Your Witness

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

Experts' immunity to suit

The justification for an expert's immunity from suit has traditionally been seen to be analogous to that of the advocate. Like advocates, an expert should be free to express an opinion that he or she regards as being truthful and fair without fear of being dragged through the courts because of that opinion. This immunity has been considered as necessary to the orderly management of the trial process, and this was the view taken by the courts in *Stanton -v- Callaghan (1999)*. However, the removal of immunity for advocates by *Hall -v- Simons* has caused the whole question of immunity for experts to be looked at afresh.

Experts are not advocates

The common perception that an expert's immunity is analogous to that which existed for advocates is, in my view, wrong. Experts owe an overriding duty of impartiality and independence to the tribunal; advocates, in contrast, owe a duty to their clients to put the strongest case possible. This means that advocates are *obliged* to be partisan.

It is my belief that the immunity extended to the expert should really be seen as part of that which protects the court itself. As one expert has put it:

> 'Conceptually, therefore, the expert may be said to sit in court "beside the judge", not beside his client. It follows that if anyone is to question the expert's standard of work it should surely be the court alone: the court is, as it were, the only "party" entitled to say if it considers that the expert's discharge of his or her primary duties to the party has been "negligent".'
> (Stephen Castell, Law Letters, *The Times*, 25 March 2003.)

This is a view I fully endorse, and would hope that experts take every opportunity to correct any confusion they encounter on the origin of their immunity.

Liability for defamation

Some lawyers have suggested that an expert's immunity from suit should be retained for some classes of evidence, e.g. experts who give evidence that might give rise to a claim for defamation. In essence, they feel that experts should remain free to be critical of persons in the sure knowledge that they will not be sued for so doing.

This seems to me to be dangerous territory. Experts should never indulge in personal attacks on other experts. If an expert believes that the opposite number is lacking in honesty, independence or integrity, then in every case it ought to be possible to demonstrate such concerns through a thorough analysis of that expert's evidence – not by resorting to defamatory personal attacks.

Attack of the pragmatics

The downside of removing an expert's immunity to suit is that experts are already under fire from many directions. Imposing further onerous burdens on experts will result in a greater reluctance to give a full and frank opinion, and this will hamper rather than aid the judicial process.

Expert survey 2003

What is it that experienced expert witnesses most want to know about their colleagues? Well, how much they charge comes close to the top of the list! It is also the question we are most frequently asked by experts new to litigation work.

In my mind, there is no more useful way to satisfy this demand for information than to conduct regular surveys among our readers and to analyse the results for publication in *Your Witness*. I make no apology, then, for enclosing with this issue a questionnaire on your work as an expert witness, your terms, conditions and charging rates, and the trends in your volume of work. Please find time to complete the short questionnaire, anonymously if you prefer, and return it to me in the next few days. Alternatively, you can complete the survey on line. Simply surf to www.jspubs.com and click on the *Survey 2003* link.

Expert newswire

As part of our ongoing drive to help expert witnesses understand their role and duties, we have started an electronic newsfeed targeted specifically at professional journals read by experts and other professional and media outlets. This newswire offers a service similar to our *e-wire* for experts (see *Your Witness 30* for details), but tailors the information to the needs of other publishers. In this way, we hope to reach out to even more professionals who offer their services as expert witnesses, whether or not they are listed in the *UK Register of Expert Witnesses*.

If you have links into your professional body or its publishing arm and can help us to communicate what we do and the type and quality of the information we hold for expert witnesses, then please do get in touch. Sarah Wallace is handling the newswire project and you can contact her by e-mail (sarah@jspubs.com) or telephone (01638 561590).

Dr Chris Pamplin

Inside

Digest

Judicial criticism

Child abuse cases

New horizons

Privilege

Issue 32

June 2003 © J S Publications

Digest

The last 12 months have seen a number of developments in the law and codes of guidance affecting expert witnesses. We reflect on some of these and highlight a few key points for expert witnesses.

Accountancy experts feel the fallout from Enron

Enron forces legislative controls on experts

The uncovering of major commercial fraud in international commerce, most notably the Enron case, has led to regulatory controls being enacted in the United States. These will affect businesses, together with their lawyers and expert advisors, worldwide.

The *Sarbanes-Oxley Act 2002* imposes tough reporting requirements and rules relating to auditor independence. Section 201 of the Act lists a number of services an auditor is *unable* to provide. These include 'legal services' and 'expert services unrelated to the audit'.

Of particular concern to financial experts is the prohibition on 'providing expert opinions or other expert services to an audit client, or a legal representative of an audit client, for the purposes of advocating that audit client's interests in litigation.' This will obviously impose severe restrictions on audit firms that provide expert evidence on behalf of clients in cases where the proceedings are subject to American legislation.

Some UK firms have already reacted to the legislation by splitting off part of their practice so that non-audit work is carried out by a separate and distinct organisation.

The court looks again at delay

Cases that followed implementation of the Civil Procedure Rules (CPR) should have left us in no doubt that the court would not countenance unnecessary or avoidable delay in relation to the instruction of experts or the preparation and service of their reports.

One of the pitfalls encountered by experts was a failure by instructing solicitors to notify them of deadlines for filing of reports *at the time the court order is made.* For some time we have been making representations to the Lord Chancellor's Department requesting that a practice direction be issued to judges to provide for a specific order requiring solicitors to notify expert witnesses of these deadlines. All too often lawyers fail to give adequate warning to their experts of the date by which their reports must be served or an experts' meeting be held, with the result that the expert evidence is ruled inadmissible.

Judges critical of missed deadlines, but LCD slow to react

This was one of the factors considered previously by the Court of Appeal in *Baron -v- Lovell (1999).* Most of our readers will be familiar with the facts of that case, which provided a salutary lesson to all. The trigger date in that case was 11 September 1998, and the medical experts' reports were to be disclosed no later than 20 November 1998. The defendant's solicitors had instructed the expert on 26 August but had given little or no guidance as to the due dates. The medical expert did not examine the claimant until 6 January 1999 – a full 7 weeks *after* the date on which the report should have been served – and the report was eventually received by the defendant's solicitors on 24 February. They then compounded their folly by failing altogether to serve the report on the claimant's solicitors.

The pre-trial review took place in May 1999, at which the defendant's solicitors failed to attend personally – choosing, instead, to instruct an agent. No explanation was offered as to why the automatic direction for production and service of the expert's report had not been complied with. In view of the defendant's delay, the judge refused to exercise his discretion to allow the defendant to call expert evidence at trial. On appeal, the judge's decision was upheld.

Burden on lawyers to forewarn experts

After the *Baron* case and others like it, it was generally recognised that in all matters involving experts the courts were likely to take a dim view of any delay. Leniency was only to be expected in exceptional circumstances. Most legal practitioners knew where they stood on such matters and the burden was on them to make sure their experts were similarly forewarned.

The decision of the Court of Appeal in *Stephen Hill Partnership Ltd -v- Superglazing Ltd (2002) All ER (D)* 229 is, therefore, something of a surprise.

The case involved a professional negligence claim against accountants. Late in the proceedings, and following the meeting of experts, the defendants decided that they wanted to release their expert and appoint another in his place. The reasons put forward to excuse the lateness of the request were curious. First, it had come to light that the expert in question had discussed his reply to the experts' draft joint statement with the defendants' employees which, said the defence solicitors, amounted to inappropriate behaviour. Second, it had been discovered that the expert was also acting for the defendants in discussions with HM Customs and Excise concerning his VAT.

The judge took the view that neither of these reasons amounted to an adequate explanation of why the defendants wanted to change horses and go looking for a fresh expert at such a late stage. Naturally, the claimant ventured to suggest that the defendants were anxious to part company with their expert simply because they wanted to seek a more favourable opinion. The judge may have secretly shared this view and did say that there might have been an abuse of the process of the court by the defendants.

If there was ever a case for a judge to refuse leave to change experts, then we suggest this was it. Certainly, the previous authorities would have given the judge ample scope to refuse the request on grounds of delay alone. However, notwithstanding that the judge had largely rejected the defendants' arguments in support of

the request, he nevertheless allowed a new expert to be instructed. But why?

The judge stated that although the request was suspect, he was obliged to consider the evidence given on oath by the defence solicitor – that the substance of the expert's opinion was not the reason for the decision to release the expert. He granted the request but took the unusual step of giving leave to the claimant to call the expert as a witness so that he could be questioned by both sides, if desired, regarding the reasons for his dismissal. We gather that the claimant declined to take the judge up on his offer and allowed the matter to rest.

The circumstances of this case were out of the ordinary. The golden rule must still be that lawyers must deal expeditiously with the instruction of experts. Practitioners should not expect generosity from the court when dealing with instances of delay, and the penalties are likely to remain severe. All too frequently it is the experts who will bear the brunt of the criticism when, in reality, they are struggling to meet impossible deadlines about which they have been given inadequate notice.

The inadequate expert

The courts and bodies seeking to represent expert witnesses continue to struggle with the vexed question of incompetent or rogue experts. A sizeable proportion of this issue of *Your Witness* is taken up with discussion on various aspects of this topic.

The expert who incurred the wrath of Judge Jacob in the *Gareth Pearce* case was described variously in the press – 'expert witless' probably taking top prize in the clever headline competition. We think, however, that Brian Dean MBE, the expert instructed by the claimant in the case of *SPE International Ltd -v- Professional Preparation Contractors (UK) Ltd (1) and John Glew (2) (2002)* probably has other failing experts beaten on all counts. With an almost apologetic note, Judge Rimer said in his judgment: 'with respect to Mr Dean, I doubt if there has often been an expert less competent than he.'

Mr Dean, hired ostensibly to give an expert opinion in proceedings for copyright infringement in the field of shot blasting, seems, instead, to have been a walking textbook on how not to conduct oneself as an expert witness.

Mr Dean's main difficulty, said the judge, was that he had no relevant experience. He was an ex-RAF officer who, no doubt, had specialised knowledge and experience of many fields of human endeavour, but they did not include the field of shot blasting. The only experience he did have in that field was confined to the work he had done for the claimant as a management consultant – and that for barely 2 years.

Mr Dean had made no note of the instructions he had received because he said there was no need – he said he had a fairly good memory. Neither was there a record of any letter he had written seeking information. The judge referred to this as 'the most astonishing ignorance of the most basic professional practice'.

But worse was to come. It transpired that much of the work on Mr Dean's report had not been done by him at all, but by his wife!

To cap it all, he was far from independent of the claimant because he was receiving generous remuneration for his role as a consultant. His evidence itself betrayed that he really regarded his primary role as being to present and defend the claimant's case.

While there is a comic side to all this, the underlying point is a very serious one indeed. Most professionals who undertake expert witness work, and especially those who appear regularly in court, will be familiar with CPR Part 35, the Practice Direction and the codes of guidance. But those experts who receive 'one-off' instructions (perhaps because they have knowledge in an unusual field or narrow subject) cannot be expected to be familiar with the rules governing an expert's conduct. And those who appear more frequently, or even seasoned practitioners, may need to be reminded of them from time to time.

Lawyers should ensure experts know the Rules

Judge Jacob emphasises that a general knowledge of the duty of experts is not good enough. All those who appear as experts in the civil courts must be fully conversant with all aspects of the codes and must be seen to comply.

As a matter of course, it would be commonsense for all lawyers who instruct experts to send out with their letters of instruction copies of Part 35 and the associated codes. This might not have saved Mr Dean from acute embarrassment, but he would, at least, have been able to measure himself against the expectations of the court before enduring it.

Finally…

We reported in the last issue of *Your Witness* our ongoing efforts to get the Lord Chancellor's Department to say when it would be revising its guidance on the allowances payable to experts who give evidence in criminal cases. Well, on 28 April they finally made their announcement. We hope you weren't holding your breath!

There are increases of 20% across the board, except for fire assessors and explosives and fingerprint experts who, for some reason, only get a 10% increase (see panel to the right for details).

Our advice from the last issue bears repetition. The court personnel (a.k.a. determining officers) responsible for paying allowances to witnesses may, in exceptional circumstances, and entirely at their discretion, pay experts who have provided opinion evidence more than the guidelines suggest. It is up to the individual expert, though, to make the case that he or she deserves to be paid over the odds.

Rates for a full day in court (as of 28/04/2003)

Consultant medical practitioner, psychiatrist, pathologist
£346–£500

Fire (assessor) and explosives expert
£255–£365

Forensic scientist (incl. questioned document examiner), surveyor, accountant, engineer, medical practitioner, architect, veterinary surgeon and meteorologist
£226–£490

Fingerprint expert
£153–£256

Judicial criticism of experts

RIBA investigates criticised expert...

The controversial subject of the impartiality of expert witnesses continues to trouble the courts. In a string of recent cases, judges have gone so far as to openly criticise those experts who have, in their view, failed to comply with the Civil Procedure Rules (CPR), with the severest criticism being reserved for those experts whose impartiality is in doubt.

The CPR do not impose sanctions on experts who breach the rules. In November 2001, however, Judge Jacob, in delivering his judgment in *Gareth Pearce -v- Ove Arup Partnership Ltd and Others*, held that there is 'no reason why a judge who has formed the opinion that an expert has seriously broken his Part 35 duty should not, in an appropriate case, refer the matter to the expert's professional body'.

Gareth Pearce -v- Ove Arup

Briefly, the facts in the *Gareth Pearce* case were these. Mr Pearce was an architecture graduate who, in his final year, had produced a putative design for a town hall in Docklands. He then went to work for the Office for Metropolitan Architecture Stredbouv SV (OMA) in London. OMA was associated with a Mr Remment Koolhaas, a leading Dutch architect. Mr Pearce claimed that Mr Koolhaas and others had plagiarised the town hall design when designing the famous Kunsthal Exhibition Centre in Rotterdam (see *Your Witness 28* for full details).

Mr Pearce's case relied heavily on the expert evidence of another architect, Michael Wilkey. Mr Wilkey produced evidence of 52 similarities between the two designs which, he said, were too many to amount to an accidental coincidence. Furthermore, Mr Wilkey went on to suggest that if Koolhaas denied copying, he must be lying.

During the course of the trial, Wilkey abandoned some of his 52 points but clung to others. The trial judge, Judge Jacob, highlighted blunder after blunder in Wilkey's evidence. These included Wilkey's failure to visit the Kunsthal before making his report, and his failure to properly read an important document (the original design brief for the Kunsthal) that had been exhibited to his report. In his summing-up, Judge Jacob described parts of Wilkey's report as being 'fantastic' (by which he meant a work of fantasy) and 'absurd'. He said of the 52 points that 'not one made sense individually'.

.. and rules 'not guilty' on all counts

Judge Jacob, having decided that Wilkey's evidence of similarities in the designs was manifestly fanciful, concluded that the expert had abandoned all objectivity and that he had, effectively, come to court to argue a case on behalf of the claimant. According to the judge, any point that might support the case, however flimsy, Mr Wilkey took.

Failure to comply with CPR Part 35

The judge pointed out the expert's duty as set out in CPR Part 35(3). Namely, that it is the duty of the expert to help the court on matters within his or her expertise and that this duty overrides any obligation to the person from whom instructions have been received or payment is due. Judge Jacob said that 'so biased and irrational' was Wilkey's evidence that he had failed in this duty to the court and bore a heavy responsibility for the case ever coming to trial.

Judge Jacob bemoaned the fact that there was no system of accreditation for expert witnesses and no accreditation body to whose attention a breach of duty could be drawn. He thought it perfectly proper, however, in appropriate cases, to refer the matter to an expert's own professional body. In this case, he requested the defendant's solicitors, Ashurst Morris Crisp, to send the judgment and related papers to the Royal Institute of British Architects (RIBA) – which they duly did.

Over to RIBA

The matter has now been before the Professional Conduct Committee of the Architects Registration Board (ARB). The decision of the Committee was given on 5 February 2003. In the event, the whole question of the alleged similarities in the two buildings was not really considered by the Committee – the parties' lawyers having agreed that 'an architect acting reasonably could have found similarities in the drawings'. However, given that Judge Jacobs' main criticism of Wilkey's evidence was his alleged failure to deliver an objective report, it seems strange that the ARB did not look at this aspect of the matter a little more critically. We understand that Mr Wilkey was permitted to make written representations to the ARB. As these have not been made available to us, we can only speculate on whether they were instrumental in the decision not to examine the central question: Was Mr Wilkey's evidence of a reasonable standard?

Instead, the Committee was required to investigate the alleged breaches of duty by Mr Wilkey:

- his failure to visit the Kunsthal or mention that fact in his report
- his failure to properly consider the design brief document for the Kunsthal, and
- his failure to inspect the drawings at the Netherlands Architectural Institute (NAI).

Lastly, the Committee considered whether it had been appropriate for Mr Wilkey to make the statement in his evidence that Mr Koolhaas had been lying.

These were all considered within the larger question of the solicitor complainant's case that Mr Wilkey had failed to provide an unbiased opinion and had failed to consider material facts.

The ARB decision – not guilty

In all cases the Committee found Mr Wilkey not guilty of the charges of unacceptable

professional conduct or serious professional incompetence.

The Committee disagreed with Judge Jacob about the need for Mr Wilkey to actually visit the Kunsthal as the case involved the alleged *graphic* copying of plans. They did accept, though, that a reference in the report to 'the Kunsthal as built' was potentially misleading. Indeed, they said that, with hindsight, it would have been better to put a paragraph into the report confirming that Mr Wilkey had not considered it necessary to visit the site.

The Committee found that the judge had been inadvertently misled into thinking that the design brief for the Kunsthal had been exhibited to Wilkey's original report and that he had failed to read it properly. In fact, the design brief was never exhibited to the report and had not been relied on by Wilkey.

So far as the visit to the NAI was concerned, the Committee accepted that Wilkey had never been instructed to make such a visit, although he had, at one point, suggested that he should so do. It was pointed out that the claimant was publicly funded and it was unlikely that the Legal Services Commission would have agreed to finance such a trip. The same could be said, incidentally, for a visit to the Kunsthal itself.

As regards the allegation of lying, the Committee thought that, upon reflection, these statements by Mr Wilkey were not ones he would have made 'had he had an opportunity to consider them'. They considered, though, that the words 'perjury' and 'lying' were ones that had been 'put into the mouth' of Mr Wilkey in the course of cross-examination.

Judicial criticism likely to continue

Melanie Carter, who acted for Mr Wilkey in the disciplinary hearing, said: 'The ARB decision was a great vindication for Mr Wilkey and I imagine that it is a great relief to expert witnesses, who have increasingly been feeling the heat of judicial criticism'. She added that Mr Wilkey is 'considering how he might claim costs or compensation for the damage he has suffered'.

The ARB decision is unlikely, however, to stem the mounting criticism of some experts by trial judges. Judge Jacob has already said that he would like to see experts who have received such criticism give an undertaking that they will accept no future instructions without disclosing the judgment that criticises them.

The courts do, of course, guard jealously the principle of expert witness impartiality, and will abhor any attempt by parties to use an expert as a 'hired gun'. Accordingly, an expert who allies his or her evidence too closely with one party's interests, or is too compliant with the evidential requirements of the instructing party, is open to justifiable criticism. However, the provisions of the CPR have made life for would-be 'hired guns' much less comfortable.

In practice, the 'hired gun' is relatively easy to spot. Skilled examination of the witness usually shows where unreasonable reliance has been placed upon conclusions that are simply not supported by reasoning. We echo the words of Judge Jacob in the *Routestone* case: 'what really matters in most cases are the reasons given for the opinion'.

Judge calls for direct sanctions on errant experts

Could sanctions on experts be next?

It is an inevitable fact of the human condition that some experts will fail in their duty to impartiality. Some judges, and we think we have to number Judge Jacob amongst them, would like to see real sanctions that could be applied to experts who are considered to have failed in their duty to the court.

Perhaps ominously, it might be that there is a clue in Judge Jacob's judgment in the *Pearce* case. At the conclusion of that judgment he said: 'Mr Wilkey said he understood [his] duty. I do not think he did. He came to argue a case. … Mr Wilkey bears a heavy responsibility for this case ever coming to trial – with its attendant cost, expense and waste of time…' Notwithstanding Mr Wilkey's exoneration by the ARB, could it be that the case is now pointing the way towards possible costs sanctions against experts in future?

Such sanctions would certainly give food for thought to any expert prepared to act as a 'hired gun'. A more likely result, we think, would be an unseemly increase in 'fence sitting', particularly in ground-breaking or otherwise controversial cases. Experts would fight shy of any suggestion that they were unreasonably favouring one point of view over another.

Role of the professional bodies

The risk of such sanctions will, perhaps, be lessened if professional bodies are seen to be tougher in self-regulation. Judicial confidence can only be strengthened by rigorous monitoring of professional competence and strict adherence to professional codes of conduct. Professional bodies that are less robust in these areas, and even ignore the expert witness element of their members' activities, risk tarnishing the reputation of their membership. So far as expert witnesses are concerned, failure by professional bodies to self-regulate will inevitably lead to further intervention by the courts and attempts to enforce stricter controls.

The expansive mood at the Registration Council for Forensic Practitioners is just one example of moves that undermine the regulatory function of existing professional bodies towards those of their members who undertake expert witness work. If professional people want to ensure they are subject only to effective peer-based regulation – surely the best system for everyone – then they must start to act now to make their professional bodies take expert witness issues seriously.

The ARB decision

A full transcript of the Architects Registration Board Professional Conduct Committee's decision can be found at:

http://www.arb.org.uk/regs/judgements/wilkey.html

Experts in child abuse cases

The fallout from the Sally Clark case (see our report in *Your Witness 31* on the dramatic decision of the Court of Appeal), which the *Guardian* dubbed 'one of the most controversial in recent criminal history', is still being felt. The brunt of the criticism has been reserved for two of the experts involved: Professor Sir Roy Meadow, the paediatrician, and Dr Alan Williams, the forensic pathologist. We are informed by the General Medical Council (GMC) Press Office that the case of Dr Williams has been referred to the Preliminary Proceedings Committee (PPC), whose investigations into his conduct are continuing. No finding has yet been reached.

The courtroom is no place for scientific debate

The Court of Appeal gives its reasons

The Court of Appeal recently released its complete judgement relating to the Sally Clark case. Reported in the *Law Society Gazette* (17 April 2003), the Court found Dr Williams' reason for not disclosing the vital medical report – that it was not his practice to refer to additional results in his post-mortem unless they were relevant to the cause of death – as 'wholly unacceptable'. Furthermore, it was 'out of line with the practice accepted by other pathologists to be standard'. Lord Justice Kay added that Dr Williams' approach ran 'a significant risk of a miscarriage of justice'.

Turning to the much-discussed 1 in 73 million chance of two cot deaths in one family, the Court found it to 'grossly overstate' the case. The Court went on to say that if the point had been fully argued before the Appeal Court, it would 'in all probability' have given a basis to quash the conviction.

The GMC complaints process

Martin Bell, who was Sally Clark's former MP, had previously lodged a complaint against Dr Williams with the GMC. On that occasion, the GMC had declined to pursue the matter, but it later reinstated the investigation when three more cases came to light which called into question the quality of Dr Williams' evidence. These included a case heard by Chester Crown Court in 2000 where the jury was directed to acquit a mother charged with murdering her baby. In that case, Dr Williams was criticised for changing his evidence.

FSID wants child post-mortems to be conducted only by specialists

Referral to the PPC is the first stage in the investigation of cases of serious professional misconduct. Complaints are heard in private by the Committee, comprising two lay members of the GMC and five medically qualified members. If the PPC decides that further action is warranted, it can ask that the matter be investigated further or refer the case to a public meeting of the Professional Misconduct Committee (PMC). The PMC has wide powers – including that of striking a doctor from the medical roll.

Calls for specialist post-mortems

Calls for the closer regulation of experts continue to be heard, but voices are far from unanimous on the exact controls that can be put in place and how effective these are likely to be. This is particularly so in cases involving children and sudden infant death.

The Foundation for the Study of Sudden Infant Death (FSID) is strongly recommending that only specialist paediatric pathologists carry out post-mortems on infants suspected of having died as a result of abuse. This demand is supported by Professor Anthony Risden of Great Ormond Street Hospital, a leading forensic paediatric pathologist. Professor Risden has expressed his dismay at the press mauling meted out to Dr Williams, but believes that the Clark case underlines the need for stringent, specialist post-mortems when deliberate harm to a child is suspected. Paediatric pathologists are, says Risden, able to do some post-mortems but are often required to do so in tandem with a home office-accredited forensic pathologist. He bemoans the fact that there is such a shortage of specialists. In paediatric histopathology, in particular, there has been a shortage for many years and recruitment has been hit especially hard following the Alder Hey retained organs scandal.

But recruitment has not been the only difficulty caused to pathology by the Alder Hey scandal. Dr Isabella Moore, Chair of the Royal College of Pathologists' Special Advisory Committee on Paediatric Pathology, has reported that there is now a lack of access to a full range of investigations because some coroners are refusing to allow pathologists to retain any tissue samples from dead children. This, she says, puts doctors under undue pressure. Dr Moore points out that the Sally Clark case clearly illustrates the need for ancillary investigators to have access to samples. It is not reasonable for the courts to expect pathologists to offer an opinion on whether a child's death is due to natural or unnatural causes based solely on an external investigation.

Dr Moore further suggests that tissue blocks and slides should be permanently retained and should form part of the child's clinical record, especially in cases where there has been suspected abuse.

Difficult dilemmas for doctors

The dilemmas that confront doctors in these types of case are increasing. The recommendations for hospital doctors made by Lord Laming following the Victoria Climbie enquiry are still being digested. These include the need to keep accurate and comprehensive records, and calls for recorded meetings to be held between doctors when there is a difference of medical diagnosis in cases of suspected deliberate harm. However, doctors are still

struggling to understand and implement the Government's existing complex guidelines on child protection, and many say they are in need of urgent and concise advice.

In his report, Lord Laming makes mention of the fact that many doctors are reluctant to become involved in child protection work, but he offers no real explanation for this. The reasons, we suggest, are not difficult to find. The sort of treatment handed out by the press to professionals and experts who sometimes get it wrong is sufficient to make anyone considering entering this field think long and hard.

Calls for a less confrontational court process

Dame Elizabeth Butler-Sloss has acknowledged the importance of expert medical opinion in cases involving children. As a judge, she realises that, for the expert, the experience can be 'intimidating, time-consuming, confrontational, complex and unpleasant'. Efforts, she says, are being made by judges to address these issues. The courtroom should not be a hostile environment for experts, and they should not feel that cross-examination is an attempt to impugn professional integrity by a personal attack on their credibility.

She quotes the words of Mr Justice Wall in *The Handbook for Expert Witnesses in Children Act Cases*:

> 'The idea that appearances in Court are some kind of gladiatorial combat where the naked doctor armed only with net and trident is torn to pieces by legal lions waving machetes whilst the judge smilingly gives the thumbs down – these ideas ought to have gone'.

No place for scientific debate

However, the high profile of the cases of Sally Clark, Victoria Climbie, Alder Hey and others means that the press spotlight will continue to fall on experts involved in alleged child abuse cases, particularly those relating to sudden infant death. One of the lessons to be learnt from the Clark case is that forensic pathology can be an inexact science. Eight pathologists argued for days over the results of post-mortem tests, each propounding their own opinion on the findings. The Court could not have dispensed with medical evidence; indeed, it was relied upon to a great extent. However, in this case, the medical evidence posed its own problem.

The courtroom is not the place for experts to propound their own pet theories – they should save that for learned journals and for debate with their peers. However, as pointed out by child law expert Allan Levy QC, the whole area of sudden infant death is still 'very much a medical frontier land'. Further research will be needed before there is anything approaching unanimity between specialists. The press, no doubt, will continue to see things in black and white and will expect 100% accuracy in every case.

New horizons

Asbestos

In an effort to reduce asbestos-related deaths, the Government is placing on employers and property owners the duty to manage and assess related risks. For the first time, employers will have a strict legal duty to identify any asbestos-containing materials (ACMs) in their buildings, assess their condition, and draw up an action plan to minimise risk to employees.

Where ACMs are identified as being unstable or otherwise hazardous, re-inspections will have to be carried out at least once every year until all materials have been removed.

The regulations are to be phased in over an 18 month period. Given the huge number of employers and buildings affected, the size of the task is immense. The Health and Safety Executive has estimated that the cost to employers will be approximately £3 billion per year for the next 5 years, and this might be a conservative estimate! The Executive has also suggested that at least 50 new specialist laboratories will have to be created to deal with the testing of materials.

By the time the regulations are fully in force (Spring 2004), there will be hefty penalties for non-compliance, including fines and terms of imprisonment.

Who can do the work?

The identification of ACMs and the assessment of their condition will need to be carried out by trained specialists – typically building surveyors with appropriate experience of surveying for asbestos and other hazardous materials. In some cases, laboratory testing will be necessary. A code of practice will set out which individuals and organisations are licensed to conduct surveys and which contractors are authorised to remove those ACMs in poor condition or that cannot be treated safely or stabilised.

What does the future hold?

Concerns have been expressed that the number of specialists in the field will be too few to meet the expected demand, so opportunities for experts will abound. It is a certainty that the implementation of the Control of Asbestos at Work Regulations 2002 will create an explosion of litigation in all asbestos-related areas.

The detection of asbestos in buildings may lead to a heavy increase in the number of personal injury claims – similar to that seen in America in the 1990s. There will inevitably be an increase in insurance-related work for experts. And litigation is also likely to arise in relation to the surveying, detection and removal of ACMs and the attendant high costs.

For those experts already established, the opportunities and rewards will be substantial. For existing experts and those who will come new to the field, the months ahead will be a time for some vigorous training and marketing.

Resources

More information about the regulations and the Approved Code of Practice are available from the HSE, which has also produced a presenters pack. The presenters pack (ISBN 0-7176-2395-5) costs £25 and can be ordered from HSE Books (Tel: 01787 881165 or online at *http://www.hsebooks.co.uk*).

Experts and privilege

Key points

- ✓ Remember always that legal privilege is a matter for lawyers, not for experts.
- ✓ In civil cases under CPR, experts can rely on CPR 35.10(3) and (4) when treating all material received from the instructing solicitor(s) as having had privilege waived.
- ✓ In criminal cases, the likely effect of an expert disclosing a privileged document in a report is that the report itself will become privileged – thereby preserving privilege but rendering the report impotent.

The various *Codes of Guidance* for experts provide that an expert instructed under Part 35 of the Civil Procedure Rules (CPR) should not be given any information that is legally privileged unless it has been decided that privilege should be waived. It should be safe, therefore, for an expert to assume that any instructions from a lawyer do not contain information for which privilege would be claimed. So are there any circumstances, other than in cases of waiver, when it would be appropriate for an expert to be shown privileged documents?

Expert or advisor?

First, it is important to make the *distinction* between a CPR Part 35 expert and an expert advisor.

An expert instructed under CPR Part 35 will owe a duty to the court to remain *unbiased* and *impartial*, and to assist the court in reaching the right decision. An expert advisor owes no such express duty and will effectively be treated as *belonging* to a party's legal team.

In dealing with a Part 35 expert, there will be a natural dilemma for the instructing lawyer. On the one hand, it would be helpful for the expert to see all the available information to reach a balanced and informed decision. However, any documents shown to the expert will be deemed to be free of privilege, can be referred to in the expert's report and thus can be revealed to an opponent.

Beware documents with conditions attached

There is a difficulty, too, for experts under CPR. How should they react if shown documents that a party thinks they will find useful but for which privilege is still claimed? An invitation to inspect a document with a condition attached – for example, that it should *not* be specifically referred to in the report – should be treated with extreme caution.

There is a real risk that failure to allude to the document in the report will constitute a breach of the expert's duty to the court. That duty includes an obligation to disclose the origin of all 'relevant' materials considered when making the report. Furthermore, the Practice Direction requires experts to provide details of any other 'material which the expert has relied upon in the making of the report' (PD 1.2(2)). Experts must also give a summary of 'facts and instructions given which are material to the opinions expressed in the report…' (PD 1.2.(8)).

Despite appearances, experts should not be overly troubled by such matters. The question of privilege, and the decision as to what should and should not be disclosed to the other side, is for a party's solicitor to decide.

So a Part 35 expert should not keep anything back from the court. If shown something that carried a request for secrecy, then the expert's report should, at the very least, contain a statement of that fact on the grounds that the instruction itself formed part of the relevant material considered, even if the document was not expressly referred to in the report.

Converting from advisor to Part 35 expert

It is not uncommon (usually out of considerations of cost and time) for an expert who has acted as an expert advisor to one party later being instructed by both sides as a single joint expert (SJE). What is the position with regards privileged information to which the expert had formerly had access?

On a strict application of the Practice Direction, such experts will still be required to refer to any relevant material or instruction received or considered when preparing their report. For this reason, there could be real dangers and difficulties for both the parties and the expert in advisors accepting instructions to act as an SJE.

The position in criminal cases

The position in criminal law is very different. Where section 10(1) of the Police and Criminal Evidence Act 1984 applies to an expert's opinion obtained at the request of a party to litigation, and where that opinion is based on privileged information, the opinion itself will be privileged.

In *R -v- Keith Davies (2002) EWCA Crim* 85 the defendant was charged with murder and he raised the defence of diminished responsibility. The trial judge ordered the defence to disclose to the prosecution a consultant psychiatrist's report. The report opined that the defendant had been suffering from an abnormality of the mind at the time of the offence but that this had not substantially diminished his responsibility.

The judge ruled that the report itself was a privileged communication between the psychiatrist and the defence, obtained for the purpose of conducting Mr Davies's defence. He considered, however, that it was admissible to call the psychiatrist as an expert witness in his own right on the grounds that his independent evidence was not privileged as it arose out of a doctor/patient relationship which could be properly divulged and admitted in evidence.

Mr Davies appealed on the grounds that the trial judge had been wrong to effectively order the disclosure of the report and that the defendant was entitled to object to the psychiatrist giving evidence as he had been instructed in circumstances of privilege within the meaning of section 10(1) of the Police and Criminal Evidence Act 1984, i.e. the communication had been in connection with or in contemplation of legal proceedings.

The Court of Appeal allowed Mr Davies's appeal. It accepted that the original purpose of the meeting between the psychiatrist and the defendant had been to enable the psychiatrist to form an opinion of Mr Davies's mental state for the purposes of a criminal defence. It was held that because the opinion was inextricably dependent on privileged material, the opinion was, itself, privileged.

Address
J S Publications
PO Box 505
Newmarket
Suffolk
CB8 7TF
UK

DX 50519 Newmarket

Telephone
+44 (0)1638 561590

Facsimile
+44 (0)1638 560924

e-mail
yw@jspubs.com

Web site
http://www.jspubs.com

Editor
Dr Christopher F Pamplin

Staff writer
Philip Owen