Your Witness

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

Revalidation and the medical expert witness

The General Medical Council's publication '*A Licence to Practise and Revalidation*' has been a cause for concern amongst medics, whether in clinical practise or retired, because it does not make the position of medico-legal reportage entirely clear. The question is, do medics need to be licensed to act as expert witnesses?

Based in part on comments made in October 2001 by David Skinner, Head of Regulation and Policy at the GMC, I have understood the position to be as follows: it is GMC policy that expert witness work falls outside the scope of the revalidation process. Mr Skinner said that it is the responsibility of the court to decide whether or not an individual is competent to act as an expert witness.

Indeed, it seems self-evident that, with the stated purpose of the GMC Register and revalidation being:

> *'... to modernise the model of regulation led by the profession, in partnership with the public. The GMC want the new system to increase confidence in the Register. They aim to ensure that doctors are up to date and fit to practise medicine throughout their careers.' [taken from the GMC web site; the emphasis is mine]*

and there being no such medical specialty as *expert witness*, the position could hardly be otherwise.

I find it interesting to compare the situation with that of doctors who give media interviews: there is no medical speciality of *media commentator*, and therefore the GMC would not seek to licence doctors to speak to the BBC.

So, to confirm that the GMC position has not changed, I wrote to Kevin Gwilt, Senior Policy Advisor at the Registration Directorate of the GMC, who replied:

> *'I can confirm that [the GMC] takes the view that it is for the courts, and for the solicitors who instruct expert witnesses, to decide on whether medical experts need to be revalidated.'*

I have to say, I find Mr Skinner's turn of phrase rather more clear! But, on the basis that the GMC accepts that it is for the courts to decide who can appear before them as an expert witness, there is no requirement for retired medics to go through revalidation and obtain a licence in order to offer their services as expert witnesses.

Lawyer fees

Following the publication of our most recent expert witness survey (see *Your Witness 33*), I received a request for information on how the expert witness charging rates compare with the fees charged by lawyers. So, for the sake of comparison, I have prepared the following summary table from the wealth of information on such matters contained on the Chambers and Partners web site.

	Partners hourly rates		
	Low	**Average**	**High**
London	£250	£350	£425
Bristol	£120	£170	£185
Birmingham	£195	£210	£220
Manchester	£140	£165	£200
Leeds	£125	£150	£200
Edinburgh	£125	£140	£165
Glasgow	£150	£160	£200

Source: http://www.chambersandpartners.com

Choose your interest

I am indebted to one of our readers, Dr Nigel Cogger, for reminding me that there is potential for confusion over the rate to be used when calculating interest on late payments. In our piece on Getting Paid in the last issue of *Your Witness*, we referred to both the *Late Payments of Commercial Debts (Interest) Act 1998* (LPCD) and the provisions under section 69 of the *County Courts Act 1984* (CCA). These Acts provide for different rates of interest.

The LPCD provides for interest at 8% **above** the current Bank of England dealing rate (the 'reference rate') at the time the debt arose. So, if the reference rate is 4% you are entitled to charge interest at 12%. In contrast, the CCA provides for interest to be charged **at the rate of** 8%.

It is prudent, therefore, to include in your written terms of engagement a paragraph dealing with interest on late payments that refers explicitly to the provisions of the *Late Payments of Commercial Debts (Interest) Act 1998*.

New edition underway

We have begun preparations for the new edition of the *Register*. We will be sending you a draft of your entry for inclusion in the 17th edition in early January for you to check, sign and return. If you will be away during the first half of January you may wish to contact us beforehand so we can make arrangements to send your draft ahead of time. Meanwhile, everyone here at the *Register* sends their best wishes for a happy Christmas and prosperous New Year.

Chris Pamplin

Inside

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Court reports

CPR does not impose a limit of one expert per issue

The freedom to instruct

When does the need for the parties to be on an equal footing as regards expert evidence override considerations of cost and delay?

Part 35.1 of the Civil Procedure Rules (CPR) deals with the court's duty to restrict expert evidence. According to the rule, expert evidence shall be restricted to that which is reasonably required to resolve the proceedings. The Practice Direction to Part 35 states that the rule is intended to limit the use of oral expert evidence to that which is reasonably required. In addition, where possible, matters requiring expert evidence should be dealt with by a single expert. Permission of the court is always required either to call an expert or to put an expert's report in evidence. Frequently, the court will interpret this duty as requiring that the number of independent experts, save in exceptional circumstances, shall be limited to one, and will not allow a party to call evidence from additional experts where this would delay trial or lead to additional expense.

Court seeks to limit the number of experts

In *S -v- Chesterfield and North Derbyshire Royal Hospital NHS Trust* (CA 25 July 2003), the claimant sought substantial damages for clinical negligence against a hospital obstetrician. The court at first instance ordered that the number of expert witnesses (in relation to the duty and standard of care) should be limited to one. This was to be in addition to the evidence of a registrar and a consultant from the same hospital, who were permitted to give an opinion on what was to be expected of a reasonable obstetrician with equivalent qualifications and experience. The claimant was refused permission to bring evidence from another independent expert on the grounds that this would delay trial and cause an additional expense to the parties.

Court of Appeal disagrees

On appeal, the trial judge's decision was overturned. There was nothing contained in the CPR, said the Court of Appeal, that required the court to limit the number of experts to one. The claimant was seeking damages of ~£1.5 million, and the issues involved were complex. The proceedings necessitated an inquiry of the reasonable standard of care to be expected of obstetricians, and the overriding objective of the CPR required the parties to be on an equal footing. Accordingly, there should not have been a mechanical application of CPR 35.1.

A discarded expert's report becomes public property

The discarded expert

When a party loses confidence in the expert and seeks leave to instruct a replacement, to what extent can privilege be claimed in relation to disclosure of the first expert's report?

The Court of Appeal considered just such a question in *Beck -v- Ministry of Defence* (2003) *EWCA Civ* 1043; *The Times*, 21 July 2003. Mr Beck sought damages against the MoD on the alleged grounds that psychiatric treatment had exacerbated a pre-existing condition. The defence instructed an expert psychiatrist but, following his examination of the claimant, lost confidence in him because they considered he had insufficient knowledge of the MoD's psychiatric procedures and referral system. Mr Beck declined to be re-examined and it was necessary for the defence to make application to the court for leave to instruct a fresh expert.

'I can see that it would be acutely embarrassing to have to denigrate one's expert's report in order to explain why confidence in him has been lost'

Court orders disclosure of discarded report

In considering the application, the lower court ordered that the defence must disclose the first expert's report. The court considered this to be necessary in order to explain how and why confidence had been lost. This placed the MoD in an extremely difficult and embarrassing position. They argued that every critical point they might make in relation to the report would then be available to the claimant in the event the application was refused and they were forced to rely on the first statement. Their claim to privilege was refused and the MoD appealed.

Court of Appeal upholds the decision

On appeal, Lord Justice Ward upheld the decision of the lower court. Expert shopping, he said, was to be discouraged. To prevent the possibility of abuse, it was right that a discarded expert's report should be disclosed as a condition of seeking a new one. In delivering his decision, he said:

> *'I can see that it would be acutely embarrassing to have to denigrate one's expert's report in order to explain why confidence in him has been lost, only then to find that the application to replace him fails, so forcing the dissatisfied party either to call him when all those criticisms are bound to be thrown back in his face or, if one cannot risk his being thus discredited, to go into battle without any expert opinion… .'*

He did not think, however, that this amounted to sufficient reason for withholding the first expert's report.

The potential for scoring own-goals

This decision creates a dilemma for parties who wish to discard their expert and seek a new one. The first expert's report, having been disclosed, becomes public property to which no privilege can attach. There is, of course, no property in a witness, and nothing to prevent an opponent

from making use of an expert's report the other side has discarded (CPR Part 35, rule 11). Furthermore, in applying for permission to instruct a new expert, a party will be potentially handing ammunition to their opponent by highlighting any deficiencies in that report. If, as a result of the failure of their application, the party is later forced into relying on the original report, the opponent has only to point to the other party's own criticisms to discredit it. Whether this is an own goal or a blatant violation of the offside rule is open to debate!

Letters of joint instruction

There is no rule that a party shall be bound by the instruction to a joint expert given by the other side.

In *Neil Edward Yorke -v- Antoine Katra* (2003) *EWCA Civ* 867, the court was called upon to decide a curious appeal in relation to a letter of joint instruction to an expert. The claimant had issued proceedings to recover from Mr Katra the sum of £2,789.63 for building work, the quality of which was in dispute. The parties had decided to instruct a joint expert, and the district judge stayed the proceedings to allow time for such instructions to be given.

Defendant defies DJ direction to sign...

The parties had difficulty agreeing the terms of the instructions, and the district judge accordingly ordered Mr Katra to sign the letter of joint instruction prepared by the claimant. Mr Katra signed the letter but deleted from it two sentences relating to the case background.

... so DJ strikes out the defence

The district judge, upon being informed of the defendant's non-compliance with her earlier order, struck out the defence and counterclaim. The defendant's application to another district judge to set aside the striking out order was refused, and he applied to HH Judge Hull QC to challenge that decision. Judge Hull rejected Mr Katra's application without a hearing on the basis that Mr Katra had plainly refused to comply with the district judge's order.

Court of Appeal says joint letter not required

On appeal, the defendant argued that the district judge's order overlooked the provisions of CPR 35.8 in respect of procedures for the instruction of joint experts.

CPR 35.8(1) states that where the court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert. It was held by the Court of Appeal that the district judge did not appear to have had jurisdiction to insist on a joint letter of instruction to the joint expert in view of the ability provided by CPR 35.8 for each party to give separate instructions. There was no rule that a party should be bound by the instruction to a joint expert given by the other side.

Philip Owen

From the ewire

The October 2003 issue of the ewire carried a piece entitled *A solicitor's personal responsibility for expert fees.* This reminded experts that solicitors have a personal responsibility for the payment of expert fees. The following exchanges were prompted which serve to amplify a couple of important points.

Expert A: *Solicitors being responsible for fees come what may is fine, except nearly every time a solicitor asks me to act he also asks me to confirm my appointment by sending my terms of engagement to the client. I then have to render my accounts to the client, even though the sums generated are a result of the solicitor's instructions. This can jack up the bills considerably and sometimes the client objects since he did not give the instructions or give prior authority. The latter is almost impossible anyway, in the ongoing flurries to and fro between the solicitor and myself when the case is active. What is my legal position in such a circumstance?*

JSP: There is always the option for the solicitor to ask you to contract with the client direct. In agreeing to this you face the downside that you lose the 'benefit' of the solicitor's professional obligations (many of which are more onerous than those provided for under common law).

Of course, you don't have to agree to the request, and could insist on the contract being between you and the solicitor. Alternatively, you might agree to the contract being with the client, but require payments on account. A modification of this approach may be to let the client know that you would, however, be happy to extend credit if the solicitor were the one entering into the contract. It all boils down to a commercial decision about how much you trust the other party to your contract.

Expert A: *You are so right! The solicitors would rather go anywhere than enter into a direct contract. It seems to me the legal profession is starting to twig their responsibilities and solicitors are trying to ensure they minimise them.*

Expert B: *Is the solicitor still personally responsible for an expert's fee if the instructions have been sent via an agency? In other words, is there any point in pursuing a solicitor for fees if the agency is slow in paying (or worse, has gone bust)?*

JSP: Almost certainly not. It all boils down to who you contracted with. It is pretty unlikely that you entered into a contract with the instructing solicitor when working for a medico-legal middleman agency. This is one reason why many experts are very cautious about allowing agencies to run up even moderate levels of credit.

Agencies are not regulated like lawyers, and so there is no-one to carry that personal responsibility for your fee. So, when an agency goes bust, which history shows us is all too common, it is the experts who get left carrying the financial can!

A contract with the client lets solicitors off the hook!

Medico-legal agencies offer no fee protection

Getting paid II – when in dispute

Small claims track suitable for DIY litigant...

In *Your Witness 33* we looked at what experts can do to minimise the risk of late payment or non-payment of their fees. We advised on simple procedures for issuing small claims in the county court and obtaining default judgment. Here we examine what happens if a defence is filed, and offer a self-help guide to contested proceedings.

The small claims track

For the purposes of this article we shall assume that the debt for which proceedings have been issued is not greater than £5,000. Disputes involving larger sums are, subject to certain exceptions, unlikely to be dealt with in the county court small claims track. (In such higher value cases, the court procedures to be followed are more complex and a litigant in person is likely to be at a significant disadvantage. An attempt at 'do-it-yourself' litigation in the county court fast track or multi-track would, we suggest, be a false economy, unless you have substantial knowledge of civil court procedures coupled with sound advocacy skills and an unflappable disposition!)

A defence is filed

Where a defence is filed within the time permitted, the court will automatically send a copy to you. We advise that the contents of the defence should be checked carefully. Its form and content are governed by CPR Part 16.5. This provides, amongst other things, that the defendant must state which of the allegations in the particulars of claim:

- are denied
- are neither admitted nor denied
- you are required to prove, and
- are admitted.

Note, in particular, the following:

- If the defendant denies an allegation, then the reasons for so doing must be stated.
- If the defendant intends to put forward a different version of events from that given by you, then this new version must be stated.
- A defendant who fails to deal specifically with an allegation but whose defence otherwise sets out the nature of his or her case in relation to that issue to which the allegation is relevant will normally require that the allegation be proved.
- Specifically, in relation to money claims, a defendant shall require that any allegation relating to the amount of money claimed be proved, unless the allegation is expressly admitted (CPR 16.5(4)).

Save where mentioned above, a defendant who fails to deal with an allegation shall be deemed to admit that allegation.

... but is often a false economy in bigger cases

Establish what is actually in dispute

You (the claimant) should establish which parts of the claim are in dispute, if not all. This will serve to narrow the issues, thus saving time and costs. It may also, in some circumstances, enable you to ask the court to enter judgment for the proportion of the claim that has been admitted. There is a section attached to the Notice of Issue which can be completed and returned to the court when requesting judgment on an admission or an admission of part.

No reply to a defence required...

There is no need to file a reply to a defence. Indeed, if you do not file a reply to the defence, it will not be taken that you admit the matters raised. You may, however, wish to consider filing a reply if completely new issues have been raised. You should bear in mind, though, that pleadings and statements of case are intended as fairly bald statements of the facts and issues involved. They are not an appropriate place for statements of evidence – keep that for your witness statement or deal with documentary evidence at the disclosure stage.

... but you must reply to any counterclaim

However, it is important to distinguish between a defence and a counterclaim (Part 20 claim). If the defence refers specifically to a counterclaim or otherwise contains a claim against you (e.g. for breach of contract or negligence) and indicates that damages or some other remedy is sought, you must file a defence to the counterclaim. This should ideally be done as a combined 'reply to defence and defence to Part 20 claim'. The same rules of thumb apply to the drafting of this document as to the defence (see above). If in doubt, deal with each paragraph or point contained in the defence and counterclaim, saying whether each is admitted or denied. If you are not sure whether a fact is correct or incorrect, simply say it is 'not admitted'. The defendant will then be required to prove that fact by evidence. Care should be taken when admitting any fact as, save in exceptional circumstances, you will not be allowed to withdraw that admission later.

Consider summary judgment

If, upon reading the defence, it is clear that no proper grounds for defending the claim have been revealed, or if the matters pleaded are so flimsy and ludicrous that they amount to no defence at all, you should consider whether to make application to the court for summary judgment. This is a way of short circuiting the more lengthy court procedures and going straight to a hearing. Application can be made in Form N244.

You need to set out why the defence fails to reveal any adequate grounds, and conclude with a statement that the defendant has no real prospect of successfully defending the claim. Bear in mind that the court will not hear lengthy submissions on the evidence at a Part 24 hearing. The only questions to be considered will be whether the defendant has succeeded in raising a

triable defence. Accordingly, if reasonable issues have been raised that need to be proved or disproved by evidence, the court is unlikely to grant a summary judgment application. This route should, then, be used sensibly and sparingly. You might think the defence is frivolous and without any merit, but if the court does not agree with you, there is a danger of a costs order being made against you.

The allocation questionnaire

Once the defence has been filed, the court will deal with the allocation of the claim to one of the three county court tracks. An allocation questionnaire (N150) will be sent to each party. Replies to these will enable the court to decide which track will be most suitable and the directions likely to be needed.

The allocation questionnaire will ask you whether you wish to seek a stay of proceedings in which to try to settle the dispute. If either party asks for this, the court will usually allow 1 month for negotiations to take place. Whether negotiations are likely to be successful will, of course, depend on the facts of each case, the character of the parties and the nature of the dispute. It is also possible that one side or the other might suggest that formal mediation be explored as a possible means of resolving the dispute. If this is offered, a party refuses it at their peril. The courts are keen that alternative dispute resolution (ADR) should lighten their load. Consequently, if an offer to mediate is unreasonably refused, the court might later penalise the refusing party by awarding costs against them, even if they substantially succeed at trial.

The questionnaire will also seek to establish:

- the value of the claim
- the amount in dispute
- whether the parties have observed the protocols applicable to the type of proceedings
- whether the parties have exchanged information with each other that might help to resolve the dispute.

It will then go on to deal with:

- the identity and number of witnesses to fact
- whether expert evidence is likely to be required and, if so, whether any expert has been agreed or a report obtained
- the availability dates of witnesses
- other matters relevant to the timetable.

You will also be asked to give an estimate for the length of the final hearing, but bear in mind that the majority of small claims are dealt with in 3 hours or less. The court will not, in any event, allow longer than 1 day. You will also be asked to give an estimate of costs. If the claim is to be allocated to the small claims track, however, there is no need to complete this part.

You are your own witness!

The answers to these questions are, for the most part, straightforward. One aspect that might confuse the layman, however, is the section dealing with witnesses. Remember, you, too, are a witness, and in many cases you will be your only or principal witness. Accordingly, you will need to name yourself in this section. If you are not intending to call anyone else, simply state that you will be a witness to 'all facts in dispute'. Be wary of calling additional witnesses unless they have something significant to contribute. The court will not thank you for calling an endless succession of witnesses to the same facts because this is wasteful of court time and costs the parties. The judge may, in any event, restrict the number of witnesses a party may call.

You will often be your own witness

When filling in the questionnaire the parties will be invited to consider which court track is most suitable for their case. In claims less than £5,000, the most appropriate track will be the small claims track. An exception to this will be if there are difficult questions of law or fact to be decided. Bear in mind that allocation to the small claims track will have important costs consequences. These will be discussed in the next installment of this article. For the moment, though, suffice it to say that the ability of a party to recover anything other than fixed costs in the small claims track is extremely limited.

If you are intending to make any application to the court in the immediate future (e.g. for summary judgment, for leave to amend your claim or for further information in relation to the defence), there is a section in the questionnaire that allows you to give such information here. You may also, if you wish, attach a list of suggested directions that the court is invited to make. Consider doing this where the steps to be taken are unlikely to be covered by standard directions.

When you receive the allocation questionnaire you will be informed of the last day for filing. The form must be returned to the court no later than that date. As the claimant, you will normally have to file with this a court fee of £80. The allocation fee may, however, be waived in some circumstances, and is not payable in cases involving claims of less than £1,000.

The court may hold an allocation hearing if it thinks it is necessary, but where the case is obviously suitable for the small claims track, and neither party has suggested an alternative track, the allocation will usually be made without a hearing and automatic directions given.

All documents to be disclosed 14 days before the hearing

Automatic directions will make provision for each party to, at least 14 days before the date fixed for the final hearing, file and serve on every other party copies of all documents (including any expert's report) on which they intend to rely at the hearing. Provision can also be made for witness statements to be exchanged simultaneously by a fixed date.

A preliminary hearing will not always be held

If a party fails to file an allocation questionnaire, the court may give any direction it considers appropriate. The consequences of failing to file an allocation questionnaire within the time specified by Form N150 will usually be that the judge will order that, unless an allocation questionnaire is filed within 3 days from service of that order, the claim and any counterclaim will be struck out.

Preliminary hearing

The court may hold a preliminary hearing for the consideration of the claim, but only:

- where it considers that special directions, as defined in CPR Rule 27.4, are needed to ensure a fair hearing, and
- where it appears necessary for a party to attend court to ensure that he or she understands what must be done to comply with the special directions, or
- to enable the court to dispose of the claim on the basis that one or other of the parties has no real prospect of success at a final hearing, or
- to enable it to strike out a statement of case, or part of a statement of case, on the basis that the statement of case, or the part to be struck out, discloses no reasonable grounds for bringing or defending the claim.

If the court decides to hold a preliminary hearing, it will give the parties at least 14 days' notice. In theory, the court may treat the preliminary hearing as the final hearing of the claim, provided all the parties agree. In practice, however, this rarely happens.

At, or after, the preliminary hearing the court will:

- fix the date of the final hearing (if it has not been fixed already)
- give the parties at least 21 days' notice of the date fixed, unless the parties agree to accept less notice
- inform the parties of the amount of time allowed for the final hearing
- give any appropriate directions.

When preparing your case for final hearing, you should keep in mind that you will not be permitted to ambush your opponent or take them by surprise by producing documents or evidence not disclosed previously.

Relaxed rules on disclosure in small claims track

The rules relating to the disclosure of documents are not so stringent in the small claims track as they are in the other tracks. For example, formal disclosure statements verified by statements of truth are not normally required. It is sufficient to simply send copies of all relevant documents to your opponent within the time specified by the court. The court expects that you will be candid and open, however, and the disclosure process should, within bounds of proportionality, include all relevant documents. That means documents that may support your opponent's case, as well as those that support yours. Besides, failure to make full disclosure will almost certainly be met by an application for the disclosure of specific documents.

Beware of breaching privilege

You should not, however, disclose documents that are privileged. These would include such things as draft pleadings and witness statements, 'without prejudice' correspondence in which you attempted to negotiate a settlement of the claim, correspondence with legal advisors or any other documents coming into being for the purpose of the litigation or in contemplation of it.

Witness statements

If a direction has been given for witness statements to be prepared and exchanged, these should be drafted succinctly and accurately. You should tell the story in a lucid, ordered way, sticking to the facts and the issues in dispute. Hearsay evidence is now permitted in witness statements, but the court will probably attach less weight to this than it will in relation to evidence within the witness's own knowledge. Documents can be exhibited and attached to the statement, but make sure you identify these by reference and number in the text. These can commonly be referred to by your initials followed by a number (e.g. 'A.B.1'). The statement must conclude with a declaration that the statement is true.

The procedures laid down in CPR Part 27 for the preparation of the case and the conduct of the hearing are designed to make it possible for a litigant to conduct the case without legal representation, if it is so wished. Consequently, the normal rules of strict procedure and evidence are intended to be relaxed. However, in many cases, experts using the small claims track will be seeking to recover debts owed by solicitors, who will usually have at their command all the resources of a law firm and a greater knowledge of court procedure. If you are acting as a litigant in person, they will, undoubtedly, try to catch you out with procedural points.

Make things easier for yourself by reading very carefully any notices or orders received from the court, and ensure that you comply with all directions and deadlines. You will find that the majority of district judges are patient and forgiving with litigants in person in the small claims track, and will do what they can to ensure that the parties are on an equal footing.

So far as the hearing itself is concerned, you will either have or not have the advocacy skills with which to present your case effectively. These can, to some extent, be acquired, and much can be achieved by following simple, practical steps. We will offer some tips and directions for would-be advocates in the next installment of this series.

Copies of all relevant court forms can be found on *The Court Service* website at *www.courtservice.gov.uk/cms/3516.htm*.

Copyright for experts

The question of copyright is a perennial favourite on the *Register* Helpline. The topic presents, of course, two aspects to experts:

1) When does copyright protect the results of work done by an expert witness?

and

2) When can an expert use copyrighted material (such as maps, diagrams and reference texts, etc.) in a report without breaching the rules?

What follows is a detailed summary of the law of copyright in the UK as it exists after the passing of the *Copyright and Related Rights Regulations*, which came into force on 31 October 2003. This is designed to give experts an insight into how copyright arises, what protection it affords the creator of a work and in what circumstances expert witnesses can claim exemptions for actions that would otherwise be classed as breaches of copyright.

Copyright in the UK

United Kingdom copyright law is statute based, the major provisions being contained in the Copyright, Designs and Patents Act 1988, as amended. In this country there is no need to register copyright. This arises automatically and confers the right on the copyright owner to exploit certain types of material, to control the use by others without the owner's consent and to licence activities in relation to it.

Copyright is a national right, and to acquire copyrights in the UK the author of the work is required to be a 'qualifying person' within the definition in s.154 of the Act. That means that they must be domiciled in the UK or the work must have been first published here. It was largely because of the spread of e-commerce and mass access to electronically stored data that the EC decided to harmonise the copyright laws of Member States and to impose the same controls and restrictions throughout Europe.

Types of material

The 1988 Act classifies different types of material capable of attracting copyrights. If you are engaged in the use or copying of such material, you must first consider whether it is material covered by the provisions of the Act. These are:

- Original Literary Works – the Act gives this a very wide definition, and the words 'literary work' are used to describe any work expressed in print or writing, irrespective of whether it has any excellence of quality or style (*University of London Press -v- University Tutorial Press [1916] 2CH* 601)
- Original Dramatic Works, i.e. a work of action capable of being performed before an audience
- Original Musical Works
- Original Artistic Works – again, these words are widely defined and include graphic works (paintings, drawings, diagrams, maps, charts, plans, etc.), photographs, sculpture or collage, regardless of whether these works have any artistic merit or quality
- Derivative Works – these include sound recordings, films, broadcasts and cable programmes.

If the work falls into one of these categories, it must also be an original work in order for copyright to subsist. The test for originality is not, however, very onerous. Provided the work originated from the author and has not been copied from anything else, it will be deemed original. Databases pose a particular problem, however, and the test for originality in such cases is higher.

Lastly, the work must have been recorded in some way, whether in writing or otherwise. Copyright cannot exist unless it has been 'fixed' in this way. Consequently, there can be no copyright of an idea or spoken word (such as a speech or lecture), unless fixation has occurred.

As a general rule, if you are working with any written materials, documents, maps, diagrams or photographs, you will have to assume that they are works protected by copyright. They need not be academic or worthy. Indeed, the courts have ruled that such things as competition coupons and instruction labels are just as capable of attracting copyright (*Ladbroke -v- William Hill [1964] 1 All ER* 465).

Copyright arises automatically on original work

How long does copyright last?

If you are satisfied that the materials you are working with are qualifying works, you should then consider the question of duration.

Copyright will expire after a certain time has elapsed. The relevant periods are:

- for literary, artistic, dramatic and musical works: 70 years from the death of the author
- for computer generated work: 50 years from the date it was made
- for films: 70 years from the death of the director, author, dialogue writer or composer of the sound track (whichever dies last) or, if there are no such persons, 50 years from the date the film was made
- for sound recordings: 50 years from the date of first release or, if not released, 50 years from the date it was made.

If you are working with materials not produced in one of the EU Member States (or the author of the work is not an EU national), the duration of the copyright will be subject to the laws of the country in which it was produced, provided this does not exceed the periods stated above.

Having established that the materials attract copyright and the copyright is subsisting, you will need to consider whether your intended use is likely to breach the author's rights. There are several ways in which copyright can be infringed. We anticipate, however, that the majority of expert witnesses will be concerned mainly with acts of copying.

Expert witnesses still enjoy their s.45 exemption

Factsheet Update

We have now completed our thorough review of all the Factsheets. We have made revisions to Factsheets 2, 11, 14, 21, 28, 35, 41, 42 and 43.

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

Call us on (01638) 561590 for details.

Infringing copyright through copying

S.16 of the 1988 Act provides that copying is a primary infringement if carried out without the copyright owner's permission. Copying means reproducing the work in any material form (s.17(2)), including storing the work in any medium by electronic means, whether the copying is temporary or permanent. The copying must reproduce a substantial part of the copyright work. This is not simply a question of quantity, but is a qualitative test and depends on the importance of what has been reproduced (*Designers Guild -v- Russell Williams [2001] 1 All ER* 700). Accordingly, it is possible to infringe copyright when copying a very small proportion of a complete work if that part forms part of the originality of the work.

'Fair dealing' and the expert witness

The 1988 Act laid down a number of uses to which copyright works could legitimately be put without infringing copyright. These permitted acts are contained in ss.28–76. If the use amounts to 'fair dealing' for one of the purposes permitted by those sections of the Act, copyright is not breached. One of the main provisions affecting expert witnesses was contained in s.29 which permitted fair dealing with work for the purposes of research or private study. Prior to implementation of the new regulations, an expert wishing to make a single copy of a short extract from any book, journal or newspaper for the purposes of research was usually able to do so under the exception to copyright in section 29. It was also possible to ask a librarian in a not-for-profit library to supply a copy under related exceptions in sections 38, 39 and 43 of the Act, upon signing a declaration confirming the purpose of the copying.

Following the passing of the new regulations in October, s.29 is amended with the effect that the permitted uses and fair dealing provisions must exclude copying that is for research for a commercial purpose. Most experts do, of course, prepare their reports for a commercial purpose. When not working as an expert witness, the expert will need a licence to make copies of documents for the purpose of research or study. Even limited copying by not-for-profit organisations will fall outside the scope of the exceptions where the copying is in connection with research for a commercial purpose.

Judicial proceedings exemption remains

Thankfully, however, the new regulations do not interfere with the most important exemption of relevance to expert witnesses. Section 45 of the 1988 Act states that:

> *45(1) Copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings.*
>
> *(2) Copyright is not infringed by anything done for the purposes of reporting such proceedings; but this shall not be construed as authorising the copying of a work which is itself a published report of the proceedings.*

In *Your Witness 26*, and elsewhere, we reported on the confusion that seemed to exist both at the Lord Chancellor's Department and the British Library concerning this most important exemption. Now that the regulations are in place, following a lengthy period of consultation and delay, it is clear that there is nothing in them that is going to affect s.45(1).

Accordingly, when ordering copies of research papers from the British Library or other copyright library, experts will **not** have to pay a fee provided they make it clear that the copy is required for the purposes of a report for use in judicial proceedings.

No doubt confusion will continue to reign in some quarters, and we would welcome feedback from readers on any difficulties encountered.

A negative example

A case in point is the question on who owns the copyright on photographic negatives created during the course of writing a report. Our correspondent wondered:

> *'I have recently been instructed to photograph a locus and, after the assignment started, was asked to send the negatives with the developed prints to my instructing solicitor. (I had not been asked this when initially instructed.)*
>
> *'My view is that the negatives, like anything else produced by the skill of the user, are the property of the expert and, unless agreed to previously, no one else has the right to demand them.'*

The answer to this very much depends on the terms of any contract between the expert and the solicitor. However, subject to any provisions to the contrary, materials created and produced by an expert in the course of preparing a report will normally belong to the expert, and this would include the negatives for any photographs. The solicitor will, of course, have paid for the report and be entitled to receive it and any supporting documents. In some respects this will be analogous to a solicitor and the client, where the file is the property of the client but the solicitor's notes, internal memos and research materials, etc., will belong to the solicitor.

Who owns the copyright will come down to a question of contract, whether expressed or implied. And if implied, it would normally be the creator of the work who enjoys copyright over it.

Thus, the negatives will, in all likelihood, belong to the expert, and there can be no automatic requirement to hand them over. There is, however, no reason why the expert should not negotiate terms for these which would include the payment of a fee.

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