Your Witness

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Court of Appeal in two minds

The court report in this issue focuses on contingency fees and, in particular, whether an expert witness might be paid on that basis. In *The Queen on the application of Factortame and others -v- The Secretary of State for Transport* (otherwise known as *Factortame No. 8*), the Court of Appeal ruled that it would be a very rare case indeed where the court could consent to that happening.

In the same court, just a few weeks earlier, Mr Al Fayed lost the latest round in his attempt to recover his costs from the backers of Mr Hamilton in the former MP's libel action against him. That appeal was not concerned with expert evidence, but in the course of his judgment, with which Lady Justice Hale agreed, Lord Justice Chadwick made the following rather startling observation: 'I can see no difference in principle, in the context of facilitating access to justice, between the lawyer who provides his services *pro bono* or under a conditional fee arrangement, the expert (say an accountant, a valuer or a medical practitioner) who provides his services on a no-win/no-fee basis, and the supporter who – having no skill which he can offer in kind – provides support in the form of funding to meet the fees of those who have.'

Conditional fees are, of course, no less contingent on the outcome of a case than those based on a share of the proceeds. It would seem, then, that at least two members of the Court of Appeal do not share the same aversion to the idea of experts being paid in this way that the Master of the Rolls voiced in his judgment in *Factortame No. 8*.

General Pre-Action Protocol

We reported in April this year that a General Pre-action Protocol was being developed by the Lord Chancellor's Department (LCD). We have now to report (see page 2) that this idea has been abandoned because of opposition from the legal profession.

The fact remains, though, that the concerns which prompted the idea in the first place are still there and need tackling. It is clearly desirable that all litigants should follow the same basic principles in relation to their pre-action behaviour, and it is most undesirable that this should depend on there being a separate protocol for every conceivable kind of dispute. The LCD now says that it is exploring ways of achieving a uniform process by building on existing provisions of the Civil Procedure Rules. This implies that it is considering making changes to the Practice Direction that governs existing protocols. It may even be hoping to include them in the batch of CPR amendments due out next month. For future developments, watch this space!

Conferences and training

The expert witness conference season is upon us once again. It begins with the *Society of Expert Witnesses* Conference on 18 October. This year it is being held in Reading and is in association with the Academy of Experts (how refreshing to see two expert witness bodies working together for once!). The morning session is devoted to the importance of the independence of expert witnesses. To many, this is a fundamental principle that requires little debate. But this conference asks: Has the principle been under attack of late?

The afternoon session is devoted to alternative dispute resolution, a potentially important new work area for expert witness, particularly as lay abitrators (i.e. arbitrators who are not lawyers) are becoming much more favoured. For booking information contact the *Society* on 0845 702 3014.

Next, on 8 November in London, is the Bond Solon Conference. Always well attended, this annual event has become a staple of the expert witness conference season. With the provocative message 'Is expert evidence getting worse and worse? Experts are still not getting right', the conference seems likely to generate a fair amount of debate amongst the delegates! For more details contact Bond Solon on 020 7253 7053.

Moving on to some new training courses, the Association of Personal Injury Lawyers is offering a course for expert witnesses in London on 12 December. Run in conjunction with the College of Personal Injury Law (CPIL), it deals with medico-legal report writing in personal injury cases under the provisions of CPR (i.e. in England and Wales). For further information contact CPIL on 0115 938 8714.

If you attend any of these events and have views on their value, please do let me know.

Expert Witness Certificate

An interesting development in expert witness training is the upcoming launch by Bond Solon of an **expert witness certificate**. This is, according to Bond Solon, the first university-certified training for expert witnesses. Run in conjunction with Cardiff University, the unique feature of the certificate is the independent assessment of 'students' by a recognised academic institution. I, for one, will watch with interest to see if experts find it of merit.

Chris Pamplin

Inside

Issue 29

News

Government takes its time over Auld recommendations

Back to the Court of Appeal

As you may be aware, the Criminal Cases Review Commission has sent the case of Mrs Sally Clark back to the Court of Appeal for a fresh hearing, that court having previously rejected her appeal against conviction for the murder of her two baby boys, Christopher and Harry. According to press reports, the Commission took this course in the light of previously undisclosed evidence which indicated that the second child may, after all, have died from natural causes.

In our previous coverage of the case, we reported the concerns that had emerged about the evidence given by the prosecution's principal expert witness, Sir Roy Meadow. When asked by counsel for the prosection what the chances were of a second 'cot death' occurring in the same family, he had replied '1 in 73 million'. This was not only bad statistics but totally irrelevant to the case, since no-one in court believed that both boys' deaths were examples of Sudden Infant Death Syndrome. What concerned us then, as now, is the effect that that soundbite may have had on the jury when they considered their verdict.

The new evidence raises concerns about the conduct of another of the prosecution's witnesses. In his written evidence, the Home Office pathologist who carried out the post-mortem on Harry, Dr Alan Williams, gave as his opinion that the boy had been shaken to death. In court, however, he changed tack and said that he had been smothered. It now appears that Dr Williams commissioned microbiological tests on blood and tissue samples that indicated that the child may have succumbed to a staphylococcal infection. All in all, it is perhaps not surprising to learn that the General Medical Council is currently investigating the roles that Dr Williams and the Crown's other pathology expert, Professor Michael Green, played in the Clark case.

Criminal justice reform

The Government has now published its response to Lord Justice Auld's report on the criminal courts. In a White Paper entitled 'Justice for All', it has set out a raft of proposals for the reform of the criminal justice system in England and Wales that ranges from the improved detection of offences, through court procedures to the rehabilitation of offenders.

Solicitors scotch LCD plan for general protocol

With such a broad canvas to cover, it is hardly surprising that the White Paper is short on detail as to how many of its aims are to be achieved. This is particularly apparent in its treatment of Lord Justice Auld's recommendations concerning expert evidence (see *Your Witness* 26). For nearly every one of these the only comment it has to offer is 'Considering further'. Indeed, the only recommendation in this area that the Government is prepared to accept now is the fairly modest one that in any future review of the rule against hearsay, account should be taken of the increasing reliance of forensic science laboratories on the electronic recording, analysis and transmission of data.

It is more encouraging that elsewhere in the White Paper the Government commits itself to the establishment of a Criminal Procedure Rules Committee to advise on the codification of the rules of evidence and of criminal procedure generally. At present, of course, rules of evidence can only be determined from case law, much of which is contradictory and derives from situations wholly different from those of the present day. As for the procedural code, this is needed above all to speed up the trial process and provide a framework for the disclosure of evidence.

It is to be hoped that the Lord Chancellor moves as quickly to put this work in hand as Lord Mackay did in the wake of the Woolf Report, when he initiated the legislation that resulted in us getting a coherent set of Civil Procedure Rules.

A good idea shelved

Some 6 months ago, in *Your Witness* 27, we welcomed the news that the Lord Chancellor's Department had devised a General Pre-action Protocol to cater for all those classes of action not already covered by a specific pre-action protocol. We have now to report that the Lord Chancellor's Department has abandoned the idea because the legal profession, in particular, was in several minds about it.

The draft protocol was the subject of a consultation exercise that elicited just over 100 responses. While most of these were from lawyers and lawyer organisations, a quarter came from other bodies representing consumer and business interests. Sadly, though, none of the expert witness organisations thought fit to comment on the draft, despite the fact that the Lord Chancellor's Department had annexed to it some detailed guidelines on the use and appointment of experts.

In the event, 33% of the organisations and individuals who did respond to the consultation paper favoured the idea of the creation of a general pre-action protocol. Another 26% recognised the need to avoid a proliferation of subject-specific pre-action protocols but considered, 'NIMBY' fashion, that a general pre-action protocol would be unsuited to their particular area of work. A further 22% failed to express a clear view on the main issue of whether such a pre-action protocol was even desirable, and the remaining 19% were wholly opposed to one being introduced. Given this general lack of support for the proposal, it is hardly surprising, then, that the Lord Chancellor's Department should have decided to abandon the idea of having one!

'Agreed' experts in personal injury cases

When asked to act as a single expert in a personal injury case, one of the first things an expert needs to establish is the *nature* of the appointment. Is it being made in accordance with the pre-action protocol or by direction of the court?

The importance of this distinction cannot be over-emphasised, because it affects both:

1. the duty the expert owes to the parties, and
2. the status of the resultant report.

Pre-Action Protocol for Personal Injury Claims

As the Practice Direction on Protocols explains, they exist:

- to encourage the exchange of early and full information about a prospective claim
- to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings, and
- to support the efficient management of proceedings where litigation cannot be avoided.

The *Notes of Guidance* that accompany the personal injury protocol are even more specific about its aims in relation to expert evidence:

'The protocol encourages joint selection of, and access to, experts. Most frequently this will apply to the medical expert, but on occasions also to liability experts, e.g. Engineers. The protocol promotes the practice of the claimant obtaining a medical report, disclosing it to the defendant who then asks questions and/or agrees it and does not obtain his own report. But, it maintains the flexibility for each party to obtain their own expert's report, if necessary after proceedings have been commenced, with the leave of the court.'

Could anything be clearer than that?

Well, to judge from the satellite litigation the protocol has already prompted, recent correspondence in the legal press and the enquiries we receive, the answer appears to be 'Yes!' Furthermore, the confusion is not limited to solicitors and the experts they instruct. It is also shared by judges!

It all boils down to a failure to recognise that the 'mutually acceptable' or 'agreed' expert of the protocol and the 'single joint expert' (SJE) of CPR Part 35 have *different* roles to play.

The single joint expert

When a court directs that expert evidence on a particular issue should be given by one expert only, the provisions of Part 35 kick in. Although the Rules do not specify a method by which the parties must select this 'SJE', the parties will be jointly responsible for the appointment and remuneration of the expert. Furthermore, although the court may urge the parties to agree in advance the instructions the expert is to receive, the Rules do allow them to send separate instructions if they so wish. In that event, though, the party must at the same time copy to the other side the instructions it sends. Finally, either party may put written questions to the expert in clarification of the report, the answers to which are to be treated as part of the report.

An 'agreed' expert is not the same as an SJE

It is implicit in this arrangement that an SJE must be scrupulously even-handed and completely transparent in dealing with the parties. Thus the expert:

- should copy to all parties any instruction-related correspondence
- should decline to attend any meeting or conference at which all the parties are not present or represented
- must send all parties copies of the finished report that is addressed to the court.

Because the report of an SJE has to be filed with the court, issues of disclosure do not arise. Specifically, no privilege attaches to its contents and all the instructing parties are free to make use of the report at the trial of the action.

The 'mutually acceptable' expert

All this is in marked contrast to the position of single experts appointed before proceedings are issued, as the Court of Appeal's judgment in *Carlson -v- Townsend* demonstrated amply.

The claimant in that case alleged that he had suffered a back injury while employed by the defendant. The latter, however, disputed the nature and origin of the problem. In accordance with paragraph 3.14 of the pre-action protocol (see panel), the claimant's solicitors nominated three orthopaedic surgeons, any one of whom they would be willing to instruct. The employer's insurers accepted that an orthopaedic surgeon would be appropriate, but objected to one of those named. The claimant's solicitors then proceeded to instruct one of the other two, a Mr T.

So far, so good. Both parties believed that they had followed the protocol to the letter. Mr T was undoubtedly 'a mutually acceptable expert' (paragraph 3.16), and – or so the insurers thought – his report was 'a medical report obtained by agreement' (paragraph 3.21) that would be disclosed to them in due course. When the claimant's solicitors got the expert's report, however, they refused point blank to disclose it. Instead, they commissioned another report, this time from an anaesthetist, Dr S, who was not on their original list. It was Dr S's report that they eventually attached to their particulars of claim.

The report of an 'agreed' expert need not be disclosed

At a preliminary hearing, the defendant applied for the earlier report to be disclosed, and the district judge so ordered, holding that on a proper construction of the protocol there was no distinction between the joint selection of a medical expert and his or her joint instruction. On appeal, however, that decision was overturned by the circuit judge, who ruled that as the claimant alone had instructed Mr T, there was no waiver of the privilege that would

Voluntary disclosure encouraged but not required

ordinarily attach to his report. He found support for that conclusion in the wording of paragraph 3.21: if reports of 'agreed' experts had to be disclosed, what possible need was there for a further paragraph requiring that they be disclosed where liability was admitted? It was now the defendant's turn to appeal.

At the Court of Appeal

Before the Court of Appeal, counsel for the defendant argued that the usual canons of construction do not apply to a non-statutory protocol. Instead, its meaning should be determined pragmatically, in the light of the objectives quoted at the head of this article. The protocol not only promotes the disclosure of reports, but without it there can be no 'joint… access to experts'.

Lord Justice Simon Brown disagreed. Although the protocol clearly encourages voluntary disclosure, it does not specifically require it. Consequently, by withholding Mr T's report, the claimant was not in breach of the protocol. He had, however, breached it by instructing Dr S without giving the defendant the opportunity to object. Even so, courts have ample and various sanctions they could impose for that misdemeanour. The claimant would still need the permission of the court to call Dr S and might not get it. The defendant, on the other hand, would almost certainly be allowed to call an expert of her own, since the court would know that at least one other expert had reported less favourably than the claimant liked. However, one sanction a court could not impose was to order the disclosure of Mr T's report. Procedural law cannot override pre-existing substantive law – in this case the law of privilege – and on that basis the defendant's appeal had to be dismissed.

In his concurring judgment, Lord Justice Brooke pointed out that protocols are not agreements on which one party or the other can bring an action. Nor are they drafted 'with the precision of the products of a parliamentary draftsman'. They are guides to good practice, drafted and agreed by those who know the difference between good and bad practice.

The personal injury protocol did not aim to deprive a claimant of the opportunity to obtain confidential advice about the viability of the claim, which the claimant would be at liberty to disregard if it was not agreed with. Nor was there any hint in the protocol that its authors intended that parties' solicitors should instruct on a joint basis an expert selected in accordance with its provisions.

The net result of the Court's decision in *Carlson -v- Townsend* can be summarised as follows. If the claimant in a personal injury case instructs an expert in accordance with the protocol and likes the report received, then the claimant can disclose it, rely on it in court and, usually at least, prevent the defendant from adducing evidence to the contrary. Conversely, if the claimant does not like the report, it can be discarded. Furthermore, providing there are other experts on the original list to whom the defendant did

Continued on page 5

The experts' section of the pre-action protocol for person injury claims

3.14 Before any party instructs an expert he should give the other party a list of the name(s) of one or more experts in the relevant specialty whom he considers are suitable to instruct.

3.15 Where a medical expert is to be instructed the claimant's solicitor will organise access to relevant medical records.

3.16 Within 14 days the other party may indicate an objection to one or more of the named experts. The first party should then instruct a mutually acceptable expert.

3.17 If the second party objects to all the listed experts, the parties may then instruct experts of their own choice. It would be for the court to decide subsequently, if proceedings are issued, whether either party had acted unreasonably.

3.18 If the second party does not object to an expert nominated, he shall not be entitled to rely on his own expert evidence within that particular speciality unless: (a) the first party agrees, (b) the court so directs, or (c) the first party's expert report has been amended and the first party is not prepared to disclose the original report.

Defendants disadvantaged at every turn!

3.19 Either party may send to an agreed expert written questions on the report, relevant to the issues, via the first party's solicitors. The expert should send answers to the questions separately and directly to each party.

3.20 The cost of a report from an agreed expert will usually be paid by the instructing first party: the costs of the expert replying to questions will usually be borne by the party which asks the questions.

3.21 Where the defendant admits liability in whole or in part, before proceedings are issued, any medical report obtained by agreement under this protocol should be disclosed to the other party.

The complete text of the pre-action protocol for personal injury claims can be found on the Lord Chancellor's Department web site at the following address:
http://www.lcd.gov.uk/civil/procrules_fin/contents/protocols/prot_pic.htm

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not object, the claimant can commission a separate report from one of them without even having to tell the defendant that this is what is happening. No wonder insurers complain that in personal injury cases the cards are stacked against them!

A counter-ploy

For an insurer, the position post-*Carlson* is especially galling if the case that is being defended requires evidence from an expert in a narrow speciality with few practitioners competent to provide it. The situation might then arise that the expert who has been 'agreed' in accordance with the protocol is one whom the insurer would have chosen if he or she had not been nominated on the claimant's behalf. In those circumstances, if the claimant's solicitors do not like the expert's report, they cannot only discard it, but also prevent the defendant from instructing the same expert after proceedings have been issued.

Or can they? After all, there is, as Lord Denning famously said, no property in a witness. This, at any rate, was the issue with which Circuit Judge Thompson was faced in an appeal heard at Aldershot County Court last November.

The claimant in *Sage -v- Feiven* had suffered neck and back injuries in a road traffic accident. It was agreed with the third-party insurers that a report was needed from a consultant orthopaedic surgeon. In this instance it was the insurers who took the lead in suggesting their names. The claimant's solicitors agreed and said that they would instruct one of the nominated experts, a Mr W, but not as an SJE.

When, however, Mr W's report came in, the claimant's solicitors did not agree with it and notified the insurers that they would not be disclosing the report. Since the deadline for issuing proceedings was imminent, they proposed instead to go ahead with them and request the court to order the instruction of another orthopaedic surgeon, this time as an SJE. At the directions hearing, however, the defendant's solicitors demurred and sought leave to instruct their own expert, who was to be – yes, you've guessed it – Mr W.

The district judge agreed with the claimant that it was desirable to appoint an SJE in order to keep costs down. But he was also receptive to the defendant's argument that instructing Mr W would be cheaper because he had already examined the claimant once and would not charge as much for a second report. He also accepted the argument that, in line with the Court of Appeal's decision in *Daniels -v- Walker* (see *Your Witness* 20), the defendant might be prejudiced if he was denied the right to instruct his own expert. The judge squared this particular circle by ordering that Mr W should be instructed as the SJE! Not surprisingly, the claimant appealed.

Before Judge Thompson, counsel for the claimant argued that the district judge's order had to be wrong, since appointing Mr W as the SJE was bound to undermine his client's claim to privilege over information in Mr W's earlier report. It was inconceivable that Mr W could produce another one that did not include some, at least, of that information.

Claimant can 'block' defendant's use of a preferred expert

For the defendant, it was argued that if the Rules were followed exactly, it would be possible for Mr W to produce a report in which information was omitted over which privilege was claimed. However, this was countered immediately by opposing counsel who pointed out that that information was likely to be crucial to Mr W's opinion. Moreover, the expert would be placed in an invidious position if written questions were to be put to him about his report, or if he was cross-examined at trial, and his answers involved disclosing privileged information. Judge Thompson agreed that it would not be practical to instruct Mr W as an SJE and ordered that the parties agree on one from a list that excluded his name.

Yet another issue

It follows from the Court of Appeal's decision in *Carlson* that an expert appointed in accordance with the pre-action protocol for personal injury claims does not owe the same duty of fairness and transparency towards both parties as he or she would do if instructed jointly by them. Above all, the expert must not fall into the trap of keeping each party informed of the questions the other asks about his or her report, or of the answers he or she supplies. This much should be apparent from the provisions of the protocol regarding such questions. If either party puts questions, the expert's answers must go to that party alone and must not be made known to the opposing party. Note, though, that if it is the non-instructing solicitor who is putting the questions, they should be sent via the instructing solicitor – which some might think is yet another provision that favours the claimant. Were the non-instructing solicitor to send questions direct to the expert, it would be prudent for the expert to consult his or her instructing solicitor, but only to establish that they may be answered. It is never the job of the expert to get involved in sorting out procedural breaches of this kind, still less to compound them.

Be clear on whether your appointment is pre-action

Conclusion

The message for experts is clear. If you accept instruction as a single expert in a personal injury case, be sure to ask if the case is pre-action. If your appointment is pursuant to the pre-action protocol, be very wary that you do not infringe the instructing party's privilege over your report, or confuse your role with that of an SJE who is appointed after proceedings have been issued.

John Lord

Court report

Contingency fee: a percentage of any damages unrelated to the usual rate for the job

One of the least glorious episodes in the jurisprudence of this country is now drawing to a close. In its final stages, though, it has had the unexpected result of clarifying the law relating to contingency fees, and in particular whether expert witnesses might be paid on that basis.

The Factortame litigation

The story begins in 1988 with a singularly misjudged attempt on the part of the UK Government to prevent British-registered vessels that were Spanish owned from fishing in UK waters. The owners challenged the lawfulness of the legislation enacted for that purpose, maintaining that it violated provisions of the EC Treaty. In July 1991 they obtained a ruling to that effect from the European Court of Justice.

The question then arose whether the owners were entitled to compensation. After much toing and froing between the courts in London and Luxembourg, it was decided that they were. So in 1998 the Official Referees' Court was given the hugely complicated task of assessing the amount of the damages. Three firms contended for the job of providing the forensic accountancy services needed by the claimants, one of which was Grant Thornton. In July of that year Grant Thornton entered into agreements with several of them, and it was these agreements that were the subject of the eighth and, one must hope, final case in the *Factortame* series.

Grant Thornton's terms of engagement

By the time the liability issue had been settled in 1998, most of the claimants were in a parlous financial state. Many had given up fishing altogether and sold their vessels, some had gone into liquidation and others were in a state of insolvent dormancy. When Grant Thornton began negotiations with its clients, it expected to be paid on the conventional hourly rate basis. The firm quickly realised, though, that it would have to wait for payment until the claimants had secured their damages. And in the meantime, the claimants were anxious not to incur an open-ended liability for accountancy fees.

Grant Thornton reckoned that its group of claimants was due to recover around £25 million in damages. It estimated, too, that its own fees, if calculated by the hour, were likely to exceed £2 million. On that basis a deal was struck whereby the claimants would pay Grant Thornton contingency fees amounting to 8% of the damages received from the UK Government.

Conditional fee: the usual rate for the job plus a percentage uplift

Champerty and all that

When the process of assessing damages got underway, counsel for the Government objected to the inclusion of Grant Thornton's contingency fees in the costs the claimants were also seeking to recover. He did so on the grounds that the agreements for their payment were champertous and, therefore, unenforceable. The Costs Judge held otherwise, whereupon the Government took its challenge to the Court of Appeal.

Champerty is a species of maintenance, and for over 700 years both were criminal offences in English law. You were guilty of maintenance if, without just cause or excuse, you supported litigation in which you had no legitimate concern; and you were guilty of champerty if you did so in return for a share of the proceeds. It followed that, in civil law, a champertous agreement was illegal and void simply because it entailed criminal conduct.

The reason why champerty was outlawed for so long was for the abuses to which it gave rise. As Lord Denning observed in a case decided in 1963: 'The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses'. But in the event, the Criminal Law Act 1967 abolished the criminal offences of maintenance and champerty, and the latter only survives nowadays as a rule of public policy that can render a contract unenforceable.

Public policy is not immutable, however, and since 1995 lawyers have been able to contract, if not for a share of the damages their clients recover, at least for an uplift in their fees should the clients win. They had been allowed to do this to give effect to another aspect of public policy, namely improving access to justice. The question the Court of Appeal had to decide in *Factortame No. 8* was whether the rule rendering champertous agreements unenforceable still applied to those made by other professionals involved in the conduct of litigation.

The judgment

The Master of the Rolls, Lord Phillips of Worth Matravers, delivered the reserved judgment of the Court on 3 July. In any individual case, he said, it is necessary to look at the agreement under attack to see whether it tended to conflict with existing public policy protecting the due administration of justice.

The main thrust of the Government's case had been that the services provided by Grant Thornton were, in large measure, of the kind solicitors are accustomed to provide, and that, accordingly, the firm was subject to the same restrictions as were solicitors. The Court had little difficulty, however, in disposing of that line of argument. The legislation permitting conditional fee agreements applied only to those who had control of the conduct of litigation, and in this case the claimant's solicitor had been in charge throughout. Although Grant Thornton had played a very important role in the damages phase of the litigation, it was an ancillary role nonetheless. The agreements the firm had made with the claimants for the payment of its fees were not caught by the restrictions governing solicitors' fees.

The position of expert witnesses

However, the Government's counsel had also made an alternative submission, namely that some of the services provided by Grant Thornton were in the nature of expert evidence, and that the law of champerty could render unenforceable an agreement by an expert to give evidence in return for a share of the proceeds.

Lord Phillips noted that the codes of guidance published by the Academy of Experts and the Expert Witness Institute both declare that experts should neither be offered nor accept payments contingent on the outcome of a case. But, he said, there was no authority binding on the Court that dealt with the propriety of experts contracting to give evidence on that basis. He drew attention, though, to two recent decisions that dealt with the related issue of whether an expert should have no connection at all with the parties to a case.

In *Field -v- Leeds City Council*, the Court of Appeal had unanimously agreed that a surveyor employed by the defendant council was not, for that reason alone, automatically disqualified from giving expert evidence on its behalf. As Lord Justice Waller observed, whether he should be able to do so depended on whether it could be demonstrated that he had the relevant expertise and was mindful of his primary duty to the court.

The Master of the Rolls contrasted that decision with the comments made by the trial judge in *Liverpool Roman Catholic Archdiocesan Trustees Inc. -v- Goldberg* (reported previously by us in *Your Witness* 25). In that case the defendant had wished to call to give expert evidence on his behalf a QC who shared his chambers and was a friend of long-standing. When ruling on the admissibility of that expert's evidence, Mr Justice Evans-Lombe said: 'where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted, however unbiased the conclusions of the expert might probably be. The question is one of fact, the extent and nature of the relationship…'.

In their Lordships' view, that approach was incorrect. It would, for example, inevitably exclude an employee from giving expert evidence on behalf of his or her employer. While it is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he or she gives evidence, such disinterest is not *automatically* a precondition to the admissibility of the expert evidence. If an expert should have an interest of one kind or another, the question of whether that expert may be permitted to give evidence should be determined in the course of case management. The judge will then have to weigh up the alternatives open if the expert evidence is to be excluded, bearing in mind the overriding objective of doing justice for the parties.

Where, however, the interest is of a financial nature, other considerations come into play, because an expert will often be in a position to influence the course of the litigation in a manner which a funder, or even the lawyer conducting the litigation, will not. On these considerations the Master of the Rolls had this to say:

'To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar agreement. Accordingly, we consider that it will be a very rare case indeed that the court will be prepared to consent to an expert being instructed under a contingency fee agreement.'

No authority binds the court on no-win, no-fee terms for experts...

The decision

Lord Phillips then turned to the facts of the instant case, and drew three conclusions from them.

1. Although Grant Thornton had provided valuable back-up services to the claimants' solicitor and to the expert witnesses in the case, they had not themselves acted as expert witnesses. Indeed they had been instrumental in identifying (and paying for) independent experts whom the solicitor could instruct on the claimants' behalf.
2. When the firm became involved in the case, the claimants were already heavily in debt. Anyone providing services in connection with their litigation could only expect to be paid out of whatever damages were recovered. So the reality was that whoever helped the claimants would have had a financial interest in the outcome of their case.
3. The significance of the contingency fee agreements that Grant Thornton made was much reduced by the fact that by the time they were made the claimants had already largely succeeded on the issue of liability.

All in all, public policy had not been affronted by the agreements. The claimants had been faced with an extraordinarily complicated task in proving the damage suffered, and there had been a real risk that they might lose the fruits of their litigation through lack of funds. The agreements with Grant Thornton ensured that the claimants continued to enjoy access to justice. They did this without putting justice in jeopardy, and so were not champertous. The Government's appeal had to be dismissed.

... but very rarely would the court accept such terms!

Factsheet Update

The following new factsheet is now available:

ID	Factsheet title
48	Answering written questions

You can access factsheets through our web site, or by using our *Factsheet Viewer* software.

Letters to the Editor

A hazard for SJEs

Dr John Caplin, Consultant Cardiologist, writes:

I was recently requested to attend court in a case where I had been instructed as a single joint expert. I had sent my report to both sets of solicitors and had answered the questions sent to me by those acting for the claimant. The defendant's solicitors did not ask any questions at that time.

I was requested to attend court by the defendant's solicitors, but although they had sought the permission of the court to examine another of the SJEs, they had not asked to be allowed to examine me.

The claimant's barrister pointed this out to the judge, who was clearly concerned by this breach of the Rules. In the end, he allowed time-limited cross-examination of my evidence, but I suspect that had the barrister shown any concern, I might not have been called at all.

I think it is important, therefore, that if you are asked to attend court after having prepared a report as an SJE and answered questions on it put to you in writing, you check that the court has granted permission for you to be examined in person. Otherwise you may have a long wasted journey.

New roles for experts

Doug Cross, Environmental Analyst and Forensic Ecologist, writes:

Dr Poloniecki's idea of 'intermediate experts' (*Your Witness* 28) is certainly appropriate in my own field, environment, and indeed I have been working in exactly this way for well over a decade. Initially, this was as a team leader in environmental impact assessments – multi-disciplinary studies ranging over a quite remarkable range of specialisms. As team leader, my task was to ensure 'quality control' across the board. When I started to get involved in court cases, it became obvious that the same approach would provide the best basis for developing a balanced assessment of the evidence disclosed by both sides.

It is especially appropriate in disputes involving the causation and impact of pollution. Evidence in cases brought by the Environment Agency, for example, typically requires expertise in hydrology and hydraulics, toxicology, chemistry, fish ecology and physiology, and often commercial fishery and aquaculture practice as well.

In oil spill analyses, there are many additional areas where expertise may be needed – tourism, meteorology and marine tidal dynamics are only a few.

Evaluating such diverse evidence, and ensuring that it is balanced and equitable, requires the expertise of that rare beast, the scientific 'generalist'. Done efficiently, it can save enormous time and costs for both sides. Almost all my cases are settled before they go to court, although this can be somewhat detrimental to my own income as a result!

The use of 'intermediate experts' is particularly appropriate in environmental litigation, but I can quite see that cases of other kinds might benefit from the same approach.

Mr Rolf Clayton, Chartered Chemical Engineer, writes:

In your editorial on the disciplining of experts (*Your Witness* 28), you comment that the Legal Services Commission is supposed to be operating much more stringent procedures to ensure that taxpayers' money is not wasted on undeserving litigation.

Some time ago I acted as expert witness in an action funded by the then Legal Aid Board where the claimant had an extremely weak case. He refused to compromise during mediation and ran up legal costs in excess of the claim itself. Eventually he settled on the court steps for an offer that had been made during mediation, not on merit but simply to finish a vexatious case.

After the case I contacted the Board and suggested that, if they employed experts such as myself to assess the merits of such cases before they agreed to fund them, they could save a considerable amount of taxpayers' money. They were totally uninterested in this possibility and curtly dismissed my suggestion.

The Legal Services Commission employs lawyers to assess the legal strength of the cases it considers for funding, but it has no-one with the ability to assess their technical strengths and weaknesses. Until it can overcome this arrogance, the Commission will continue to waste taxpayers' money on cases with little or no technical merit.

Statement of Truth

Paul Croft, Consultant Road Crash Investigator, writes:

In your response to the letters from Dr Hall and Mr Milling (*Your Witness* 28), you remind us of the wording of the Statement of Truth with the warning that it must not be modified. However, I note that, in reproducing it, you appear to have modified it yourselves. In Issue 27 you quote one of its clauses as '… the facts stated in my report are within my **own** knowledge…', whereas in Issue 28 this appears as '… the facts stated in my report are within my knowledge…'. Which of the two is correct?

Whoops! The pedant's curse strikes! You are quite right. The earlier version is the correct one, and we apologise to any expert who may have been told off for leaving out the 'own'. Ed.

Delicious irony!

Mr Sims, a door-to-door salesman soliciting no-win, no-fee accident claims, is being sued by a potential customer amid allegations that he fell on the customer's six-year-old son whilst joining in a street football game.

The Accident Group, which emloys Sims, denies liability. The boy's parents are now suing the salesman using a rival no-win, no-fee service.

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