Your Witness

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

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Call for vaccine experts

One of our subscribing law firms is the focus of multiple claims relating to adverse reactions to vaccinations. The vaccinations include:

- Astra Zeneca COVID
- Pfizer/BioNtech COVID
- Moderna COVID
- Hepatitis B
- Diptheria/Tetanus
- HPV

We would like to improve the *Register*'s subject index by adding terms to assist this firm with its searches for suitable expert witnesses. If you have expertise in the field of adverse reactions to vaccinations, please can you let me know (email me on *chris@jspubs.com*) confirming the related area (and the vaccination) in which you have expertise. For example

- neurological adverse reactions
- ophthalmic adverse reactions
- neuropsychological adverse reactions
- immunological adverse reactions

and so on. We will then add these new terms to your index terms. This will make your entry appear when these solicitors, or indeed any other solicitors, search for adverse reactions to the given vaccine.

Expert shopping in the open!

We had an interesting call to the Helpline recently on the topic of 'expert shopping'. This is the behaviour exhibited by some lawyers who set out to find an expert witness whose opinions offer strong support to the lawyer's view of the claim. In this particular case, the lawyer had sought initial expressions of interest from five potentially suitable experts, and all five had said they were able to undertake the instruction. What the solicitor then did was write to all five experts with a partial summary of the evidence base, in effect that part pertaining to what the solicitor thought was the nub of the claim. He asked the experts to 'express a view'. Our member expert thought this was blatant expert shopping, the assumption being that the solicitor would instruct the expert whose opinion most strongly backed his view of the claim. So, faced with such behaviour, what might an expert do?

We agree that expert shopping is a bad thing. The courts aren't assisted by parties choosing expert witnesses who are willing to promulgate the party line. But the reason lawyers do it is because our system of justice is adversarial, and an adversarial system is based on the courts arbitrating between two positions.

The Civil Procedure Rules themselves acknowledge this in that Single Joint Experts (SJE) – surely the simplest foil to expert shopping – are not imposed on parties when the expert issue is central to the claim. Neither does the court impose a 'cab rank rule' akin to that for barristers.

Expert witnesses are, of course, expected to provide the range of opinion in their discipline, but for key evidential points, the court still prefers to have two learned opinions.

What this lawyer is doing does look very much like an attempt to find an expert whose views match their own. But does it prevent a good expert witness, one who would never act as a 'hired gun', from engaging? Perhaps not. What if the expert replied something like this...

> *On the basis of what you have shown me, my opinion would be x. However, this gives you no certainty whatsoever that once I have seen the complete evidence base my opinion would be the same. How could it when as an independent expert witness whose primary duty is to the court I am duty bound to ensure 'the opinions I have expressed represent my true and complete professional opinions on the matters to which they refer'?*

When faced with expert witnesses who understand, and abide by, their duties, aren't all efforts at expert shopping neutered? Of course, if their efforts find them a poor-quality expert witness – the hired gun of old – they may think they have done well. But such experts often find standing up to cross-examination very difficult, so the lawyer will not have done their client any favours by adopting such tactics.

Re-vetting option

An important feature of the *UK Register of Expert Witnesses* is the vetting we've undertaken since way back in 1988. All experts have the opportunity to submit to regular scrutiny by instructing lawyers in a number of key areas – civil, criminal, SJE, report writing, courtroom skills (oral evidence and cross-examination). A summary of an expert's re-vetting is published in the printed edition of the *Register*, and fuller details are displayed in the expert's on-line entry.

If you would like to submit a re-vetting request, simply visit *www.jspubs.com/revet* and complete the on-line form. Each re-vetting request costs £12 + VAT per named referee or £50 + VAT for five referees. We make hundreds of vetting requests each year, and it is rare that a lawyer objects. It would, though, be prudent to check first with your referee. Note you are not paying for a positive reference. We will try to make contact, and it is for the lawyer to give an independent assessment of their experience of you as an expert witness.

Chris Pamplin

Russian sanctions and expert fees

Sanctions regime hits litigation

The Russian war in Ukraine has had broad and far-reaching consequences. The refugee crisis, the increases in food and energy prices, and the raised threat to security in Europe and the West are all clear. However, factors that may specifically affect experts and others involved in litigation are not yet widely recognised.

Sanctions bite

The *Russia (Sanctions) (EU Exit) Regulations 2019* and the various amendments made by regulations issued in 2022 all have consequences. Under the Regulations, the Secretary of State is empowered to designate persons as being the subject of a range of sanctions, including asset freezing, a prohibition on correspondent banking relationships and other measures, as designated in the Regulations.

A party so designated can be made subject to one or more of these sanctions. For the majority, these will include measures that prohibit them from transferring funds and assets. The Regulations also make it an offence for any person to receive funds or assets from the designated person, to make funds available to them, to enter into loan or credit agreements or to make any economic resources available to them for their benefit, including the provision of some services. This prohibition extends to companies that are owned or controlled directly or indirectly by the designated person.

Ownership and control are framed in broad terms. For the purposes of the Regulations, ownership or control is established if the designated person:

(a) holds directly or indirectly more than 50% of the shares in the company
(b) holds directly or indirectly more than 50% of the voting rights in the company, or
(c) holds the right directly or indirectly to appoint or remove a majority of the board of directors.

The overall effect is that **experts' fees and services, the provision of legal services and the payment of costs and disbursements in legal proceedings, whether in the UK or abroad, are all activities that may fall foul of the Regulations**.

Claims against Russians or brought by Russians will be problematic

Consequently, if a party to litigation is a designated person or a corporate body or organisation controlled ultimately by a Russian, it will not be possible to recover fees from them. Furthermore, if they were the party against whom a costs order is made, recovery of the costs would not be possible.

It should be noted that, in certain cases, the Secretary of State can grant a licence to allow some prohibited activity to take place free from sanction or penalty. However, such licences are only likely to be granted in exceptional cases. There could be no guarantee of success, and any prohibited activity carried out in the interim period would still be an offence.

Although there will have been no contravention of the Regulations by dealings with a party prior to their becoming a designated person, there is clearly a difficulty posed in ongoing court proceedings after the date of any designation.

A Russian parent company

In *Maroil Trading Inc -v- Cally Shipholdings Inc*[1], the claimants had alleged that confidential information had been disclosed in breach of a settlement agreement between the claimants and the defendants. The disclosure had led to claims against the claimants which they had settled for $30 million. In proceedings issued in December 2018, they sought to recover that sum from the defendants, as well as other costs and losses, totalling $90 million. The defendants sought to pass on the claim to the enquiry agent and his employer as third parties. The case was listed for a 9-week trial to start in October 2022.

On the face of it, *Cally Shipholdings* was not operated and run by Russians. However its ultimate parent company was Russia's largest shipping company, *Sovcomflot*, which, since the issue of proceedings, had become a designated person under the *Russia (Sanctions) (EU Exit) Regulations 2019*. The funds of the defendants fell within the definition of funds controlled by *Sovcomflot*. Consequently, under the Regulations, it was illegal to deal with funds held or controlled by them. As a result, the defendants were prohibited from paying their legal fees, disbursements and expenses, and their lawyers were prohibited from receiving payment. The defendants' solicitors had applied to come off the record because the Regulations made it unlawful for them to receive payment from the defendants of their outstanding fees.

The defendants had sought a licence under the Regulations from the Treasury's Office of Sanctions Implementation (OFSI) to enable them to continue to fund the proceedings. The evidence was that it would take at least 4–6 weeks to obtain a licence. The application to vacate the trial on the basis that it would not be fair for the defendants to be unrepresented was supported by the third parties. It was opposed by the claimants, however, who argued that it would, under the circumstances, be wholly reasonable for the court to wait for the 4–6 weeks to see whether the licence would be granted. The judge would then have a much clearer basis upon which to make a decision as to whether the trial date should be vacated.

Hearing the application to vacate the trial, Foxton J acknowledged that to adjourn a trial of proceedings that had been on foot for 3 years, and in which disclosure and exchange of factual witness statements had taken place, was an extremely unwelcome prospect and was to be very much viewed as a last resort. The question he was obliged to ask himself was whether, in all the circumstances, it would be reasonably possible to conduct a fair trial. He was very mindful that a considerable amount of work in preparation remained to be done. This included

the instruction of expert witnesses and the preparation and consideration of expert reports.

The imposition of sanctions on the defendants' parent company meant they were no longer able to pay for legal representation or instruct experts. Consequently, no experts had yet been appointed. So the defendants' solicitors had, quite rightly, applied to come off the court record. The judge considered that, in all the circumstances, there was no real prospect of the defendants being able to participate in a fair trial.

Turning to the OFSI licence application, Foxton J said that the grant of a licence was discretionary, and the defendants' application did not have priority on humanitarian or other grounds. Even if a licence was obtained within 1 or 2 months, it could not be assumed that the defendants' current legal team would be available. The existing solicitors would have to be re-instructed and reacquaint themselves with the case. Alternatively, another firm would have to be brought in which would need to start from scratch. Moreover, until such licence was obtained, no preparatory work could be carried out by experts, who themselves could not be instructed until a licence was granted, assuming it ever was.

The imposition of sanctions and the position of the defendants also gave rise to complications on the question of security for costs, in respect of which an application had been made. It would have been impossible for the court to hear and resolve the issues posed by that application while the existing circumstances persisted. The judge, therefore, held that the court had no option other than to grasp the nettle and vacate the trial.

Russians in the UK courts

There is an interesting contrast to be made between this case and that of *Bank St Petersburg -v- Arkhangelsky*[2]. In that case the boot was, as it were, on the other foot. Proceedings were issued in the Chancery Court in London by a Russian bank against Russian nationals living in France. The claimant bank was seeking substantial sums said to be in relation to banking indebtedness in Russia. In the interim, the defendants' assets had been frozen by the Russian court. Application was made by the defendants for the trial to be postponed for a 9-month period to allow time for the counterclaim and to deal with disclosure, expert evidence and the exchange of witness statements.

The defendants' counterclaim was that the bank, using political connections at the highest level of the Russian government, had conspired to wrest from them the control and majority ownership of a group of companies. It was also alleged that documents relied on by the bank in getting the freezing order had been forgeries. This counterclaim appeared to fall foul of the 3-year limitation period under Russian law.

Hildyard J, hearing the application for a postponement, took the view that the defendants had been outgunned and 'outlawyered', and that the playing field was far from level. Although the counterclaim appeared to fall outside the limitation period under Russian law, it was appropriate to disapply that period under the *Foreign Limitation Periods Act 1984 s.2* on the ground of 'undue hardship'. The defendants' world, he said, had been torn apart. They had been seeking the opportunity to vindicate themselves for years, on grounds of which the bank was also well aware. To deprive them of a full opportunity now would be excessive and extreme. He did not see the freezing order as a bar to further activity, and granted the defendants' application to postpone the trial to a later date.

The influence and business interests of many of the Russian oligarchs currently on the list of designated persons is considerable. They, or organisations ultimately controlled by them, may be the residing power behind many companies that show no overt manifestation of Russian ownership. However, once the owner becomes subject to sanction, the difficulty posed to those businesses is considerable. Hence, Chelsea Football Club was unable to sell new tickets or to admit spectators until a licence was obtained or some way was found for the owner to divest himself of his interest and control.

Dismantling Moscow-on-Thames

The UK, particularly London, has long been the home of many oligarchs, who are said to be attracted by its luxury lifestyle and *laissez-faire* attitude to foreign ownership. Anyone, including expert witnesses, who is instructed in litigation involving Russian nationals living in the UK or abroad should satisfy themselves that such persons are not on the list of designated persons. Experts, of course, will normally contract with the instructing solicitor and will be paid by them. But if the solicitor is unable to accept payment from the client, difficulties, or at least delays, are likely to ensue.

Under Regulation 8, any designation made must be the subject of proper notification and publicity. The Secretary of State must, without delay, take such steps as are reasonably practicable to inform the designated person of the designation and any variation or revocation, and must publicise the same.

It should consequently be fairly easy to **identify whether any party to proposed litigation is a designated person**. It will be less easy to establish whether they are likely to become one in future, or whether some organisation is ultimately controlled by such a person.

Cases involving companies in the fields of shipping, air freight, city property portfolios and oil and gas are among those that often have an element of Russian ownership or control. It might be prudent for any expert who has had his or her suspicions aroused to seek the necessary reassurance from their instructing solicitor.

Experts should be alert to possible sanctions issues affecting payment

References

[1] *Maroil Trading Inc -v- Cally Shipholdings Inc* [2022] 4 *WLUK* 144.

[2] *Bank St Petersburg -v- Arkhangelsky* [2013] *EWHC* 3529 (*Ch*).

Independence of experts – can any mo

We have often reported on cases where expert witness independence has been called into question. Just when you think you've seen the worst transgression, another two come along.

Experts must maintain independence at all times

Surely everyone knows that experts must not act as 'hired guns'. Civil Procedure Rules (CPR) Part 35 makes clear that **an expert's first duty is to the court, and this overrides any obligation to those who instruct or pay the expert**.

Where the court directs discussions to take place between experts, neither the parties nor their legal representatives may attend, unless this has been ordered by the court or agreed by all parties and the experts. In the course of discussions, experts must give their own opinions to assist the court, and do not require the authority of the parties to sign a joint statement. The report must reflect the expert's own opinion, and it should not be influenced by the instructing party. Neither should experts venture into advocacy. If these rules have been breached, it is within the court's power to exclude the expert evidence.

Lawyers, keep out of joint statements!

In *Dana UK Axle Ltd -v- Freudenberg FST GmbH*[1], the defendant was alleged to have supplied defective automotive parts. To secure equality of arms, the court ordered each side to instruct its experts via solicitors rather than to engage them direct. All instruction material was to be disclosed, and each expert was to ensure their opposite number had access to the same material.

However, the defendant's expert reports did not detail the instruction materials the experts received. Nor did they identify the documents on which the experts relied in support of their opinions and analyses. Furthermore, the reports showed that the defendant's experts had visited the defendant's factories without informing the claimant's experts.

At the pre-trial review (PTR), the court ordered the defendant to remedy the failings. It did not do so, and the extent of the failings became clear at trial. The defendant's experts had not only engaged in site visits without informing the claimant's experts, but had also made more visits than they disclosed. It also remained unclear exactly what information had been provided to the experts during the various site visits. Furthermore, two of the experts had given manufacturing analyses without identifying the information they had relied upon.

Leave experts to write their own joint statement

In addition to the breaches of the PTR order, the defendant had also been in breach of CPR 35 and the 2014 *Guidance for the instruction of experts in civil claims*. There had been the free-flow exchange of information between the defendant's experts and its in-house technical specialists. The experts had also been privy to information that was not shared with the claimant's experts. This had continued during the period between the joint expert meetings and the signing of the experts' joint statement. What's more, during this critical period, the defendant's experts had relayed information from the joint meetings to the defendant's in-house specialists, and had even sought assistance in how to respond. The analyses and opinions of the defendant's experts appeared to have been influenced directly by the defendant. This conduct called into question the independence and impartiality of their reports.

Granting the application to exclude the defendant's expert evidence, Joanna Smith J said that the breaches of the PTR order were all serious and unexplained. Furthermore, the court was inclined to believe that the failure to comply was not inadvertent, because compliance would have given the court and the claimant an insight into the defendant's numerous breaches of CPR 35.

The judge said that it was important that all experts and all legal advisers should understand what is and what is not permissible in the preparation of joint statements. While experts can, if necessary, provide a copy of a draft joint statement to solicitors, the expert should not ask the solicitors for suggestions on its content. The solicitor could, in the judge's view, draw the expert's attention to any fundamental error of law or fact contained in the draft statement, but that must be done 'in the open' so that all parties and the trial judge may be aware. She quoted Para 13.6.3 of *The Technology and Construction Court Guide* which states that, **whilst the parties' legal advisers may assist in identifying issues the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement**.

No, really, let the experts write them

More recently, the words of Judge Smith have been echoed in *Patricia Andrews & Others -v- Kronospan Ltd*[2]. That case involved a claim by 159 householders who sought damages for nuisance caused by dust, noise and odour which were alleged to be emitted from the defendant's wood processing plant in Chirk, near Wrexham.

At the first case management conference (CMC), the court granted permission for each party to rely on expert evidence in the field of dust dispersion modelling. Subsequently, a further order allowed for each party to adduce additional evidence from an expert in dust analysis and modelling. The claimant party chose to rely on a single expert with knowledge and experience in both fields.

From the outset, the court acknowledged that these were very technical and specialist areas. Indeed, the issue of expert evidence in dust analysis had been considered at numerous hearings. There had been very little agreement about a common approach. For example, there was no agreement on the methodology to be adopted or the manner and monitoring of data collection. There was also no agreement on the identity of the joint expert responsible for the laboratory analysis, nor the letter of instruction to be sent to that joint expert.

ore warnings be needed?

In light of the many difficulties, and to ensure that the parties' experts were reporting on the same basis, Senior Master Fontaine made an order that the experts were to continue discussions to agree their approach. Indeed, they were to prepare and file with the court a document in respect of each report.

The experts were given a list of areas that they should consider specifically. Similarly, the order provided specific directions as to the areas and time periods for monitoring. Further, the experts had to agree the sites from which control samples were to be taken, as well as the number of samples from each site. The order also made provision for what should be included in the joint letter of instruction to the expert, who was to provide the chemical and scanning electron microsope (SEM) analysis.

Senior Master Fontaine acknowledged that it was somewhat unusual to make such a detailed order concerning experts. It seems, though, that in this case she felt driven to do so because of the continued lack of agreement between the experts, and the very technical nature of the work they were to undertake. Indeed, during the course of proceedings, the Senior Master had called the experts to attend a CMC so that she could explain to them directly what it was that the court required. Her hope was that this would help them address the objective of their reports, and to focus less on their disagreements. Consequently, it is not unreasonable to suppose that the experts had been left in no doubt as to what was required from them and the manner in which this was to be achieved.

From the date of the order, it took a further 2 years for the expert reports to be exchanged. Discussions between the experts commenced in the following month, May 2021. However, at the end of December 2021 it came to light that from the beginning of May to mid-November 2021 there had been frequent and ongoing communications between the claimants' solicitor and their expert. Working drafts of the joint statement had passed backwards and forwards between them, and there had been several telephone conversations in which the content of the joint statement was discussed.

Loss of independence = loss of report

The defendant made an application seeking revocation of the permission given to the claimants to rely on their expert.

Although some of the comments made by the claimants' solicitor on the various draft statements were merely in relation to typographical errors, or queries where there was a lack of clarity, 16 comments were made on issues of substance.

The defendant recognised that such an order by the court would be a drastic step, but argued that this was the only recourse. The conduct of the expert had demonstrated that he was not truly independent and had been acting as an advocate. It was submitted that both his conduct and that of the claimants' solicitor amounted to a failure to comply with the terms upon which the claimants were given permission to adduce the expert's evidence. There had also been a clear breach of CPR 35 and Practice Direction 35.9, which states specifically that **legal representatives should not attend expert discussions**.

The claimants' solicitor acknowledged that their conduct had not been appropriate and admitted that they had given advice and made suggestions in relation to the joint statement. Seeking to rely on the decision in *BDW Trading Ltd -v- Integral Geotechnique (Wales) Ltd*[3], however, they argued that it would be disproportionate and potentially disastrous for the claimants if they were unable to rely on the expert evidence. It was pointed out that proceedings had been going since 2017, and the expert had been involved for 3 years. The expert's costs, to date, amounted to £225,000.

Allowing the application and revoking the permission given, Senior Master Fontaine said that, given the gravity of the transgressions, which had occurred on numerous occasions over a period of many months, it would not be disproportionate to grant the application. She quoted, in her decision, the words of Joanna Smith J in *Dana*, that it was **wholly inappropriate for independent experts to seek input from their client's solicitors into the substantive content of their joint statement** or, for that matter, for the solicitors either to ask an expert to do so or to provide input if requested. The Senior Master said:

> *'... it is important that the integrity of the expert discussion process is preserved so that the court, and the public, can have confidence that the court's decisions are made on the basis of objective evidence'.*

Considering whether to permit the claimants to rely on an alternative expert, the Senior Master acknowledged that this would undoubtedly cause additional costs and delay to the proceedings. Of course, if this conduct had been uncovered only during cross-examination at trial, the claimants would not have been able to rely on any expert evidence. Although the claim was by no means at an early stage in the proceedings, no trial date had been set. The data had already been collected and analysed by an independent laboratory, so a newly instructed expert in dust analysis would not be involved to the same extent as had been the claimants' previous expert. She considered that it was still possible, at this stage in the litigation, to allow the claimants to seek new experts.

Both cases demonstrate the **grave dangers inherent in any conduct by experts whose behaviour crosses the threshold into advocacy, or who allow themselves and their reports to be co-authored by those instructing them**. The wasted costs and expenses in both cases were considerable.

Break the rules, and evidence could be disallowed

References

[1] *Dana UK Axle Ltd -v- Freudenberg FST GmbH* [2021] *EWHC* 1413 (*TCC*).

[2] *Patricia Andrews & Others -v- Kronospan Ltd* [2022] *EWHC* 479.

[3] *BDW Trading Ltd -v- Integral Geotechnique (Wales) Ltd* [2018] *EWHC* 1915 (*TCC*).

Expert opinions in the round

Expert evidence, particularly in complex medical cases, may not point irrefutably to one conclusion. The expert's role is to assist the court in reaching the correct assessment. While the expert evidence may provide a strong and compelling guide, it is not the expert's function to pass judgment on the ultimate issue. That is a matter for the judge or jury.

Experts can reasonably reach different opinions given the same set of facts

If, as postulated, an expert's evidence can lead to more than one inference, it is, of course, highly likely that one will suit a party more than the other. It will become a strong temptation, therefore, to prefer one possible conclusion while ignoring the other. **To what extent is it necessary for the court to weigh the whole of the expert evidence, and not take part of it in isolation?**

In *R -v- Walker*[1], the court dealt with an application to appeal from a decision in a murder trial when, following a retrial, the defendant had been found not guilty. Central to the murder trial had been the question of the probable cause of death. The deceased had died from hypoxic ischaemic injury to the brain following cardiac arrest, caused by hypoxia and increased carbon dioxide due to positional asphyxiation. The prosecution case had depended on it proving that strangulation and/or traumatic brain injury had resulted from an assault by the respondent. It was alledged that the attack had made a significant contribution to the reduced consciousness of the deceased by the time a paramedic arrived on scene. The paramedic had taken the deceased out of the recovery position and laid her on her back. The deceased's reduced consciousness meant that she had been unable to correct the life-threatening position she had been placed in by the paramedic.

All the experts agreed that the deceased's incapacitation could have been caused by several factors including alcohol intoxication, traumatic brain injury or manual strangulation. Indeed, these factors could have contributed in isolation or in combination. The retrial judge concluded that the pathological and expert evidence did not establish that manual strangulation or concussion countered the realistic prospect that intoxication was a substantial cause of reduced consciousness. Accordingly, the retrial judge made a terminating ruling, and acquitted the defendant of murder and manslaughter, thus effectively overturning the previous finding.

All opinions must be considered... no cherry picking!

The Crown sought leave to appeal against the decision on the ground that the whole of the expert evidence was not reflected adequately in the retrial judge's analysis. The expert evidence had not discounted the possibility that the assault had been the major cause of the deceased's reduced consciousness, and hence the major cause of death. It was also submitted that the judge had been wrong to find that there was no other available evidence of events prior to the deceased's collapse that would assist the jury in excluding intoxication.

The prosecution case had been that there were observable injuries to the brain indicative of trauma. It was alleged that these had been caused by the defendant, notwithstanding that this did not accord with the medical observations recorded by the paramedic. Furthermore, there had been evidence of a pattern of lies and suspicious behaviour by the defendant prior to the ambulance being called.

The Court of Appeal acknowledged that the circumstances of the case presented a difficult medical scenario, in as much as drawing definite conclusions on the issues surrounding the deceased's death. Indeed, there was an extremely narrow basis upon which the prosecution could prove its case.

Of course, expert evidence that supports one or other scenario is important and relevant. But it is also necessary to **consider the expert evidence in its entirety**. Delivering his decision, Macur LJ said that when dealing with cases of this kind, a judge is required to have regard to the whole of the expert evidence.

Similarly, the prosecution must overcome the evidential burden as a whole, based on the weight of the expert evidence. Cherry picking from evidence-in-chief, regardless of the fact that the opinion was not maintained during cross-examination and ran counter to the experts' joint statement, did not assist the prosecution case. In essence, evidence of the defendant's lies and suspicious behaviour made no real difference to the consideration of the evidence supplied by the medical experts.

The Court of Appeal found the analysis by the retrial judge had been a meticulous and careful exposition of the evidence. A reasonable jury would be unable to disregard the unanimous expert evidence, and consequently could not be sure whether intoxication had caused the reduced level of consciousness.

The case makes it clear that, where the expert evidence provides alternative conclusions that can properly be drawn from the facts, the court is bound to consider the whole of that evidence. So far as the conclusions drawn subsequently, the test is one of **reasonableness**. The prosecution was unable to demonstrate any evidence that the judge had failed to take into account, or otherwise had taken into account without necessary qualification. Providing the judge has acted in this way, an appellant cannot cherry pick from the evidence only those parts that suit their case. The Crown's application to appeal was refused.

Conversely, and by implication, the Court of Appeal's decision confirms that the **reasonableness test imposes a duty on the court to consider the whole of the expert evidence**. Not to do so may constitute a ground for appeal, where possible alternative conclusions suggested by the expert evidence have been, or appear to have been, ignored.

Reference

[1] *R -v- Walker (Gary David)* [2021] *EWCA Crim* 1956.

Softer approach to adjournments?

Should a court grant or refuse applications for adjournments? It's a question that is a frequent cause of controversy. Prior to introduction of the Civil Procedure Rules (CPR), adjournments were often readily allowed, even on the flimsiest of grounds. But the attitude of the courts has hardened over the years.

Adjourn for new solicitors... eventually

Back in 2012, *Bowden -v- Homerton University Hospital NHS Foundation Trust*[1] saw the Court of Appeal act to curb the reforming zeal of some judges. The case involved a claim of clinical negligence. A meeting took place between the parties' legal representatives in an abortive effort to reach terms for settlement. At the time of the meeting, the claimant was abroad and did not return to the country for several days afterwards. Then the relationship between the claimant and his solicitors broke down, leading them to make application to come off the court record. The claimant consented to the application, and the order was duly made. Some 8 days later, now acting as a litigant in person, the claimant made application to the court for an adjournment of the trial to allow him time to obtain fresh representation. The date that had been fixed for trial was only 2 weeks after the date of his application, and 8 days after the date on which his application was heard!

The trial judge said that, although he had sympathy with litigants in person, the claimant had consented to break the retainer at a very late stage. He should have known that there was a risk the trial would not be vacated, and that he would have to proceed quickly to appoint new solicitors or deal with the trial himself. His application was refused, and the claimant appealed.

Allowing the appeal, the Court of Appeal said that the judge had proceeded on an incorrect basis in the exercise of his discretion:

- the claimant agreeing or not to his solicitors coming off the record was immaterial
- it was clear that the claimant had done all he reasonably could and had acted promptly
- the judge failed to give adequate weight to the very difficult position the claimant would face if he had to start representing himself.

Accordingly, the trial would be vacated and an adjournment allowed, although the claimant had to pay the costs wasted by the adjournment.

Adjourn for timley expert opinion

This decision was followed earlier this year in circumstances that were not, perhaps, quite so compelling. In *KDJ -v- Royal Free London NHS Foundation Trust*[2], application was made to adjourn an independent living trial in a medical negligence claim listed to begin in 3 months' time and to last for 10 days. The ground for the application was that expert evidence was not going to be available in time to give the defendant NHS trust a reasonable opportunity to deal with updated facts.

The circumstances were, briefly, as follows. The claimant had suffered a brain injury at birth when starved of oxygen which resulted in severe cerebral palsy. Now, aged 20, he had issued a claim in medical negligence. The defendant eventually accepted causation, and in 2019 an interim payment was ordered. In 2020, directions were given for disclosure, witness statements and expert reports. A trial was listed originally for October 2021, but the timetable was subsequently extended by consent of the parties. Joint expert reports were delayed until November 2021, and a new trial window had been fixed for July 2022.

A difficulty arose in relation to the preparation of the expert reports. In September 2021 the claimant was still living in the family home, which was a house formerly belonging to his mother. He was living there independent of his family, with 24-hour one-to-one support. The house, however, was not appropriate for his needs. Suitable rented accommodation had been found, but it would not be available for a month. Consequently, the care and case management expert would not be able to assess his needs until after he had moved into the flat.

The claimant, with the agreement of the defendant, sought an adjournment of the trial until later in the year.

Hearing the application, Ritchie J said that in exercising a power to adjourn, the court is obliged to have regard to the overriding objective and to consider whether it was possible for justice to be done without an adjournment. He was very mindful that the proceedings had been ongoing for 5 years and that they were fast approaching a 10-day trial. Consequently, the court should be reluctant to allow any adjournment at this stage in the proceedings, although it was clear that both parties had approached the application with a somewhat naïve expectation that it would be granted.

Considering the authority provided in *Bowden*, Ritchie J acknowledged that the circumstances in the instant case were not entirely analogous, and the reasons provided for the request were not so compelling. However, given that the trial was to be on issues of independent living, it was imperative to the overriding objective and to the interests of justice that the care and case management expert should be able to make a proper assessment at the claimant's new accommodation. Furthermore, the Hospital Trust should have sufficient time to deal with any updated relevant facts that might result from the assessment. Consequently, the application for an adjournment was granted.

The decision of the court in this case is, perhaps, indicative of a slight relaxation in its approach to adjournments when applications are made to extend time for the preparation and consideration of expert reports. Certainly, in the past, the courts have taken a less flexible stance. But whether this is the start of a trend, time will tell.

Late-stage adjournments difficult but do happen

References

[1] *Bowden -v- Homerton University Hospital NHS Foundation Trust* [2012] *EWCA Civ* 245.

[2] *KDJ -v- Royal Free London NHS Foundation Trust* [2022] 4 *WLUK* 142.

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