Your Witness

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Adequacy of an expert's qualifications

Where there is a recognised professional body that regulates, monitors standards or imposes codes of practice in a particular discipline, it is a reasonable expectation that any expert instructed in that discipline will be recognised by that body. If not, in what circumstances is it reasonable to challenge the evidence on that ground?

In *F -v- M* [2022] *EWFC* 89, Davies J, sitting in the Family Court, heard an application from the mother of two children. Her application was for a reopening and rehearing of proceedings dealing with contact arrangements. The ground for the application was that the jointly instructed expert had not been appropriately qualified.

Making her application, the mother submitted that the expert had not been properly qualified, and that the judge had attached too much weight to her report. The court heard that the expert was a psychologist who was not eligible for chartered membership of the *British Psychological Society* or registration with the *Health and Care Professionals Council*.

Considering the application, the court held that there was **a discretion to appoint an expert who did not hold the qualifications referred to in the application, provided it was satisfied that the expert had relevant psychological knowledge or training**. In the instant case, the joint expert's CV had been approved by all parties and by the court. She had fulfilled the role expected of her and her conclusions were clear.

Davies J was mindful of Lord Justice Peter Jackson's judgment in *Re E* [2019] *EWCA Civ* 1447, where he said: '*... the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial. There must be solid grounds for believing that the earlier findings require revisiting... '*. Jackson LJ had added that '*it is not open to a party to appeal a finding simply because they do not like it*'.

If the expert's qualifications were to be challenged, the proper time to do this was at the original hearing. Indeed, in this case, the expert had given her evidence first, and the mother was represented at that hearing by leading counsel who had robustly challenged the expert on her qualifications, her expertise, the regulatory bodies who oversaw her work and her professional and commercial links with the various therapists.

The judge noted that the expert had provided a CV showing that she had extensive experience in reporting in cases where allegations of parental alienation had been made. It is clear from the correspondence at the time that she was instructed that she had been chosen for that specific reason, with the agreement of all parties.

The mother, who had expressed her unhappiness with the original decision in 2021, had sought leave to appeal. The High Court judge who considered the application for permission to appeal had held:

> *'The complaints made by the mother about the expert are not sustainable. She was jointly appointed in March 2020 and no appeal against her appointment was made. She produced reports and gave oral evidence, which was challenged. Her expertise was firmly placed in the arena by the mother. It was open to the judge to accept her evidence and to find that she was an impressive witness. Further, her evidence was only one part of the totality of the evidence which the judge considered.'*

Davies J was satisfied that the new application was on substantially the same grounds as the failed application for leave to appeal.

The judge acknowledged, however, that there was some uncertainty over how suitable psychologists should be identified by the courts. He quoted the words of the President of the Family Division when he said in 2021: '*Where the issue of parental alienation is raised and it is suggested to the court that an expert should be instructed, the court must be careful only to authorise such instruction where the individual expert has the relevant expertise.*'

Nevertheless, in dismissing the application, Davies J drew attention to the current unsatisfactory position. For many years, he said, there has been a debate about the definition of a 'psychologist'. There have been arguments about the differences between a clinical psychologist, a forensic psychologist and someone who has followed a degree course in psychology. There have been many learned debates between the various professional bodies who are keen to regulate or register psychologists of various types. For good reasons, the professional bodies are anxious to protect those who fulfil the criteria for membership. Hence, guidance and memoranda have been issued by the *Health and Care Professionals Council* (HCPC), the *Professional Standards Authority*, the *British Psychological Society* and the *Association of Clinical Psychologists*. The latter supports that only those registered under the HCPC be eligible to be instructed in cases.

Davies J said that, at some point, these debates need to draw conclusions. He called for some simple helpful guidance for everyone to avoid the type of arguments that had arisen in this case.

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Inside

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Are expert witnesses still needed?

With access to Google, why do courts still need expert witnesses?

We live in an information age where, in theory, the world's accumulated knowledge, from the workings of an Armstrong Siddeley aircraft engine to the history of custard, is readily available to anyone who can operate a computer. So is expert evidence still necessary?

Traditionally, the role of experts is to assist the court by giving an impartial opinion on particular aspects of matters within their expertise and which would otherwise be beyond the understanding of the ordinary person.

Obviously, in posing the question 'Is expert evidence still necessary?', we are being deliberately provocative. It is not the availability of the information that poses a hardship, but rather the correct interpretation and application of that information as applied to the particular facts of a case. It is only an expert witness who is permitted to express an opinion.

However, there are certainly some areas where all that is required is access to the appropriate information. Where that access is sufficient and the material does not require further elucidation or interpretation, then expert evidence and opinion may be superfluous or even undesirable.

Role of the judge in French courts

In France, for instance, preliminary investigations in a criminal case are conducted by a pre-trial judge who can undertake fact-finding exercises. This might include the issue of **search warrants** and making a **personal examination of the evidence**. The judge will question parties and witnesses, and can direct the lawyers to address specific points or to call particular witnesses. This is a **judge-led inquisitorial system**. As part of the preliminary work, the judge or examining magistrate can conduct research and background reading to better understand any issues that arise which are outside the judge's specific knowledge. It is only when this approach is insufficient, or the findings require a more in-depth scientific analysis, that the French court will find it necessary to seek the opinion of an expert witness.

Court changes to rules on experts in foreign law

The role of the pre-trial judge in France is primarily to establish the truth, not necessarily to determine guilt or innocence. It is consequently a much more investigatory, 'hands-on' approach. The role of the judge in the UK is very different. The courts of England and Wales operate an **adversarial system**. In such a system the parties and their lawyers have the freedom to choose the evidence they wish to present to the court or, sometimes more importantly, what evidence not to present! Although we have quite strict disclosure rules, for the most part they merely require a party to disclose any information that is requested specifically by an opponent. Of course, this approach operates to restrict the emergence of evidence. If it is not known to exist, it will not be requested. There is, therefore, a possibility that the truth in its entirety will not emerge at all... a result that is far less likely in the French inquisitorial model.

The judge's role in the adversarial system is to hold the balance between the contending parties without taking part in their disputations. The judge does not take on an inquisitorial role to remedy the deficiencies of the case on either side. Consequently, the opportunities for a judge operating within an adversarial system to be immersed in the evidence at an early stage, to become familiarised with the technical or scientific data needed to interpret the facts, or to elucidate by directing further enquiries is almost non-existent. For those reasons, judges and juries in England and Wales are reliant on experts when dealing with most issues of a technical nature.

Experts in foreign law

That said, however, there are certainly some areas where information can be located and provided to the court and which the court can be left to consider and interpret without expert assistance. One such area is foreign law.

Historically, evidence relating to foreign law could only be given by an expert on the law and legal system operating in the country in question. However, there is now a considerable softening of the approach to be taken by the courts, and they are likely to be far more flexible.

Lord Leggatt JSC in *Brownlie -v- FS Cairo*[1] said that '*... it should not be assumed that the only alternative to relying on the presumption of similarity is necessarily to tender evidence from an expert in the foreign system of law. The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says.*'

This view is reinforced in the new *Commercial Courts Guide*[2] published at the start of 2022. Changes to the *Guide* are many and varied, and include some brought about by the COVID-19 pandemic. These include default electronic bundles, and encouraging greater use of technology and remote hearings. Of interest to expert witnesses is the broader range of options the court will now regularly consider for foreign law evidence.

The *Guide* at para. H3.2 provides that, as part of their preparations for any Case Management Conference at which directions for the filing of evidence are to be given, the parties should consider the approach they will invite the court to take to the proof of foreign law.

The court can limit the expert evidence to the identification of any relevant sources of foreign law, and of any legal principles as to the interpretation and status of those sources. The advocates then make submissions at trial as to the relevant content of foreign law by reference to the sources thus identified.

New court rule limits use of experts

Factors relevant to the court's decision are set out in para. H3.4, and these include:

- *How much of the content of the relevant foreign law is in issue (as distinct from its application to the facts of the case, which is for argument not evidence) (H3.4a), and the nature of the issues and the legal sources in issue (H3.4d).*
- *Where there is a Pre-Trial Review, and directions have previously been given for there to be oral expert evidence of foreign law at trial, the parties should consider and be ready to discuss with the court whether such evidence is still reasonably required (para. H3.7).*

This is an important departure. These **new rules allow for expert evidence to be dispensed with altogether** in cases where, hitherto, expert evidence would invariably have been called and permitted. For example, the approach in H3.3 may now be routinely deemed appropriate when foreign law issues relate to a common law system with which the court has familiarity.

It is too early to say how this approach is likely to develop and the extent to which expert evidence of foreign law will be diminished. Interestingly, though, the question has already come before the court in the recent case of *Nopporn Suppipat*[3].

This was a complex and high-value claim which alleged fraudulent conspiracy to deprive the claimants of shares with a value of US$1-2 billion in two Thai energy companies. The case had been listed for a 20-week trial and involved claims covering English, Thai, Chinese and Singaporean law.

At the pre-trial review it emerged that the timetable was becoming increasingly tight and that the expert evidence procedure in relation to the various foreign laws had not been concluded. So far as the evidence on Chinese and Thai law was concerned, the judge considered that it would still be necessary for expert reports to be exchanged. However, to assist the judge with his pre-reading before the experts were called to give evidence, the parties should identify in a short written note which Thai or Chinese law cases and statutory provisions it was essential for the judge to pre-read (being central to the dispute between the relevant experts), rather than leaving the judge to read through the entirety of the voluminous expert reports to identify them for himself.

With regard to the law of Singapore, the judge observed that the legal system of Singapore had its origins in the English common law system. He considered that it was sufficient for the English judge to be supplied with the key sources of Singaporean law which were relied upon (and, if necessary, any legal principles as to the interpretation and status of those sources). The parties' advocates were to confine themselves to making legal submissions at trial as to the effect of Singaporean law, without the need to call oral expert evidence. This, said the judge, would have the advantage of freeing up some additional time in the trial timetable.

While the directions in this case were made on perfectly sound and reasonable grounds, the precedent this case sets, together with the new *Commercial Courts Guide*, is not without some dangers. Dispensing with expert evidence runs the risk that subtle differences and nuances in structure and language might be missed, or that application of the law requires a broader knowledge of how the courts in a particular country have interpreted it.

Confusing 'cheapest' with 'value for money'

It raises the general spectre of a brand of 'DIY' expert evidence... a scenario where judges and barristers are expected to put their heads together and come up with their best interpretation of how a foreign law is to be applied and what the law-maker intended.

One has to wonder whether there might be a temptation to extend such a notion to other areas of expert evidence with which the court decides it is 'familar'. In one sense, and taking the worst consequence, it is akin to dispensing with translators and relying instead on a Google or Babelfish translation of a scanned document, or accepting into evidence a presumed translation that has not been properly validated. On some levels, this approach might work, but it is almost certain to result in inaccuracy, howlers and absurdities. We particularly like the example on a bilingual road sign in Swansea: *No entry for heavy goods vehicles. Residential site only* was translated for Welsh lorry drivers as *I am not in the office at the moment. Send any work to be translated.* On another, *Cyclists dismount* was translated as *Inflamed bladder collapse*. Enough to raise an eyebrow or quiet chuckle, but certainly not the sort of thing we want to see in our courtrooms.

While such procedural changes often appear, at first sight, laudable and sensible, one is also able to lament that, once again, they are driven by economies. The cumulative effect of cost cutting has resulted in unrepresented parties, overworked judges and court staff labouring in an environment of cut-price justice, with timetables being slavishly adhered to and expert assistance deemed to be an unnecessary delay or expense. When, we wonder, will a halt be called to the penny pinching? Our own involvement in Ministry of Justice 'working parties' has proved to us that ministers too often confuse 'lowest cost' with 'value for money'. Sometimes the courts and the parties will need more time, not less, and expert evidence will be a necessity, not a luxury.

DIY expert evidence on the cheap threatens justice

References

[1] *Brownlie -v- FS Cairo (Nile Plaza) LLC* [2021] *UKSC* 45.

[2] See *www.judiciary.uk/wp-content/uploads/2022/02/Commercial-Court-Guide-11th-edition.pdf*

[3] *Nopporn Suppipat, Symphony Partners Limited, Next Global Investments Limited, Dynamic Link Ventures Limited -v- Mr Nop Narongdej and others* [2022] *EWHC* 1806 (*Comm*).

Systemic failures in medical negligen

NHS blame culture creates jeopardy for more than just the doctors

Where damages are sought in personal injury claims against NHS trusts, doctors and other health professionals, it will usually be necessary to prove some degree of medical negligence. The very nature of the tort of negligence requires that an examination of the conduct be undertaken by an expert and a finding that the conduct falls short of that reasonably expected of people in a similar position of responsibility.

Blame culture doesn't harm just the doctor

In medical negligence cases, the examination focuses on the individual. If the individual is found to have been negligent, the personal consequences that follow can be disastrous. Their professional reputation will be in tatters, they may be suspended or struck off the medical register or, in the worst cases, be imprisoned. It might also inflict real long-term psychological damage, and even result in suicide.

A few years ago, the General Medical Council (GMC) carried out a review of instances where doctors who were under fitness-to-practise investigations had committed suicide. In all, 28 suicides were reported, but these were believed to be merely the tip of the iceberg. Indeed, it was felt that the review failed to reveal the full scale of the stress suffered by many under investigation.

The claimant, their legal team and the experts they instruct may not bear any malicious intention towards the doctor. At least in the case of the expert, they will be expected to provide an objective, unbiased view of the doctor's conduct. However, proving negligence (often of the most heinous sort) will be fundamental to the success or otherwise of the claim, and the level of damages to be awarded. The claimant will, therefore, have a vested interest in a finding of personal negligence against the doctor and will seek an expert who supports that contention. That is just the way the system works.

As S Radhakrishna pointed out in the *British Journal of Anaesthesia*: '*The medical paradigm demands that the practitioner practises to perfection, and if the person falls short of this high standard, then the person is to blame. It maintains that error is a moral and ethical failure that constitutes an unprofessional act, which should be punished; the last person to touch the patient should be blamed if there is an untoward result. This person is also expected to own up to the error. This approach puts significant pressure on the individuals by demanding perfection with the ever-present danger of 'blame'. Given that errors are not treated as human, errors may not be reported for fear of professional insults or legal reprisals.*'[1]

Doctors work within a system; systemic failings are revelant

There is also a legal paradigm that relies on rules of malpractice or negligence to ensure the safe delivery of medical care. However, as Bryan Liang identified in '*A system of medical error disclosure*' 2002, this legal process can '*... taint data by zealous advocacy [and] manufactures data to support one side's case. It does not understand that the professionals are trapped in a complex system that from time to time is prone to error.*'

Instead of concentrating attention on the individual medic, might it not be better to examine the claim in a broader context? Perhaps it is not necessary to require an attribution of blame to a single person, or might actions be mitigated once seen in the wider circumstances under which they were operating?

Look at the system, not just the person

This 'systems paradigm' is based on the principle that humans are fallible. Indeed, human errors are likely to occur in the best organisations. What's more, errors can be seen as the end result of a series of failures in the system, and are therefore a consequence and not the cause.

There have, of course, been many cases where health professionals have taken the blame in cases where the true fault lies with the system and not the individual. There was the tragic case of nurse Jacintha Saldhana, who committed suicide after being blamed for leaking information about Kate Middleton's hospital treatment. Two hoax telephone callers posing as the Queen and Prince Charles had been put through to the nurse as a result of a failure in the system that should never have allowed such calls to be transferred.

In *Bawa-Garba -v- General Medical Council*[2], the Court of Appeal considered the case of a junior doctor specialising in paediatrics and whether a tribunal should be permitted to look at wider systemic failings when assessing what sanctions should properly be applied. In February 2011, Dr Bawa-Garba had recently returned to practise as a registrar in a hospital's child assessment unit after 14 months of maternity leave. A 6 year-old child with Downs Syndrome and a 'hole in the heart' had been admitted to the unit. The child required long-term medication, and he was susceptible to coughs, colds and resulting breathlessness. The appellant had initially misdiagnosed him with gastroenteritis. Delays in receiving test results meant that he was not correctly diagnosed with pneumonia and sepsis until later in the day. He subsequently died. Had he been treated appropriately, he would probably have survived.

Following a trial, the appellant was convicted of manslaughter by gross negligence in 2015. Reaching that decision, the jury found that the doctor's personal failings had been '*truly exceptionally bad*'. She was sentenced to 2 years' imprisonment, suspended for 2 years. The GMC's Medical Practitioners Tribunal was subsequently convened to determine whether, on the basis of her conviction, her fitness to practise was impaired. The Tribunal found this to be the case, and went on to consider what sanction to impose under the Medical Act 1983. In doing so, the Tribunal took into account her previously unblemished record, her good character, the length of time that had passed since the offence (during which she had

continued to work as a doctor), and that her actions had not been deliberate or reckless. The Tribunal noted that the 'error' had occurred in the context of wider systemic failings, including staff shortages and IT system failures that had crucially delayed the test results.

Taking all of these elements into consideration, the Tribunal rejected the GMC's contention that her name should be erased from the register. This, it said, would be a disproportionate sanction. It concluded that the goal of maintaining public confidence in the profession would be satisfied by suspension of her registration for 1 year.

The GMC appealed. At first instance, the Divisional Court held that the Tribunal's decision was not consistent with and did not appear to respect the verdict of the jury... that the appellant's conduct was 'truly exceptionally bad'. It also held that the Tribunal had erred in taking the hospital's systemic failings into account. It therefore quashed the Tribunal's order of suspension and substituted an order of erasure.

When the matter reached the Court of Appeal, the central issue concerned the proper approach to the conviction of a medical practitioner for gross negligence manslaughter in the context of fitness to practise sanctions where the registrant did not present a continuing risk to patients. Burnett LCJ identified in his judgment that the appeal court should only interfere with the evaluative decision of the Tribunal:

- if there was an **error of principle** in carrying out the evaluation, or
- if the **decision was irrational** in that it fell outside the bounds of what the adjudicative body could properly and reasonably decide.

In the present case, he was able to make no such finding. The criminal court and the Tribunal were, he said, different bodies, with different functions, addressing different questions and at different times.

The Court of Appeal took the view that the Divisional Court appeared to have applied a presumption of erasure following a conviction for manslaughter by gross negligence without considering whether a lesser sanction would be consistent with the maintenance of public confidence in the profession. The Tribunal had been entitled to conclude that the appellant's suspension for 1 year was an appropriate sanction, given the important factors weighing in her favour. The erasure order was quashed, and the Tribunal's decision was restored.

Courts can already weigh systemic failings

It was implied in the decisions of both the Tribunal and the Court of Appeal that systemic failings in an institution can be weighed when considering the culpability or fitness to practise of an individual. The criminal court, too, must have had this in mind given that sentencing was at the lighter end of the range.

In July 2022, a spokesperson for the Medical Protection Society (MPS) said that, currently, clinical negligence expert reports focus on a scrutiny of the individual doctor or health professional and do not give sufficient consideration to the setting in which they work. Medical expert witnesses, said the MPS, played a crucial role in setting the standard against which doctors are measured in clinical negligence claims, as well as in coroner, criminal and regulatory cases. The MPS made a call for experts in cases involving doctors to have a mandatory duty to consider systemic issues, such as inadequate staffing levels, lack of resources, or faulty IT systems, to avoid doctors being scapegoated for wider failures.

The MPS would like to see this mandatory duty imposed on all medical experts, and for this to be included in the GMC's Good Medical Practice guide. Consultation on the new guide ended in July 2022, and it will be interesting to see whether any such provision is made.

There is a better way for health

In any complex area where perceived wrongs are to be addressed, it is easier to find fault with an individual than with a system. This leads to scapegoating of individuals. But this culture has been largely overcome in many other technical and scientific environments, such as the aviation and nuclear industries.

Without a blame culture and with a greater willingness to consider systemic and collective failures, there would probably be greater openness in the reporting of errors, less likelihood of cover ups, and better learning of the lessons that errors teach. Many believe that this will greatly enhance patient safety and lead to fewer scandals, such as those of Mid Staffordshire and, more recently, the Shrewsbury and Telford Hospital NHS Trust. In the latter case, Donna Ockenden, in her inquiry, found that there had been a reluctance to report or investigate, resulting in a failure to learn and improve, and leading to mistakes being repeated.

A 2018 survey of 7,000+ doctors reported that many felt they worked in a toxic environment with a blame culture that jeopardised patient safety and discouraged learning and reflection. Some 78% said that NHS resources were inadequate, and that this significantly affected the quality and safety of patient services. Furthermore, in a 2020 NHS staff survey, on the question of whether your organisation would treat staff involved in a patient safety incident fairly, *c.* 230,000 respondents felt they would not.

It was Alexander Pope in his *Essay on criticism* who said '*to err is human*', and more than 300 years have elapsed since Pope's sage observation. Errors are an unavoidable aspect of almost any complex system involving humans. Recognition of that, and a move towards a more systems-based analysis of fault, is long overdue. Medical experts and the courts have an important role to play in bringing about change.

Health sector must learn from approaches used in aviation and nuclear settings

References

[1] *British Journal of Anaesthesia* [2015] 115, Issue 5.

[2] *Bawa-Garba -v- General Medical Council* [2018] *EWCA Civ* 1879.

Weighing witness evidence

Mistaken, misremembered or lying?

It is, perhaps, rare in any case for witnesses (be they expert witnesses or witnesses of fact) to be so at odds with one another that there is no common ground between them. Such cases are likely to elicit the same sort of surprise that caused the judge in *Bank of Ireland -v- Watts Group Plc*[1] to observe at the beginning of the trial that he had never seen a joint statement between experts that contained no agreement at all!

Clearly, it is unlikely that one witness will be entirely right and another entirely wrong. But where witnesses of fact appear to be addressing a wholly different set of circumstances to those assumed by an expert's report, there is something clearly amiss. And when the gulf between them is so wide, the court must find some way to weigh the conflicting evidence and decide whether a witness is merely mistaken, has misremembered or is, in fact, lying.

When business partners part

In *Jaswinder Singh Bahia -v- Inderdeep Singh Sidhu*[2], Mrs Justice Joanna Smith was faced with just such a dilemma. In her decision, she gives a useful précis and guide to the resources the court can use when evaluating evidence.

This was a dispute between the claimant and the personal representative of his late business partner. The partners had together entered into two partnerships in 1972 and 1976. The first partnership had acquired a sizeable property portfolio, including residential and retail premises. In addition, the partners were directors of a company, *A Star Liquormart Limited* (ASL). It traded from one of the partnership properties which had been let to the company by the partners on a commercial lease. The second partnership had leased property in East Finchley, from which it was trading as a convenience food store known as *Greatways*. At a later date, the respective wives of the two original partners were admitted as partners in *Greatways*, each holding 40%, with their husbands holding the remaining 20% equally between them. In 2012, *Greatways* ceased to trade and the ground floor store was taken over by Tesco, although the partners continued to collect rents from other tenants in the building.

No reliable documents forces judge to weigh divergent oral evidence

Although the partners appear to have traded amicably for several years, in or around 2007, each of the two families began to harbour suspicions about the other in relation to the collection of, and accounting for, rental income from partnership properties and the unauthorised personal use of partnership monies. In 2016 and 2018, the defendant had served notices of dissolution in respect of the ASL and *Greatways* partnerships respectively. At around the same time that the *Greatways* dissolution came into effect, the claimant commenced proceedings.

The court gave summary judgment on the issue of the existence and dissolution of both partnerships, declaring that each had been a partnership at will created by oral agreement and that each had been dissolved by the relevant Notice of Dissolution. The Chief Master ordered that both partnerships should be wound up and that a dissolution account would be taken and such inquiries made as may be necessary. As to the scope of any necessary inquiries, the Chief Master ordered that these should be determined by the court at a hearing on written evidence.

On 9 July 2020, following a hearing at which the parties were represented by counsel, the Deputy Master ordered a trial of 17 separate inquiries arising in the dispute.

There were considerable evidential difficulties in this case. The rancour between the parties was such that it precluded any discussion and sensible resolution by agreement on any of the issues. Consequently, it was necessary for the court to decide the disputes wholly on the evidence.

There had been no signed accounts for *Greatways* since 2007, and the last signed accounts for ASL were in 2008. The last set of signed accounts for each partnership property were in 2011. The accountants had, apparently, declined to become involved in the proceedings or give evidence. That left much of the accounting evidence contained in only scraps of paper going back many years, and for one of the main issues in dispute these had come into being in 1972!

The court heard from a total of 10 witnesses, many of whom were dealing with events that had occurred several years previously. Some problems experienced were caused by language difficulties and the fact that some statements had been translated, and possibly not always accurately. For a number of the inquiries, there were few, if any, contemporaneous documents concerning the events about which the witnesses were giving evidence. Indeed, where documents were relied upon, their provenance was not always clear, and their authenticity was on occasions challenged. Perhaps unsurprisingly, given the level of antipathy between the families, their evidence was, for the most part, completely at odds.

Lack of credible documents

The claimant had instructed an expert forensic accountant. Although the sister of the deceased partner had attempted her own forensic accountancy work on the figures produced by the expert, her work had not been disclosed and the defendants had chosen not to call an expert. They did, however, rely on oral evidence of witnesses of fact, including the sister, to challenge the conclusions reached by the expert. They also sought to adduce documentary evidence in rebuttal, including diaries and cheque stubs.

Clearly, in a case where the evidence given by the parties and their witnesses (including the forensic accountant) was so strikingly dissimilar, and where there was little or no common ground, the court was obliged to weigh the evidence and

make a decision about which evidence it would accept and which it would reject, and why.

Dealing with the lack of credible documents disclosed in the case, the judge followed the guidance given by the Court of Appeal in *Natwest Markets Plc -v- Bilta (UK) Ltd*[3] at [51] to the effect that when faced by a documentary lacuna:

'*… the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was being challenged in cross-examination.*'

The evidence given by any witness is subject to the fallibility of human memory, particularly in relation to events that occurred long ago. Leggatt J (as he then was) in *Gestmin SGPS SA -v- Credit Suisse (UK) Ltd*[4] highlighted the unreliability of memory when it comes to recalling past beliefs, the considerable interference with memory that may be introduced in civil litigation by the process of preparing for trial, and the potential for powerful biases where witnesses have a stake in a particular version of events. He said that **the passage of time can cloud or distort memory**, and that it is **unlikely to be the case that individual witnesses will be consistently reliable or unreliable**. He was also mindful that **some witnesses may, for whatever reason, have better recollections** than others.

Is the witness untruthful?

The judge also had to consider whether one or more of the witnesses was lying. She was directed to *Phipson on Evidence* 20th Ed at 45–18 as to the approach to adopt when considering whether a witness is being untruthful. *Phipson* states that the factors to take into account are:

1) the **consistency of the witness's evidence** with what is agreed, or clearly shown by other evidence, to have occurred
2) the **internal consistency of the witness's evidence**
3) **consistency with what the witness has said or deposed** on other occasions
4) the **credit of the witness in relation to matters not germane** to the litigation
5) **lies established** in evidence or in the context of the proceedings
6) the **demeanour** of the witness, and
7) the **inherent probabilities of the witness's account being true**.

As to the demeanour of a witness, however, the judge accepted submissions made by counsel for the defendant, that it will generally be dangerous for the court to determine the reliability of a witness's evidence principally by reference to the impression created by his or her demeanour. She bore in mind that people's mannerisms may differ between individuals and between cultures. Additionally, where witnesses give evidence through an interpreter, it will be even more difficult, if not impossible, to draw any inference from demeanour.

Specifically with regard to cultural differences, the judge referred to guidance in the *Equal Treatment Bench Book*. It is just conceivable that some of this might, in exceptional circumstances, be applied to expert witnesses. For the most part, though, it would be confined to the assessment of factual evidence.

Assessing expert evidence is different

Expert evidence is assessed based upon:

- the **knowledge and experience** of an expert in the field
- the **nature of the peer-reviewed science** being applied and the **degree of recognition in the wider scientific community**
- the expert's **independence**, **understanding of his or her duty to the court**, the **manner** in which the expert evidence is prepared and presented, and whether there is **persuasive expert evidence in rebuttal**.

The **demeanour** of any witness when giving oral evidence is, however, always an important influencing factor.

The expert in this case, a chartered accountant with 11 years' experience in practice, gave his evidence remotely. In her decision, the judge observed that the expert was a partner in a large, well-known firm, he had advised a diverse portfolio of clients, and he oversaw the forensic and corporate finance departments. He had dealt with clients of varying size, from sole traders and owner-managed businesses to international groups. The expert report (which attached an earlier report) contained a clear explanation of his instructions and of the analysis work carried out. Although the expert had attracted much criticism from the defendants, the judge formed the clear impression that he was an independent expert who knew and understood his duties to the court, as well as the obligations imposed on an expert pursuant to Civil Procedure Rules Part 35 . Having obviously kept abreast of the oral evidence, he had made appropriate corrections to his report to reflect that evidence prior to giving his testimony.

Under cross-examination, the expert appeared to be measured and reasonable, making appropriate concessions and responding to the questions asked of him without seeking to advocate on behalf of the claimants.

This contrasted with some of the factual witnesses called by the defendants. Applying some or all of the principles outlined above, the judge found the defence witnesses to be unreliable, and that their testimony could not be accepted unless corroborated by reliable evidence.

In the absence of any expert evidence to the contrary, and given her assessment of the accountant as an expert, Smith J accepted his evidence in its entirety.

Measured expert evidence trumps unreliable factual witness testimony

References

[1] *Bank of Ireland & Anr -v- Watts Group Plc* [2017] *EWHC* 1667 (*TCC*) .

[2] *Jaswinder Singh Bahia -v- Inderdeep Singh Sidhu* [2022] *EWHC* 875 (*Ch*).

[3] *Natwest Markets Plc -v- Bilta (UK) Ltd (In Liquidation)* [2021] EWCA *Civ* 680.

[4] *Gestmin SGPS SA -v- Credit Suisse (UK) Ltd* [2013] *EWHC* 3560.

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