

# Your Witness

Newsletter of the  
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## Criminal defence woes

As this issue of *Your Witness* goes to press it would seem that the Legal Services Commission (LSC) is on a collision course with solicitors over the former's plans for the Criminal Defence Service (CDS). The CDS is due to come into being on 2 April, when the existing system of criminal legal aid will end. One consequence of the changeover is that only solicitor firms which are contracted to provide criminal defence services will be allowed to undertake cases funded by the CDS. With only 4 weeks to go, however, just 94 of the several thousand eligible firms had signed up to join the new scheme.

Much of the trouble stems from the fact that the LSC circulated a draft contract for consultation that omitted details of the remuneration participating solicitors might receive. With no increase in the rates for duty solicitor or magistrates' court work since 1992, practitioners were understandably suspicious that the rates would not be changing when so much else was. For example, the draft contract included complicated quality and audit requirements that were bound to increase firms' costs considerably.

At the beginning of February the Lord Chancellor agreed to an overall increase in the rates of 7.25%, but by then the profession's blood was up. In a rare show of defiance, the Law Society's officers recommended members not to sign the contracts they had been offered, and this advice was endorsed at a meeting on 2 March that was attended by over 1,000 of them. Unless one side or the other gives ground quite soon, it seems that *either* the CDS's launch next month must be postponed *or* the criminal justice system will rapidly grind to a halt. We shall know soon enough which it is to be.

## An expert view

The court report in this issue summarises a characteristically incisive judgment of Mr Justice Wall, and it reminds me that he is the author of a new and most helpful *Handbook for Expert Witnesses in Children Act Cases*. Written specifically for medical and mental health professionals, the book has the stated purpose of encouraging more of them to undertake work as expert witnesses in Children Act cases. In this it deserves to succeed for it is clearly written, concise and entirely practical in its approach. Indeed, I would go further and say that many experts who are experienced in this kind of work would find it useful to have close to hand. The book is published in paperback by the Family Law Division of Jordan Publishing Ltd (ISBN 0 85308 628 1) and costs £12.50.

## East Anglian litigation lunch group

If you are based around East Anglia, you may be interested in a new lunch group that is being started by Denise Cullum, a forensic accountant with Price Bailey.

The lunch group, centred around Cambridge, is open to all those involved in the litigation process, and Denise would be pleased to hear from any experts interested in joining. You can contact Denise on 01223 507891.

If, like Denise, you would like to use *Your Witness* as a way of making contact with other experts in your area, please do let me know.

## SJE survey by e-mail

The main item in this issue is our analysis of our SJE survey carried out during the second half of February. For this survey we decided to try the electronic route: notification about the survey was sent by e-mail only, and participation in the survey required a visit to our web site.

One limitation to the electronic approach is the reduced number of participants: only 2,392 (out of 3,800) had e-mail addresses. Another problem is the immediacy of the web. To account for this, the survey recorded relative perceptions (i.e. on a scale of 1–10) rather than absolute numbers. One advantage of the method is speed: it has taken less than 3 weeks from survey to report.

I would be interested to hear your views on whether the ability to provide up-to-the-minute analysis of issues justifies the inherent limitations of the methodology, or would paper-based surveys be preferable?

## Society of Expert Witnesses Conference

The eighth conference of the *Society of Expert Witnesses* is being held in Cambridge on Friday 30 March. The morning session will explore the role of the SJE through a debate of the motion 'that there is merit in the application of the principle of the single joint expert to the majority of cases which reach the courts'. With speakers for and against the motion drawn from the ranks of expert witnesses and lawyers, this promises to be a very interesting session.

In typical *Society* fashion, the afternoon session is dedicated to an exploration of 'nuts and bolts' issues of practical value to expert witnesses. On this occasion, the two topics under consideration are CPR Part 35.12 'meetings of experts' and the giving of oral evidence.

The conference fee is £80.00 + VAT to *Society* members and £125.00 + VAT to non-members. The *Society* can be contacted on 0845 702 3014 or by e-mail at [helpline@sew.org.uk](mailto:helpline@sew.org.uk).

Chris Pamplin

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Issue 23

# Acting as an SJE – the hard facts

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*Our findings based on over 2,000 SJE instructions*

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It is now almost 2 years since the Civil Procedure Rules 1998 came into force, and Lord Woolf's brain-child, the single joint expert (SJE), became a reality. Of course, it had always been possible for parties to agree that expert evidence on an issue in their case could be presented by just one expert witness, but outside of the family courts this rarely happened. Under the new Rules, parties are required to consider appointing an SJE, and courts have the power to insist on them doing so.

It is common knowledge that litigation lawyers viewed Lord Woolf's initial recommendations on this score, together with those he made for the disclosure of experts' instructions, with the utmost dismay. In the transition from Report to Statute Book, though, several of the provisions that most alarmed lawyers were watered down. By the time the Rules were implemented, the legal profession was reconciled to the idea of using SJE's whenever possible. The snag, of course, is that what might seem possible to the court may appear wholly unattractive to the parties – or, at any rate, to one of them.

During the first year or so of the new Rules a 'honeymoon period' prevailed. Senior judges congratulated practitioners on their readiness to embrace the concept of the SJE. Lord Woolf himself expressed pleasure at the extent to which solicitors were coming to case management conferences armed with agreed proposals for the appointment of SJE's. Other commentators made sweeping statements to the effect that the use of SJE's was already general. Yet the evidence for all this was purely anecdotal – no-one was seemingly able to provide hard figures to back such assertions. So last month we decided to obtain some data ourselves, by asking experts about their experiences of being instructed in this new role.

## The survey

Since time was of the essence if we were to report our findings in this issue of *Your Witness*, we elected to conduct the survey by e-mail.

Of the 3,800 expert witnesses on our database, 2,392 could be contacted in this way. There is, however, a difficulty with e-mailed questionnaires: they do not work well if you fill them with questions requiring precise numerical answers or detailed research. Accordingly, all but three of the 15 questions posed invited either a yes/no response or a frequency score on the scale of 1–10.

In the week that followed dispatch of the e-mail, we received 228 replies, of which eight had to be discarded because they were either corrupted in transmission or internally inconsistent.

## How widespread is SJE work?

First we asked our respondents to state how many times they had been instructed as an SJE

*prior* to proceedings being issued (e.g. in accordance with a pre-action protocol) and how often *after* proceedings had been issued (i.e. as a result of a court order). Moreover, we asked experts to provide this information for each of the years 1999 and 2000.

It was immediately apparent that most of those who replied had yet to experience any great surge of SJE work. Indeed, 52 of them (24%) had not been instructed in that capacity in either of the years. Several experts expressed surprise at this, and one put it down to lawyers still preferring to use their own 'tame' experts. He added: 'Similarly, judges seem reluctant to insist upon SJE's, even in my field of topographic surveying and mapping where one would have thought that the expert opinion of Ordnance Survey would be regarded as independent and authoritative.'

## Is there more SJE work?

Whether or not there is still reluctance to use SJE's, it is equally clear from our survey that the incidence of instruction increased sharply from 1999 to 2000. In the first year, 98 respondents were instructed as SJE's in a total of 575 cases (on average 5.9 cases each), whereas in the second year, 162 respondents were instructed in a total of 1,908 cases (on average 11.8 cases each).

While this, perhaps, is only to be expected as more proceedings came to be issued under the new Rules, it is interesting to note that the proportion of instructions given as a result of a court order also increased over the 2 years. In 1999 it was 23% of the total, but in the following year it was 27% of the total. If that trend was to be maintained, it seems likely that more and more SJE's will find themselves having to meet tight deadlines for the completion of their work.

## Detailed analysis

For the remainder of this report we summarise the replies received from a more limited group of our e-mail correspondents. This is because, as indicated earlier, the great majority of those who answered our appeal for information had had relatively little experience of working as an SJE, and this made their answers to our further questions less meaningful.

For most of what follows we have chosen to rely on the answers provided by the 60 of our respondents who had been instructed as an SJE at least 10 times during the previous 2 years. In case this should appear too restrictive, it is worth pointing out that the total number of cases in which these 60 individuals had acted as SJE's came to 2,110 – 85% of the total for all those who replied to our e-mail. It seems reasonable, then, to base any further analysis on the answers of these 60 'experienced SJE's', and safer to do so than to take into account answers from experts who, in many instances, had acted as an SJE only once or twice.

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*SJE instructions doubled between 1999 and 2000*

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### Effect of pre-action protocols

Until October 2000, the only pre-action protocols that had a binding effect were those for personal injury and clinical negligence actions. It is no doubt as a result of this that the 30 experts in our ‘experienced’ subset who were medically qualified accounted for the lion’s share of SJE instructions given prior to commencement of proceedings (84%; 1,352/1,603; see Table 1). Table 1 also shows that the majority of SJE instructions received by the non-medical experts in the ‘experienced’ subset (62%; 404/655) were given *after* proceedings had been issued.

With two more protocols now in force and several more in the offing, it will be interesting to see to what extent SJE in other professions come to be instructed sooner.

### Expert adviser

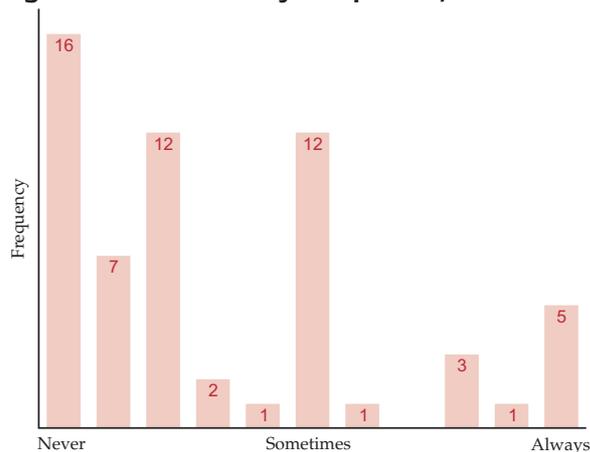
We asked our respondents to tell us how many times during the past 2 years they had been instructed as an SJE after previously advising one of the parties. The received wisdom is that this is unlikely to happen very often. But to our surprise, we found that it had occurred in 144 of the 2,110 cases handled by the experienced SJEs, or 7% of the overall total. Furthermore, in 80 of these cases, the experts were from professions other than medicine, which means that the rate of incidence for non-medical cases was significantly higher – at 56% compared with 44%.

### Separate instructions

The Draft Code of Guidance for Experts recommends that, wherever possible, parties should agree beforehand any instructions that are to be given jointly. We were concerned to discover how often that did *not* happen (Figure 1).

Only nine out of our subset of experienced SJE reported that they frequently received separate instructions, while for 23 of them that scarcely, if ever, happened. Of the 44 to whom it had happened at least once in the past 2 years, 30 said that they had had little or no difficulty reconciling the separate instructions received

**Figure 1. How often are separate instructions received (i.e. instructions that have not been agreed beforehand by the parties)?**



(Figure 2), but 31 experts reported that it had resulted in them having to obtain supplementary instructions.

The main disadvantage of parties giving their instructions separately is that it tends to delay the start of work. That was the experience of 32 of the 44 experts who had been instructed in this way, and nine of them complained of being frequently delayed in this manner. The effect of delay will be most serious in cases

**Table 1. Effect of pre-action protocols on the timing of an instruction for medical and non-medical disciplines**

	Medical (n = 30)	Non-medical (n = 30)	Total (n = 60)
Pre-action	1,352	251	1,603
Post-action	130	404	507
<b>Total</b>	<b>1,455</b>	<b>655</b>	<b>2,110</b>

(n = number of experts)

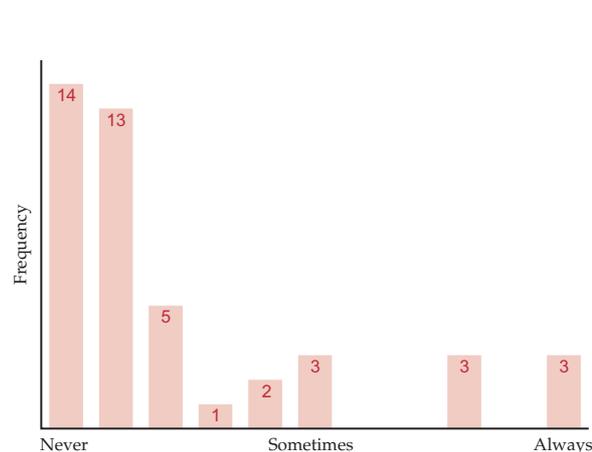
where the court has ordered the SJE’s appointment, because – as one respondent explained – it uses up the time the court allows for completing the report, with the result that the SJE then has to work to an unrealistically short time scale. For experts in this situation it would seem that the sooner agreed instructions for SJE becomes the norm, the better.

### Disclosure

One of the most frequently reported difficulties encountered by SJE is reluctance on the part of instructing solicitors to release all the information the SJE needs to carry out the assignment. Of our subset of 60 experienced SJEs, 15 said that this had happened to them. One expert thought that sometimes ‘both parties know that there is more information available, but they seem to have agreed that “If you don’t tell him that, we won’t tell him this.”’

If SJE suspect that a party is holding back information, they might care to adopt the practice of yet another of our correspondents. He wrote:

**Figure 2. When instructed separately, how often did that cause difficulty in reconciling the instructions?**



*Most SJE work is being done by medics*

*Separate instructions can be a nightmare*

**Disclosure issues can also cause problems**

‘When I suspect that relevant information is not being disclosed, I write out a set of questions to be answered by one or other side. If I get no response, then it is obvious what is being withheld and I let the solicitors fight it out. I only prepare a report for the court when I am satisfied that I have all the relevant information to hand or when I have agreed with both sides’ solicitors that I am to write it without the information I have requested. That way things can be moved forward and I don’t get directly involved in the subsequent legal wrangling about disclosure!’

In answer to another question on disclosure, 17 of the experienced SJE’s confessed to being uncertain at times whether they might reveal to one party information imparted to them by another. This suggests that there is a need for SJE’s to be given clearer guidance on that issue.

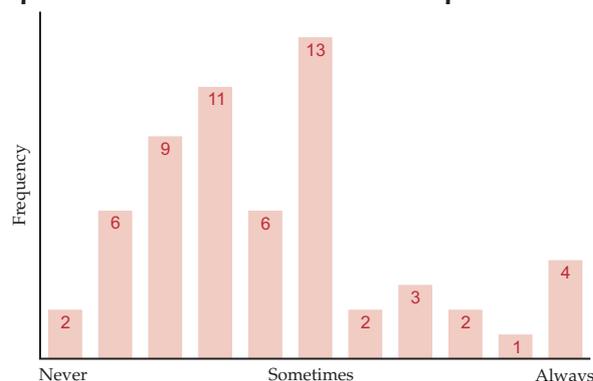
**Written questions**

Under the new Rules, parties are entitled to put written questions to expert witnesses seeking clarification of the reports they have written. For SJE’s, this can mean fielding questions from *both* their instructing parties. A further complication is that a party may use the opportunity to browbeat the SJE into adopting a position more favourable to its case. One correspondent, an orthopaedic surgeon, identified insurance companies as being more likely to ask questions designed to alter an SJE’s opinion or confuse the situation. He acknowledged, though, that they were often quicker to pay!

Of those of our respondents who had acted as SJE’s at some time during the past 2 years, 80% had received questions on their reports, although for most it had happened in only a minority of cases. Of our subset of 60 experienced SJE’s, 39 had not found the questions to be excessive. However, the experience of nine others was quite the opposite (Figure 3).

While for the majority of respondents the most questions they had been asked did not reach double figures, a few were less lucky. One surveyor had had a total of 54 questions put to him about one of his reports, an occupational therapist had notched up 76 questions on one of

**Figure 3. When acting as an SJE, how often have the parties exercised their right to put questions in clarification of the report?**



**Shadowing not much in evidence**

hers, and a medical doctor had on one occasion been faced with no fewer than 80. In view of this, it is perhaps reassuring that only 1 in 5 of the respondents most experienced in SJE work discerned any trend towards longer lists of questions.

**Conferences with counsel**

Whereas party-appointed experts regularly take part in conferences with counsel, it is generally thought to be inappropriate for SJE’s to do so – unless, that is, lawyers representing all their instructing parties are present. It comes as no surprise, then, to find that only 20 of our subset of 60 experienced SJE’s had ever been involved in such a conference while acting as an SJE, and, if it occurred, it was almost always with the lawyers present.

In this connection it is worth recording that several respondents found the role of SJE to be a lonely one, especially if they are required to attend court. As one of them wrote: ‘The isolation leaves one totally out in the cold on the progress of the case. Is a settlement being discussed? Is one about to be released, etc.?’

**Requests for directions**

While all experts are entitled to seek directions from the court to assist them in carrying out their function, it is difficult to envisage many party-appointed experts finding it necessary, or even desirable, to do so. It might be thought, though, that SJE’s – and especially, perhaps, those whose appointment had been ordered by the court – would be more likely to need the court’s help to resolve difficulties arising from their ‘piggy-in-the-middle’ role. It says much, perhaps, for the diplomatic skills of our subset of 60 experienced SJE’s that only four of them had had to use this facility in the past 2 years.

**Shadowing**

Another of the spectres raised by litigation lawyers was that if courts were to insist on the use of SJE’s, it would lead to parties appointing their own experts to ‘shadow’ the SJE. The end result would be more expense, not less.

Our survey provides no evidence that this is happening to any great extent. Of our subset of 60 experienced SJE’s, 36 were not aware that they had ever been shadowed in this way; for only three experts – an engineer, a medical doctor and a surveyor – had it been a common experience.

Similarly, to the question, ‘Have you yourself been instructed to “shadow” an SJE?’, 40 replied that they had not been, and only four indicated that it had happened to them at all regularly.

As a footnote on this topic, another respondent reported that on one occasion when he had been ‘shadowing’ an SJE, he was instructed to meet with the expert who was doing the same for the other party, in order to resolve differences between their respective positions. A bizarre experience, indeed!

# Letters

## Payment problems

Rule 35.8 lays down that, unless the court directs otherwise, parties instructing an SJE are jointly and severally responsible for the payment of that expert's fees and expenses. However, neither the Practice Direction that accompanies Part 35 nor the Draft Code of Guidance for Experts has anything further to say on the procedure to be adopted for paying the SJE. Should one of the instructing parties be undertaking that responsibility on behalf of all of them, or is the expert to invoice each party separately for equal shares of the overall sum?

To judge from the replies of our subset of 60 experienced SJE's, the latter is the preferred option of most litigation lawyers. In all, 20 of the experienced SJE's reported that they were invariably asked to invoice the parties separately; a further 15 said that this happened in at least half the cases for which they acted as an SJE.

In these circumstances, it is hardly surprising that SJE's experience just the same difficulties as party-appointed experts in securing payment of their fees and expenses. They may, indeed, find themselves in an even worse situation, because solicitors for losing parties could well be less inclined to pay up if they had not wished to see the expert appointed in the first place.

This is borne out by further replies from the 35 experienced experts who had been asked in the majority of their SJE cases to invoice the parties separately. Of these, 30 experts reported that in at least half of such cases they had subsequently encountered difficulties in extracting payment from one of the parties. Indeed, for 11 experts that was invariably their experience.

One might be tempted to deduce from this that the sooner experts make settlement of their invoices by just one of the instructing parties a condition of accepting appointment as an SJE, the better it will be for them. The experience of our respondents, however, suggests that such an agreement may go only some way towards solving the problem. Of our subset of 60 experienced SJE's, 20 told us that they almost always arranged to be paid in that way, but nine of these experts still reported difficulties in securing payment in half or more of their SJE cases. Having one of the parties settle your bill is still no guarantee that you will be paid promptly!

## Conclusion

None of us at J S Publications imagines that a survey such as this can supply ready answers to the problems that face SJE's in performing their challenging role. We hope, however, that the information presented here will be of help to expert witnesses who may be about to undertake an SJE assignment for the first time, and also that it may highlight some issues worthy of further research. That task is one we hope to return to before long.

## More on the Toulmin principles

*Mr John Severs writes:*

'I was warned from the outset when starting out as an expert witness that I must be ultra careful in ensuring that I did not tell the judge what to do. However, I am conscious of at least two occasions where, although I wrote what I thought were totally objective reports which, because of what actually occurred, tended to support the defendant (I had been instructed by solicitors acting for the defendants), I realised that, in certain respects, I would not personally have acted as they did.

'In one case, it was a question of the positioning of a piece of equipment colliding with which was responsible for the injury, in the other, procedure – what I would have actually done myself. In the latter, it did not mean that the action undertaken by the defendant was actually wrong and led to the accident but that the alternative may have been arguably safer. In each case, I told the solicitor involved that, if asked directly by the barrister representing the claimant, I would have to say that I personally would have acted differently.

'It may seem naïve, but I am wondering what the position would be if those cases had gone to court and this issue been raised in cross-examination. Would the judge have intervened to say that it was not a question of what I would have done, or would it be in order for me to claim that my supposed actions were not relevant since we were only concerned with what actually happened?

'I would be interested in your views.'

## Comment

Mr Severs raises an interesting point, but we wonder whether the problem he outlines is as stark as it may seem. In negligence cases it is often possible to hold different opinions as to the safety of actions taken by a defendant or of the procedures followed. Providing that in such cases expert witnesses summarise in their reports the full range of those opinions and give reasons for their own opinions, then the basic requirement of all expert reports – objectivity – will have been fulfilled. In any event, as Mr Geoffrey Lloyd pointed out in our last issue, a well drafted report is bound to reflect what the expert regards as best practice, and it follows that that is the way the expert would have behaved in similar circumstances.

What we are quite clear on is that when experts are being cross-examined on their evidence in court, they cannot avoid answering questions as to what they would have done by asserting that their supposed actions are irrelevant. Nor can we foresee a judge disallowing such a question, since it would be on a matter opposing counsel was entitled to probe. It would be up to counsel for the expert's client to interpose the irrelevance point should it be considered necessary.

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*Lack of defined procedure for paying SJE's*

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*Securing payment still a bugbear*

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# Court report

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## *The expert's role in Children Act cases*

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Proceedings involving children constitute a special category of litigation. In most civil cases, the court's main responsibility is to deal justly with the parties in deciding the issues. In family proceedings, however, the paramount consideration is the welfare of the child – the court is not concerned with whether one party or the other succeeds in getting what it wants. The role of the expert in such cases is to help the court decide what is best for the child. Although the instructions will come from a solicitor for one of the parties, the expert's opinion is being sought because the court wants it and has given permission for the expert to see the papers in the case and, where necessary, to conduct interviews and investigations.

Since in family proceedings the court has an inquisitorial or investigative function to perform, it is entitled to have disclosed to it all information relevant to the case. It follows that a party to such proceedings which commissions an expert report cannot withhold the report's contents from the court, whether or not that party intends relying on it. On the contrary, the party is duty bound to share the report's information not only with the court, but with the other parties to the proceedings.

### **The case**

These issues were well to the fore in a judgment given last month by the Hon Mr Justice Wall. Although it was mainly concerned with a wasted costs application, his Lordship's comments are of relevance to all experts who have been, or may be, instructed in Children Act cases.

The facts in *Re A (children)* are straightforward enough. In October 1999, the two children of a marriage were made wards of court and they and their mother went to live in a refuge. The father was allowed supervised contact with the children at a family centre. He surreptitiously videoed one such session and arranged with his solicitors for the tape to be sent to a clinical psychologist, Dr B. The solicitors instructed Dr B to report on the quality of the father's interaction with the children and the desirability of them remaining in contact. In response to a request for further information and a background history, the solicitors supplied the required details in anonymised form.

No permission for any of this was sought from the court, nor was any notice given to the mother or her lawyers of the father's intention to obtain an expert report. Furthermore, although it was clear that his opinion was being sought in the context of heavily contested proceedings, Dr B made no other inquiries of the father's solicitors but simply wrote the report as requested.

Some time thereafter, the father filed a statement in support of his application to continue having contact and attached to it Dr B's report. An issue then arose as to the manner in which expert witnesses should be instructed in

family proceedings. In particular, should an expert accept instructions to give an opinion in a case where (a) the documentation had been supplied to the expert in an anonymised form and (b) the expert was not informed whether the court's permission had been obtained for preparation of a report?

### **The judgment**

In his judgment, Mr Justice Wall acknowledged that there had been no identification of the parties nor unauthorised disclosure of court papers. Therefore there had been no breach of the Family Proceedings Rules. He did not doubt, either, Dr B's professional integrity or that Dr B had accepted his instructions in good faith. Nevertheless, Dr B had seriously misunderstood the role of expert witnesses in family proceedings and the relationship between them and their instructing solicitors.

The essence of case management in Children Act proceedings is that it should be transparent. If expert evidence is required, the issues to be addressed should be identified early so that the briefs to be given to the expert(s) can be defined by the court and its permission given for relevant documents to be disclosed. It is for the court to decide what expert evidence it needs. It is quite contrary to the spirit of the Act that one party should commission an expert report without the knowledge of the court or the other parties.

It is just as important that expert witnesses understand their role in family proceedings. In particular, experts must know:

- the terms of the court order that defines their involvement, and
- the purpose for which they are being instructed

for without this information they cannot properly fulfil their obligations to the court.

It was no excuse for Dr B to say that he 'assumed' the solicitors had the agreement of the court in terms of what they had asked him to do, and that they would have seen him to be questioning their professional integrity had he pressed the point. On the contrary, expert witnesses must be told explicitly what the court requires of them; if the information is not volunteered, they must ask for it.

Solicitors require the court's permission to instruct an expert. It was against good practice for them to use anonymised instructions to seek to avoid that obligation. It was also bad practice for the expert witness to accept such instructions. Although Dr B had said it was not uncommon for him to receive them, his Lordship found it difficult to envisage circumstances in which that might be appropriate or a court might permit it. As it was, the instruction of Dr B in the instant case was wholly inappropriate. He should not have been invited to report, nor should he have accepted the instructions without further enquiry.

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## *What experts should know and must do*

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# Usurping the role of the judge

The report in *Your Witness 21* of Judge John Toulmin's ruling on the duties of expert witnesses has provoked a lively response and another letter on the subject appears in this issue.

While most of Judge Toulmin's 'principles' mirror those laid down 9 years ago by Mr Justice Cresswell in the *Ikarian Reefer* case, two of them are new. It is to one of these that our correspondents have taken objection. It reads:

*'The expert's evidence should normally be confined to technical matters on which the court will be assisted by receiving an explanation, or to evidence of common professional practice. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.'*

Some readers have commented that the first of the sentences quoted here is too restrictive. In their view, expert evidence is not to be limited to mere explanations of technical matters, because it often involves the expert drawing inferences from observable facts, which only his or her expertise enables the expert to do. Others have pointed out that while no expert witness worthy of the name should base his or her evidence on what he or she would have done in similar circumstances, that much may well be apparent from the expert's report. As Mr Geoffrey Lloyd wrote in our last issue, 'A well drafted report is bound, by implication, to reflect what the expert regards as best practice; it follows that if the expert is a well respected authority in a particular field, then that is the way he or she would have behaved.'

## The 'ultimate issue' rule

In this note, however, my concern is with Judge Toulmin's admonition against usurping the role of the judge, which raises a different concern. What judges generally mean when they complain of this is that the evidence being given by a witness is on an issue that it is for the court to determine. The classic instance of that is provided by the ruling some 168 years ago that a witness might describe to the court the mental condition of the accused, but he could not be asked whether the accused was insane, if that was the question the court had to decide.

This common law rule against admitting evidence on 'the ultimate issue' has troubled courts ever since. It has suffered, at least in part, from the difficulty of defining what the ultimate issue might be. As a result, courts have tended, often for good practical reasons, to ignore the rule altogether. The quandary is particularly acute with expert evidence of opinion, where it involves inference from facts, because it is on this that the court's decision will be based. It follows that in circumstances where a court needs expert evidence to help it decide a case, the expert's conclusions will often prefigure those of the court itself.

## A non-issue in civil cases

In criminal cases, a trial judge may still feel it necessary to stop an expert from doing the jury's work. But in civil cases nowadays it appears to matter little whether an expert states, in so many words, his or her conclusions on the very issue the judge is required to decide. Indeed, for almost 30 years there has been statutory authority for admitting in civil cases expert opinion on any relevant matter on which the expert is qualified to give evidence, *including* an issue in the proceedings in question.

Section 3 of the Civil Evidence Act 1972 provides that:

- (1) Subject to any rules of court... where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.
- ...
- (3) In this section 'relevant matter' includes an issue in the proceedings in question.

Despite this, judges still grumble from time to time about experts expressing opinions on matters that it is the court's function to decide. However, the court is not *obliged* to accept the opinions the experts express. The decision is still the court's, even though it may have been left with little scope for coming to a different conclusion from that arrived at by the expert. Where there is danger in the situation nowadays is if the only evidence the judges have allowed themselves to hear is that of a single joint expert – but that is another issue altogether.

## Relevance is key

Is the rule a dead letter, then? Well, not quite. The key word in the passage from the Civil Evidence Act 1972 set out in the panel is 'relevant'. The opinion of an expert witness will most often be inadmissible, not because it is upon an ultimate issue, but because it is irrelevant, i.e. of no probative value. And that will generally be because the judge or jury are as capable of forming an opinion on the issue as the expert. Expert evidence, properly described, is evidence a court needs to decide the case before it, and not merely evidence given by an expert. The rule may have gone, but one of its principal justifications remains.

The crucial point is that expert evidence will not 'usurp the role of the judge' so long as an aspect of the issue with which it deals requires expertise for its elucidation. As one commentator has suggested, Section 3 of the 1972 Act merely ensures that in such an event the evidence will not be denied to the court because the issue is one that it is for the court to decide.

John Lord

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*The 'ultimate issue' rule may be dead...*

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*... but its justification lives on*

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# News

## Factsheet Update

The following new factsheet will be available **after Easter**:

### ID Factsheet title

44 The Single Joint Expert

We have also undertaken major revisions of Factsheet 29 on Taking Instructions.

You can access factsheets through our web site, or by using our *Factsheet Viewer* software. Call us on (01638) 561590 for details.

## Neutral citation of judgments

Since the New Year a new system has come into being for citing judgments of the Court of Appeal and, as soon as practicable, those of all divisions of the High Court. It is designed to facilitate publication of the judgments on the Web and follows what is becoming accepted international practice.

Hitherto, judgments have been identified by the report series in which they are published, and particular passages in them by the page and paragraph numbering peculiar to the publisher concerned. Now, however, they are each being assigned an identification number by the court concerned and are being issued with paragraph numbering that is sequential throughout. Thus, if *Smith -v- Jones* had been the tenth judgment this year of the Civil Division of the Court of Appeal, its 59th paragraph would be cited as *Smith -v- Jones* [2001] EWCA Civ 10 at [59], with EW standing for England and Wales.

It is intended that this system of citation should take precedence over all others, and it is hoped that that will make it easier for anyone to access and search Court of Appeal and High Court judgments. Unfortunately, though, there is no prospect of it being applied retrospectively to judgments issued before January this year.

## Managing the courts

The Court Service has unveiled its future plans in a consultation document, *Modernising the Civil Courts*. Much of what this document has to say is eminently sensible, and indeed encouraging, though it is marred by some grating jargon.

The key proposals concern the management of the system and the introduction of new ways of serving customers and of handling cases. There is to be a clearer separation of 'back office' administration and hearing centres (a.k.a. courts), and four tiers of organisation are envisaged. The Royal Courts of Justice are to be developed as (God help us!) a 'Flagship Hearing Centre for Civil Justice', with the other major courts (sorry, 'Primary Hearing Centres') destined to deal with the remaining defended cases. Then there is to be a network of supplementary venues providing remote access to the major courts, and lastly regionally based 'business centres' (a.k.a. registries) to deal with such matters as enforcement.

The new ways of serving customers rely heavily on the greater use of e-mail, the internet and electronic data exchange. Systems will be established to enable housing authorities, for example, to communicate directly with the computer system of the court, and at long last customers will be allowed to use their credit cards to pay court fees.

For expert witnesses, the most interesting part of the consultation paper is likely to be that dealing with the handling of cases in court. The Court Service proposes to develop means by

which practitioners can file documents with the court electronically and the judge and court staff can work from an electronic case file. In the longer term, it also promises to improve case management by means of an electronic diary system for listing cases.

All this, of course, is bound to take time to implement, although various pilot schemes are scheduled for the next 18 months. In the meantime, the full details are to be found at [www.courtservice.gov.uk](http://www.courtservice.gov.uk), and responses are invited by 21 April.

## Legal aid fears resurface

At long last hard facts are beginning to emerge as to the Government's intentions for expenditure on legal aid. Shortly before Christmas, the Legal Services Commission (LSC) published its corporate plan for the years 2001–2004. From this, it is clear that the honeymoon period of the Community Legal Service (CLS) will soon be over. The CLS fund, as the civil legal aid fund is now known, is set to fall over the next 4 years from £810 million to £686 million, while the budget of the Criminal Defence Service is due to go up by £89 million. This would seem to confirm the fears canvassed while the Access to Justice Bill was still before Parliament, that criminal legal aid would be allowed to grow at the expense of civil legal aid.

On the civil side, it is evident from the LSC's plans that more resources are to be devoted to the provision of information and advice and less to funding representation before the courts. Yet while increased access to the former can only be welcomed, it is not at all the same thing as increased access to justice. To achieve that, legally aided clients may still need to take their case before a judge. For the foreseeable future, though, it seems that their chances of being able to do so will be narrowing all the time. The prospects for funding disbursements on the expert evidence they might require are similarly bleak.

## A Woolf in soggy clothing

It was reported in *The Independent* that Lord Woolf, the Lord Chief Justice, was soaked when a litigant in person doused him in water, the litigant having first stripped to his underpants. (What on earth were the court officials doing while he stripped?)

The litigant had asked Lord Woolf to quash a vexatious litigant order banning him from using the court to bring legal actions. Lord Woolf, having dried himself off, declined to grant the application!

*The Independent* went on to report that as the litigant left the court room he was heard to mutter: 'What does it take to get committed to prison these days?' Choosing a target with less liberal views than Lord Woolf might be a good start!

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