressed by counsel for the anaesthetist that such a verdict would not be appropriate. The coroner gave an accurate direction to the jury on how to determine negligence, rehearsed the relevant evidence, then directed that it was not open to the jury to consider care when framing their verdict. A verdict that death occurred due to the wrong supply of gas to the hospital was returned.

On appeal, it was held that the coroner had exceeded his jurisdiction because the legislature had not intended him to have an almost *carte blanche* jurisdiction to examine all aspects of the death; this would mean a quasi-commission of enquiry if the coroner was so minded. Under English authorities, a 'lack of care' verdict means conduct on the part of a person who had some responsibility towards the deceased which caused or contributed to the physical condition bringing about the medical cause of death. The conduct is to be judged on the standards of a reasonable man, not of experts whose views may often conflict.

This is something falling far short of a legal evaluation of conduct. The coroner is charged with finding the effective cause of death, i.e. the facts, and what was done or not done, and why. He should not go on to evaluate conduct to see if there is some contributory cause of death when

the effective cause would usually be plain and obvious.

This was similar to the decision reached in *R -v- HM Coroner for Surrey, ex parte Irene Wright* (1996) *QBD* 14/6/96. The applicant in this case was the mother of the deceased, who was a young man admitted as a day surgery patient for relatively minor dental surgery to remove his wisdom teeth. He received a general anaesthetic and never regained consciousness. He died, shortly afterwards, of cerebral necrosis due to cerebral anoxia, having suffered an obstruction to his airway. The applicant sought a fresh inquest before another coroner and a jury under s.8(3)(d) of the Coroner's Act 1988. The coroner had found 'without being specific, those who had care of the deceased failed to maintain his airway and death resulted from such failure'. However, the coroner felt that he was prevented from returning a verdict to that effect and was obliged to say that a verdict of lack of care or neglect would not be an appropriate conclusion. The court, in this instance, agreed with the coroner's reasoning and said that he was perfectly entitled to record the decision, which he did.

The court did say, however, that a coroner was entitled to invite an expert to sit at an inquest if it was believed necessary in view of the technical nature of the evidence under consideration. The expert might question witnesses but should not give evidence him- or herself.

Coroners Reform Team and standards of care

However, following *R (On the Application of Christine Davies) -v- HM Deputy Coroner for Birmingham*, there is an increasing willingness for coroner's courts to consider issues relating to the quality of medical treatment, standards of care and the like, and to admit the evidence of expert witnesses. This is now set to change still further.

The Home Office has appointed a Coroners Reform Team with the aim of looking at improvements to the coronial system in advance of any changes in legislation. It is also planning ahead for possible legislation that Home Office ministers agree is required to ensure the system is effective, supportive and transparent. Tom Luce, Chair of the Fundamental Review, has been asked to link the recommendations to those made in the Shipman Inquiry. This is intended to help formulate a programme of reform, taking into account both sets of observations and recommendations.

The Shipman Inquiry

In the Third Report of the Shipman Inquiry, which was published in July 2003, the Chairman, Dame Janet Smith, considered the present system for death and cremation certification and for the investigation of deaths by coroners, together with the conduct of those who had operated such systems in the aftermath of the deaths of Shipman's victims. She made a number of recommendations for change.

She said that, in her view, the Coroner Service requires medical, legal and investigative expertise. Coroners should not, as now, carry out all coronial functions regardless of whether they are legally or medically qualified. In future, they should perform only those functions for which they are professionally qualified. Coroners should have the support of trained investigators. Here, she is referring not just to medical experts, but to experts in a number of other fields too.

Coroners need the support of trained investigators

The coroner often has to decide whether to certify a cause of death, on the basis of an autopsy, without an inquest. The interpretation of the autopsy results, in the light of other available evidence, is essentially a matter of medical rather than legal judgement. In any event, in Janet Smith's view, the identification of the cause of death in a case of uncertainty need not and should not always automatically entail the conduct of an autopsy. Consideration by a medically qualified person of other materials, such as medical records and information about the circumstances of death, should, in many cases, sufficiently identify the cause of death.

Calls for Statutory Medical Assessor post

Apart from the conduct of inquests and the investigation that precedes some of them, most of the coroner's functions call for medical expertise. In Jane Smith's view, there is a need for a medically qualified person to exercise many of the functions presently carried out by coroners who have, in the main, no medical expertise.

The Coroners Review, too, has concluded that there is a need for medical expertise in the coroner's office. It proposes that the coroner should be legally qualified and the person with medical expertise should be called the 'statutory medical assessor' (SMA). The SMA would carry out enquiries, consider the evidence and assist the coroner at the inquiry.

It is clear, then, that whatever recommendations are eventually adopted, there will be far greater scope in future for expert evidence and assessment in coroner's proceedings as the coronial system is extended to cover a much more searching and thorough examination of what is often a very technical subject matter.

SMAs will conduct enquiries, consider evidence and assist the coroner

Fees for appearing in the coroner's court

If you are called as a professional witness at a coroner's inquest the present allowances are not particularly generous. Current rates are set out on the *Register* web site (*www.jspubs.com*).

The position for expert witnesses is somewhat better in that the expert is at least able to negotiate his or her fees with the coroner.

If greater involvement by experts is expected and encouraged, then funds will have to be found with which to pay more commercial allowances.

Experts, agents and solicitors

Agency law may enable experts to side step agent...

If your work as an expert comes to you through an intermediary (other than by simple recommendation), it is likely that the arrangement will, to some greater or lesser degree, be governed by the law of agency.

An agent is, in essence, a 'middleman' who has express or implied authority to enter into agreements on behalf of another (the 'principal'). Whether an agency situation arises will depend upon the nature of any agreement, the relationship between the parties and their conduct.

Agent of the solicitor...

If you get an unsolicited approach from an organisation that requests you to carry out work for a solicitor (or, indeed, any other party), it will be more likely that the organisation is acting as an agent for the solicitor. Where that agent appears to have express authority to act for the solicitor, it will also have implied authority to carry out such acts and to enter into such agreements that are ordinarily incidental to the proper performance of such acts and duties (*Mullens -v- Miller* [1882] *22 Ch D* 194). Accordingly, if an agency appears reasonably to be acting within the normal scope of its powers, and you enter into an agreement with it for the provision of your services as an expert, you will be contracting with the agent's principal (i.e. the solicitor), notwithstanding that the agent is the party that actually carries out the negotiations and/or agrees the terms. As a general rule of English law, the principal will be bound by the actions of an agency that has acted within the scope of its actual or implied authority, provided the agency has disclosed the existence of the principal at the time the negotiations are carried out.

...or the agent of the expert?

Similarly, if you enter into an agreement with an organisation to obtain work for you as an expert, then it is likely that you will be entering into an agency agreement. In this case, it will be you who will be the principal. Care is therefore needed because the agency will, if acting within its ostensible authority, bind you and make you personably liable for its actions.

... and go direct to lawyers for payment

The agent's duties to the principal

So what happens if the middleman is your agent and something goes wrong? You have a cause of action against your agent in relation to any breach of duties towards you. The agency will owe you a duty to act in good faith and must not put itself in a position where its own interests conflict with yours. The agency will be required to supply you with all relevant information and to account for money received. There is also a duty of care on the agent not to act recklessly or negligently. The agent will also need to observe the specific terms and conditions of its agreement with you. If it fails to do so, you can sue the agency for damages or seek an indemnity for any losses you have suffered.

However, where an expert's agent has acted in good faith and within its express, implied or usual authority, then the expert may sue, or be sued, on the contract with the solicitor. Effectively, the agent has no further part to play. Think of the agent as a matchmaker. The agent introduces the couple, they fall in love, get married and then fall out. It is the couple that must then deal with the messy divorce – the matchmaker will have no part in it and will count itself lucky.

The right to bypass an insolvent agent

A situation may arise where the agent becomes insolvent or goes out of business before or after the expert has performed the contract with the other party. Where does that leave the expert?

As already stated, the principal can sue or be sued on the contract. So whether the agent was acting for the expert or the solicitor, both can sue the other for non-performance of any term of the agreement. Accordingly, there is nothing to prevent an expert suing a solicitor for outstanding fees, even where the contract was made through an agency and it has gone bust.

If the solicitor has already made payment to the agent and the agent becomes insolvent or absconds with the money, is the solicitor liable to pay again? The general rule of agency states that the debt is not discharged and the third party will remain liable to the principal. This rule is based on the assumption that an agent who is authorised to sell goods and services is not necessarily authorised to accept payment (see *Butwick -v- Grant* [1924] *2 KB* 483). However, this general rule will be overturned if the agent has actual authority to accept payment on your behalf. Accordingly, if the terms of your agency agreement provide for payment to be made through the agent (to include a handsome commission, no doubt), then settlement with the agent will usually release the third party from any further liability.

When experts can bypass an agent on fees

Your ability to bypass the solicitor's agent and recover fees direct from the solicitor principal may be limited by the terms of your agreement with the agent. In general, though, unless the agent is in breach of some contractual term, the expert will have to work through the agent. However, once the agent is in breach of a term, perhaps by not paying on the due date, the expert can seek redress from the solicitor principal. There is also merit in experts including a term in their contracts with agents that makes payment due immediately upon certain circumstances, for instance, the agent getting into financial difficulties. In this way, the expert can side step any deferment period on fees if troubled waters appear.

Copyright protection

The article on copyright in the last issue of *Your Witness* generated so much interest that we are revisiting the topic to look at how copyright law protects the interests of the expert creating an expert report.

The work of an expert

Most of the materials experts produce will be protected by copyright. In the main, these will be classified as 'literary works'. This term covers any original written work (other than dramatic or musical work) and includes reports, databases, tables, compilations, computer programmes and design specifications.

Other sorts of material produced by experts might attract copyright by virtue of their being original artistic works. For this purpose 'artistic works' are defined as including a graphic work, a photograph, a work of architecture being a building or model for a building or a work of artistic craftsmanship. Examples of artistic works would include diagrams, charts, maps, graphic designs and photographs.

Rights in copyright

Ownership of copyright will vest in the author of the work. S.9 of the Copyright, Design and Patents Act 1988 (CDPA) defines 'author' simply as the person who creates the work.

Copyright confers the moral rights to be identified as the author of the work (the right of 'paternity'), the right to object to derogatory treatment of the work (the right to 'integrity'), the right not to suffer false attribution and the right to privacy in respect of certain films and photographs. These rights last for the life of the author plus 70 years.[1]

Reports produced by experts will, in normal circumstances, have been produced for a specific purpose and will be specifically intended for use by a third party. In what circumstances will the expert retain the copyright in work that has been produced at someone else's request and for which payment has been received?

Contract of service or contract for services?

A *contract of service* will generally be a contract of employment. Works produced in the course of employment will normally vest copyright in the employer, but there are grey areas – for example, works produced outside normal working hours. For this reason, it is prudent for such contracts to include an intellectual property rights clause.

A more common situation for experts will arise out of the *contract for services*, where a report is commissioned by a third party. In the majority of cases the third party will be a party to litigation, a solicitor or the court. In those circumstances the expert will retain the copyright, even though the commissioning party has paid for the work and 'bought' the report or other relevant work. This presumption is, however, subject to the terms of the contract.

In many cases, it will be an express or implied term of the contract that the commissioner will be entitled to the copyright. Provided that the contract is enforceable, the commissioner will, in effect, be the equitable owner of the copyright.[2]

Deal with copyright ownership in your contract

Putting photography in the frame

There are some specific statutory provisions that govern the copyright of commissioned photographs. The Copyright Act 1956 provides that where a person commissions a photograph, that person will, subject to certain conditions, be entitled to any subsisting copyright.

So far as photographic negatives, film and similar materials are concerned, it is possible for the expert to retain ownership (subject to the terms of the contract) of the materials from which prints are made but for the copyright in the image to belong to the commissioning party.

Overriding contractual terms

The normal assumptions of copyright ownership are, then, to some degree varied by the contractual arrangements under which the work is produced. Contractual terms can be expressly agreed or can be implied from the nature of the contract. Accordingly, if an expert wishes to retain intellectual property rights, it is important that this be spelt out in the terms of engagement.

For example, if an expert wishes to retain the rights to publish the report, or extracts from it, or wishes to reproduce a report for teaching or training purposes, it would be wise to expressly reserve this right when agreeing to carry out the work. Bear in mind, though, that what we are talking about here is the work itself and not the ideas it might contain. Copyright applies to the form in which those ideas are expressed – the ideas themselves are as free as air.

The CDPA does permit the assignment of copyrights in works that are, as yet, uncreated. This allows flexibility when agreeing contractual terms in advance of the work being carried out.

Copyright applies to form, not ideas

Basic steps to protection

If you are likely to want to claim copyright for your work, there are some basic steps you can take to protect it. UK law does not require any specific formalities to be observed, but you should take steps to:

- identify all materials for which copyright is likely to be claimed
- identify yourself as the author of the work and make any ownership issues clear
- if the work has been commissioned by a third party, ensure that there are terms in place which deal with assignment, licensing or any implied waiver of moral rights
- keep proper records of the above matters and mark any documents for which rights are claimed in accordance with the Universal Copyright Convention, i.e. © [name of copyright owner] [year of publication].

[1] Directive 93/98 EEC
[2] *Lawrence Ltd -v- Aflalo* [1904] *AC* 17

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VAT – a simple guide

Value Added Tax (VAT) is a tax on the final 'consumption' of some goods and services in the home market. Goods and services that do not attract VAT are called 'exempt'.

There are currently three rates of VAT in the UK: the 'standard' rate of 17.5%, the 'reduced' rate of 5% and a 'zero' rate of 0%. Note that goods and services that are zero-rated are not the same as exempt ones – this has implications for registration threshold calculations.

Registration threshold

Registration for VAT is mandatory under some circumstances, but it is also possible to register on a voluntary basis. You must be registered for VAT if the value of your taxable supplies exceeds the registration threshold.

You must register for VAT, using Form VAT 1, within 30 days of the following:

- The end of the month in which your taxable supplies (sales of goods and services on which a VAT rate is charged) reach £56,000
- The date you first expect your taxable supplies to reach £56,000

If you fail to register on time, you may be liable to pay HM Customs & Excise (HMCE) both the VAT on your taxable supplies from the date you should have been registered, and a fine or financial penalty (which is open to appeal).

You can also get exemption from registration when you make taxable supplies in addition to zero-rated supplies, but the level of the taxable supplies must fall below £56,000.

Taxable turnover

The goods and services upon which you are liable to pay VAT are called 'taxable supplies'. If your business turnover reaches the registration threshold of £56,000, it must be registered for VAT and the business must then charge VAT on **all** of its taxable supplies.

It is the trader's responsibility to add the tax. The amount you will have to pay to HMCE is the difference between the 'output tax' and the 'input tax'.

Output tax is the VAT charged to your customers, and VAT charged by suppliers to your business is your *input tax*. To calculate what is to be paid to HMCE, you simply deduct your input tax from your output tax. If input tax is greater than output tax, a refund will be due.

Should you register voluntarily?

Even if your taxable turnover is below £56,000, you may be eligible to apply for 'voluntary registration'. The most important benefit is that you'll be able to reclaim your input tax. Once you are registered, you are entitled to claim back VAT on the goods and services you buy in the course of your normal business activity.

Business set up costs

It is also possible, subject to certain conditions, to reclaim any VAT you are charged on goods or services you use to set up your business. Normally, this will include:

- VAT on goods you bought for your business within the last 3 years and which you have not yet sold; together with
- VAT on services you received not more than 6 months before your date of registration.

You should include this VAT on your first VAT return. Notice 700, *The VAT Guide*, gives more information on this.

The main disadvantage to registration is simply the amount of extra work involved in keeping and maintaining the necessary records and accounts. You must keep records of all your business supplies and purchases. You will also need to keep a note of all the VAT you have charged and paid for each period covered by your VAT returns.

If you are already in business you will probably find you can use your normal business records to give this information. Our view is that if you currently employ an accountant to keep these records in proper order, there are few operational reasons not to apply for VAT registration.

However, once registered you have a duty to make your records available for examination by HMCE, and any of your customers who are not themselves VAT registered will not be able to reclaim the VAT you start to add to your fees.

Position for medics

If the rulings in *d'Ambrumenil* and *Unterpertinger* are followed, and you otherwise satisfy the criteria mentioned above, VAT will be chargeable on all your medico-legal work, and as such you will have to register. But there is an important issue to consider: should you register in your own name?

Such personal registration would mean that you have to keep VAT records for **all** supplies, not just medico-legal supplies, whether these are chargeable, exempt or zero-rated – an onerous and invasive consequence indeed!

You could decide to set up a separate business (in any form other than a sole proprietorship) for your expert witness work and keep these records segregated from your normal clinical work. You may also consider setting up in partnership with others similarly engaged. In doing so, you will need to be wary of the Statement of Practice that is applied by HMCE and is aimed at countering the artificial separation of businesses to enable them to trade below the VAT registration threshold.

We suggest that, in the majority of cases, other business and supplies carried out by you will be wholly exempt from VAT based on the definitions given in *d'Ambrumenil* and *Unterpertinger*. Accordingly, separation of the businesses is unlikely to result in an avoidance of VAT and should not be caught by the anti-avoidance provisions. But you should obtain specific professional advice on this point.

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