Your Witness

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

Perhaps the most important feature of the *UK Register of Expert Witnesses* is the vetting we have undertaken since the product's inception way back in 1988. Indeed, my many conversations with lawyers have highlighted the importance they place on knowing that listed experts are vetted. But I've never been under any illusion about the unsophisticated nature of the vetting itself. (You may recall that this involves us obtaining a couple of references from lawyers who have actually instructed the applicant.)

So we've decided that all experts should be offered **revetting**. The results of the vetting process will be published in the directory, in the software and on-line. Further details are outlined below, together with information relating to other opportunities you have to improve the portrayal of your professional profile.

New 2004 revetting

It's easy for us to show the vetting date of an expert, and it's useful for lawyers to gain an appreciation of:

- how recently the vetting was undertaken
- the number of recommendations received.

So we're going to publish the 'last vetted' date in the next printed *Register*, and from August 2004 will include a vetting date for various aspects of an expert's role in both the electronic editions. We'll also display the total number of positive recommendations gained by each expert. Please see the enclosed **Revetting Form** for details.

For many listed experts, current vetting dates will be some time in the 1990s, before the introduction of the Civil Procedure Rules. To show a more recent vetted date, and to amass a number of positive recommendations, do please complete the enclosed sheet or apply on-line by following the *Revetting* link from our home page.

You'll appreciate that the revetting process will involve us in significant amounts of additional work. Accordingly, there's a charge of £40 + VAT per five named referees. Many experts prefer to check that their potential referees are willing to act as such before putting their names forward. We would encourage you to adopt this approach.

Revetting: the benefits

- You'll be able to demonstrate **recent approval** of your work by lawyers.
- Recommendations will be sought in the various aspects of expert witness work. So you'll be able to **demonstrate your range of experience** in the different arenas.
- A recent date will **give an instructing lawyer peace of mind** that this expert has been recommended very recently.
- A recent date will show lawyers that the expert **is willing to be the subject of regular scrutiny** from instructing lawyers.
- A running total of positive recommendations will **give the lawyer more information** to weigh into the equation when deciding who to instruct in a particular case.

Date-stamped logo – FREE!

Successfully revetted experts will be able to download a special 2004 date-stamped logo. The present undated logo will still be available to all experts in the current edition of the *Register*.

CVs on-line – FREE!

Requests for CVs have grown steadily in recent years, so now we are making them accessible on-line. The huge variety in style and formatting has persuaded us that CVs should be made available in one of two ways:

- in Adobe Acrobat format (i.e. a .PDF file)
- via a link to a web page containing your CV.

To lodge your CV against your on-line entry:

- e-mail it in .PDF format to **cv@jspubs.com**, *or*
- e-mail the web address of your on-line CV.

There are other chargeable options for getting your CV on-line, including us converting your wordprocessing file. Please contact the office on (01638) 561590 for guidance or visit our web site. We're also happy to accept Profiles as .PDF files.

Put your face to your name – FREE!

For some time now you've been able to send us a portrait photograph for on-line display next to your entry details. To submit a photo, simply:

- mail a photograph to us, with your name and 'U' reference number written on the back, *or*
- e-mail a JPEG file to us, together with relevant contact details, *or*
- send us instructions of how to find your image on-line and we'll retrieve and post it next to your *Register* details.

Display your company logo on-line

We've redesigned the experts' details page on our web site to enable corporate logos to be shown. A logo can be displayed against one entry at a one-off cost (i.e. the cost doesn't recur annually) of £50 + VAT (considerable discounts apply to multiple entries). Simply:

- mail your logo to us on paper and we'll scan it into our system, *or*
- e-mail a JPEG file of the logo to us, *or*
- send us instructions of how to find your logo on-line (e.g. on your web site), and we'll retrieve and post it next to your details.

Chris Pamplin

Inside

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Case digest

No one expects a judicial inquisition!

Judge must not question experts, unless in clarification

In criminal cases the trial judge should refrain from asking the expert witness questions during the trial. But if the judge does, will this render a conviction unsafe?

The Court of Appeal considered just this in *R -v- Brian Thomas Bowden* (2004; EWCA Crim 106). Mr Bowden appealed against his conviction for armed robbery and possessing a firearm with intent. The facts relating to the attempted robbery at a post office were not in dispute. The only question for the court was whether the defendant had taken part in the robbery.

The prosecution relied on evidence that, they said, linked Mr Bowden to the offence. This included a balaclava found in his drawer, which contained particles consistent with the glass broken at the post office and possible firearms residue; a rope found in the boot of the defendant's father's car, which was linked to the crime; and a note in a diary found at the father's house containing the false registration number of a car used in the offence.

On appeal, there were a number of issues raised in relation to the admissibility of this evidence. These included the submission that the judge had acted improperly in asking questions of the defence expert in relation to the inferences to be drawn from the particles found on the balaclava, which should have been asked by the prosecution, if they had so wished.

The Court of Appeal held that the judge *should* have refrained from asking the expert witness questions. However, no unfairness resulted because the questions raised obvious issues the jury would have had to consider in any event. Mr Bowden's appeal was dismissed.

This constraint applies in the civil arena too. Whilst it is acceptable for a judge to ask an expert questions in clarification of an answer already given, or to curtail a line of questioning of an expert, a judge is *not* permitted to lead the expert into areas not already introduced by one or other of the parties.

Experts and judicial review proceedings

Judicial review of expert tribunals may adduce expert evidence

The admissibility of fresh expert evidence is generally excluded, or at least severely restricted, in judicial review proceedings. The guidelines in relation to this were laid down in *R -v- SSE ex parte Powis* (1981; 1 WLR 584). However, the court has now held that in cases involving judicial review of the decisions of expert tribunals or bodies, it is permissible to adduce new expert evidence if its purpose is to provide technical assistance to enable the court to discharge its function. New expert evidence is admissible so long as it does not aim to challenge the factual conclusions or judgments of existing experts.

In *Lynch -v- The General Dental Council* (2003; EWHC 2987), the claimant, Mr Lynch, a dental practitioner specialising in orthodontics, sought judicial review of a decision that he did not qualify for inclusion on a list of recognised specialist orthodontists maintained by the defendant. Mr Lynch had trained and practised in Australia before moving to England, where he had become widely known for his expertise in his specialist field. He was unable to refer to himself as a specialist without being entered on The Council's specialist list of orthodontists.

Mr Lynch had applied for inclusion on the list in accordance with the relevant General Dental Council Regulations. He had complied with the guidance notes on the application form, but his application was refused by the assessment panel. His appeal against this was refused, on the ground that he had not produced sufficient corroborative evidence of his expertise or experience.

At the review, the court considered the admissibility of fresh expert evidence. Mr Lynch argued that, for a court to be able to determine whether a lower instance decision in a case such as his was irrational, it was important that it understood the meaning and significance of technical terms. He submitted that expert evidence was therefore necessary to achieve that understanding. He further submitted that it was unfair of the panel to have placed so much weight on supporting evidence when neither the directions on the application form nor the reasons given by the panel for refusing his application had indicated that such supporting evidence should be produced. The Council contended that the categories permitted by the Powis case were exhaustive and did not apply to any of the evidence on which Mr Lynch sought to rely.

The court held that fresh evidence involving expert evidence should not, in general, be admitted unless it fell within the Powis guidelines. However, since irrationality was an error of law that could lead to a decision being quashed, it was necessary for there to be some explanation of technical terms. This was especially so when the decision had been made by an expert tribunal or anyone dealing in a field involving the consideration of matters that would not be fully understood by a layman. Expert evidence should, in such cases, be permitted insofar as this was needed to provide explanation and enable the court to discharge its function.

The court said, however, that a distinction should be made between an expert report seeking to explain what was involved in a particular process and one that sought to challenge factual conclusions and the judgment of an expert. Only the former was admissible (and then only in very rare cases). The court's finding in this case was not, it said, intended to open the door to the admissibility of expert reports in all cases involving judicial review of an expert tribunal or body.

Cannings: science on trial?

Awaiting the flood

In March this year, Peter Williamson, President of the Law Society, wrote to all law firms in England and Wales. His letter was in response to numerous enquiries received following the quashing of Angela Cannings' conviction for the murder of her two children. Solicitors were seeking guidance on how to advise clients in the light of the reviews of family and criminal cases.

The expected flood of applications following hard on the heels of the Cannings case has not yet materialised. Lawyers are clearly waiting to see which cases are likely to be reviewed and the approach the appeal court is likely to take before advising potential appellants. According to the Attorney General's Office, there were 288 cases identified by the beginning of March 2004. Of these, 86 involved defendants still in custody; these will be given priority in the review process.

'Should the expert opinion of a respected man of science, at the pinnacle of his profession, be rejected out of hand because it cannot be corroborated?'

Steven Bramley of the Attorney General's Office has advised that his chief is anxious that all appropriate cases are reviewed. 'Whilst it is hoped that all cases have already been identified,' he says, 'it is always possible some have not'. He asks, therefore, that the Office be notified of any cases that might fall into the category identified by the Court of Appeal. The relevant features are as follows:

- The charge is murder, manslaughter or infanticide
- The victim was a child aged under 2 years
- The defendant was a parent or foster parent of the victim
- The issue at trial was whether the child died from natural causes (explained or unexplained)

He adds that, if there is any doubt about whether a case falls into the notifiable category, such doubt be exercised in favour of notification. The address for notification is:

Central Review Team (for the attention of Nimesh Jani), CPS Policy Directorate, 6th Floor, London, EC4M 7EX.

Although there will be some fast tracking, cases will be dealt with on their merits and on a case by case basis. The Law Society has advised that, if practitioners are aware of relevant cases involving clients or former clients, the advice to them should be to be proactive in pursuing the matter, and not to wait for the ordinary process of review to take place. The Law Society warns, however, that comparatively few cases will fall squarely within the remit of the Cannings judgment, and it will be unusual that matters such as adoption will be reopened.

In cases of adoption

Andrew Cozens, President of the Association of Directors of Social Services, has called for a measured response in relation to this and has asserted that no child will have been adopted or taken into care 'solely on the basis of expert witnesses'.

Reviews of child abuse and adoption cases move ahead

The Minister for Children, Margaret Hodge, has asked social service departments to consult with their lawyers and identify cases:

- in which a final care order has been made
- which involved harm to a child or sibling
- in which the grounds for the making of the order 'depended exclusively or almost exclusively on a serious disagreement between medical experts about the cause of the harm'.

Addressing the House of Commons on 23 February 2004, Margaret Hodge stressed that she does not want to give false hope to those who might wish to argue that the adoption was based on flawed evidence. Neither does she wish to cause distress to adoptive families where children are happily settled. If birth parents are worried, she said, they should take their own legal advice.

Guidance to local authorities has already been given in *Local Authority Circular LAC(2004)5.* The circular considers cases where a council has decided that adoption is in the best interests of the child and in respect of whom a care order was made which falls within the scope of the review. Councils are directed that, in conjunction with their lawyers, they must consider the application of the Cannings judgment and draw their conclusions to the attention of the court, if appropriate.

The Cleveland child abuse scandal

The aftermath of the Cannings case has drawn unfavourable comparisons with the Cleveland child abuse scandal. There, the expert who shouldered most of the blame was Dr Marietta Higgs.

Dr Higgs believed that child sex abuse could be diagnosed by rectal examination. Her evidence was used in the Cleveland cases with disastrous results for innocent parents and their children. Immediately following exposure of the scandal, Dame Elizabeth Butler-Sloss was asked to prepare a report. One of the key warnings of her report was that it was wrong to place excessive reliance on medical expert opinion without sufficient corroborative evidence.

CPS keen to hear of cases that may warrant review

The trouble with 'frontier' science

There are those who now question how the miscarriages of justice can have arisen in the cases of Sally Clark and Angela Cannings. Did we not have sufficient notice of the dangers of such evidence? Wasn't the evidence in these cases precisely the sort of evidence Dame Butler-Sloss warned against almost 20 years ago?

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Time enough?

Time constraints imposed by the courts are there to ensure that cases are conducted speedily and efficiently. But why does this often leave the expert feeling like the White Rabbit in Alice in Wonderland?

Case management requires the court to set time limits…

The 'Overriding Objective' of CPR

The overriding objective enshrined in the Civil Procedure Rules (CPR) requires that courts should deal with all cases expeditiously and fairly. In addition, each case should be allotted an appropriate share of the court's resources, whilst taking into account the need to assign resources to other cases.

CPR 1.4 states that the court must further the overriding objective by actively managing cases. For the purposes of this rule, active case management includes:

- encouraging the parties to co-operate with each other in the conduct of the proceedings
- identifying the issues at an early stage
- deciding promptly which issues need full investigation and trial, and accordingly disposing summarily of the others
- deciding the order in which issues are to be resolved
- fixing timetables or otherwise controlling the progress of the case
- giving directions to ensure that the trial of a case proceeds quickly and efficiently.

As part of the case management process, the court will give directions, either automatically or at a case management conference, setting out a timetable for the future conduct of the case. In cases where expert evidence is needed, the directions will invariably:

- make provision for the instruction of experts
- impose deadlines for the production and disclosure of reports, meetings of experts and other procedural matters.

There are similar constraints of time in criminal cases when a trial date has been fixed.

In a great number of cases, the directions will have been given prior to any expert being instructed. But even in those cases in which one or other of the parties has already instructed an expert, the expert is rarely consulted in relation to the directions sought. After directions have been given, a solicitor might not immediately instruct an expert or notify the expert of the deadline imposed. In the very worst cases, an expert might not be informed at all of the actual time constraints.

... but lawyers often exacerbate the problem

What are the consequences of delay?

The conduct of a party, both before and after the issuing of proceedings, can be considered by the court. Indeed CPR 44.3 gives the judge discretion to impose costs penalties for unreasonable behaviour and delay by a party.

Any delay by a party in civil proceedings can also be dealt with by way of an 'unless order'. This is an order that will effectively debar that party from proceeding further unless a specific step is taken by a fixed date. Such orders can be made:

- on application by that party's opponent, or
- by the court as part of the judge's case management powers.

Alternatively, an unless order can deal with specific parts of a litigant's case. For example, a party can be debarred from adducing evidence in relation to a particular issue or the evidence of a particular witness. If there is excessive delay in producing an expert's report, the court can order that the case shall proceed without it.

In *Lappin -v- Customs and Excise QBD (Admin)* 2004, the appellant had 4 months in which to instruct an expert, but failed to so do.
HM Customs and Excise were seeking forfeiture under the Drug Trafficking Act 1994 section 42 on the basis of a forensic report, which indicated that a bag containing banknotes had higher than average contamination with cocaine. Customs relied on this report in support of its claim that the money contained in the bag represented the proceeds of drug trafficking. Directions were given prior to the hearing that allowed Mr Lappin 4 months to prepare his case. Nonetheless, at trial he sought an adjournment to instruct his own expert in relation to the contamination. Mr Lappin argued that, notwithstanding his own failure to instruct an expert, refusal of the adjournment constituted a breach of his right to a fair trial under the European Convention on Human Rights 1950, Article 6. It was unfair, he said, that one party should be able to adduce expert evidence and the other was not. On appeal it was argued that the judge's refusal to allow an adjournment was disproportionate. Counsel for the appellant pointed out that the court could have adjourned the case but marked its displeasure by an award of costs in any event.

Goldring J held that there had been no breach of the appellant's rights under Article 6 of the Convention. Whether he had a fair trial depended on all the circumstances. The court had to take into account the desirability of obtaining the expert's report and the reason for his failure to so do. If the reason was a persistent failure over time to instruct an expert, then it was difficult to say the resulting trial was unfair or a breach of Article 6 of the Convention. In this case it was clear that Mr Lappin's failure to instruct an expert was the reason for refusal of the adjournment, and in such circumstances it could not be argued that the adjournment was in any sense disproportionate. The court had to conduct a balancing exercise. The decision it had come to was one that it had been entitled to reach.

Experts to blame?

In Mr Lappin's case there was no expert to blame. He had simply been too tardy to instruct one. However, judicial pressure to process cases

ever more quickly can frequently leave an expert with too little time in which to conduct all the work necessary for proper preparation of the report. In such cases it is all too easy for the parties and the court to attribute delay to the inefficiency of the expert.

In criminal cases it is not uncommon for experts to be instructed within 3 weeks of start of trial. In civil cases the time allowed is a little more generous, but there will frequently be a window of only 2 or 3 months between the giving of directions and submission of the expert's report. In cases where further questions are to be put to experts or supplementary reports are to be prepared, the timescale is likely to be considerably shorter.

Upon the giving of directions, a busy solicitor will often deal with those matters that appear the most pressing. For example:

- collation of the documents necessary to prepare a disclosure statement and schedule
- amendments to pleadings as authorised by the court
- a direction for the exchange of lay witness statements in advance of expert evidence.

The deadline imposed for expert evidence can appear to be dim and distant, apparently giving the solicitor the luxury of time when compared with the steps needed to be taken within weeks or even days. This can conspire to mean that the solicitor, unintentionally or otherwise, postpones the giving of instructions – thus eating still further into the precious time allotted to the expert.

So a solicitor – who might have spent 6 months or a year in preparing the client's case – can easily lose sight of the fact that an expert requires time to:

- assimilate the facts and issues in a case
- conduct investigations
- examine the evidence
- consider and research salient points and contrary opinions
- produce an exacting report that complies with all the expert's duties to the court

and all of this within weeks!

Clearly experts will be assisted if solicitors give early instructions and make the time constraints absolutely clear. Ideally solicitors should send experts a copy of any court directions issued and, if possible, consult with experts beforehand to establish how much time will be required for the preliminary work and report preparation. The court can then be advised at the case management conference.

For some time we've advocated that standard orders relating to expert evidence should contain a specific direction to the lawyer to notify the expert forthwith of the making of any order or direction directly affecting the expert or imposing any time limit for the production of expert evidence. Such a requirement could easily be contained in a practice direction. So far, however, the Department for Constitutional Affairs has resisted this call.

DCA could help, but has failed thus far!

The *UK Register of Expert Witnesses* has now published an expert witness instruction pack designed for use by solicitors and to assist experts in civil cases involving expert evidence. These time factors and the clarity of the solicitor's instructions are just two of the factors the instruction pack seeks to address. To view a copy, simply surf to our home page at *www.jspubs.com* and click on the 'Swift Guides' link under 'Resources for lawyers'.

What can you do if more time is needed?

If you're running into difficulties, contact your instructing solicitor immediately, giving notification of the circumstances. If you think more time will be needed then say so, stating the reasons, e.g. if you find you are required to obtain special permissions to examine evidence or if enquiries have to be carried out to locate previously unexamined exhibits.

If your instructing solicitor thinks it necessary, an application can be made to the court for an extension of time. If this is unlikely to interfere with the court timetable, this can sometimes be accomplished by consent of the parties. However, in cases where any extension of time is going to interfere with the court timetable, then permission of the court will be needed. This is particularly so if the effect will be to move a fixed trial date or trial window. Any revision of a written time estimate has to be justified and a proper reason given, since the court and the parties will have made plans based on the earlier estimate (*St Alban's Court Ltd -v- Daldoch Estates Ltd* (1999) *Times* 24 May).

Courts are very reluctant to grant adjournments that will require trial dates to be moved. And the closer to the trial date such an application is made, the less likely it is to be granted. It is important, therefore, to act swiftly in notifying your solicitor as soon as any problem is foreseen.

Asking the court for directions

In extreme cases, it might be appropriate to seek guidance from the court. Experts are reminded of the application of Rule 35.14 – the expert's right to ask the court for directions. (The full text can be found on our web site at **www.jspubs.com**.)

Experts could spur the DCA into action by using CPR 35.14

This is the expert's last resort if time pressures become too great and the parties and their solicitors are otherwise unable to find a solution. Despite existence of the rule, it is one that is used very rarely. Indeed, there are several civil court judges who say that they have never received a request from an expert for directions. However, if pressure of time makes it impossible for the expert to carry out his or her duty to the court, and the circumstances are outside the control of the expert, then we suggest that this would be a suitable opportunity for the right to be exercised.

Experts across Europe

Increasing number of cases being run in foreign courts

The European Community is having an increasing influence on shaping the domestic legislation of Member States. In previous issues of *Your Witness* we have touched upon specific areas, such as copyright, consumer law and mediation, where attempts have been made to harmonise laws and procedures. Here we take a brief look at the use of expert evidence by some of our European neighbours.

Expert evidence across Europe

Continuing changes to European fiscal laws, matrimonial and child proceedings, and company insolvency legislation mean that litigants in the UK are increasingly having to commence proceedings in the home court of one or other of the European states. The time is not too far distant when experts and assessors will be called upon to present evidence to a court in Frankfurt, Paris or Milan as readily as the county court in Watford.

In some Member States the use of expert evidence and the approach to experts in general is similar to that adopted in England and Wales. In many others, however, it is markedly different. With further changes certain to come and some experts already getting to grips with a new cosmopolitan way of conducting litigation, it is perhaps timely to make a comparison of the developing role of the expert in the principal European states.

The UK – a brief history

In the UK, the function of the expert witness has grown out of the adversarial system of justice. And the judge's role has been to determine the issues raised by the parties. In other words, the proceedings are not judge led, as they would be in an inquisitorial system.

Traditionally, the judge has taken a passive role in so far as the evidence is concerned. Indeed, the courts have left it to the parties to decide which facts are to be relied upon in support of their case and the evidence to be adduced to substantiate the facts. But this has not always been the case. Prior to 1782, expert evidence was allowed in English courts only if the expert was impartial. Accordingly, experts were usually only appointed by the courts.

Woolf Reforms put judicial control on expert evidence

In fact, the admissibility of expert evidence called by the parties can be traced to the leading case of *Folkes -v- Chadd* (1782). In that case the Chief Justice, Lord Mansfield, allowed one of the parties to call an expert to give scientific evidence relating to the silting up of a harbour at Wells-next-the-sea. It is true to say, though, that there has always been deep distrust by the judiciary of party-called experts. Indeed, Lord Mansfield only allowed the expert to be called in *Folkes* because he knew him!

With the increasing technicality of evidence and advances in science and technology, the role of the expert in the adversarial system became ever more important. The courts, which held themselves to be the ultimate determiners of facts in dispute, found themselves in a dilemma. Once inside the legal system, it was the experts who were often the true determiners of the facts because the facts were frequently outside the competence of the court to determine.

From the 18th century onwards, 'expert shopping' became commonplace, and with it the judicial distrust of experts increased. The adversarial system, seen as fundamental to English law, was not easily changed. So the courts were obliged to find a way in which experts could be controlled from within.

Until 1910, judges in the civil courts had a common law power to call witnesses (including expert witnesses) to carry out an investigation into the truth. This was regarded as one of the vestigial duties of the judiciary. Since then, presentation of the evidence has been in the hands of the litigants themselves.

The Ikarian Reefer

In 1993 the court was called upon to decide a case in which it was alleged that the crew of a ship had deliberately set it on fire on instructions from its masters. Eight expert witnesses were called. One expert spent several days giving expert testimony on the heating of a valve mechanism while Mr Justice Cresswell and the remainder of the court tried valiantly to stave off a deep slumber. The valve mechanism was not even referred to in the defence's closing submissions. All in all, that piece of evidence was an expensive irrelevance. On top of that, Cresswell J viewed most of the expert evidence as being biased towards one party or another, or intended to conceal evidence from the other side. The courts had had enough, and *The Ikarian Reefer* case was a catalyst in bringing about fundamental changes.

The Woolf Reforms

Expert evidence was one of the keystones of Lord Woolf's reforms now enshrined in Part 35 of the Civil Procedure Rules. The Rules establish that the overriding duty of the expert is owed to the court, and the parties are to exercise restraint in the way expert evidence is used and how experts are appointed. An attempt is made to solve the age-old dilemma of the court by preserving the adversarial system but giving greater powers to the judge to manage the case. Expert evidence is now allowed only with the permission of the court, and preferably in the form of a written report. Arguments between experts are to be avoided wherever possible by the appointment of a single joint expert (SJE).

Statistics released in 2001 showed that SJEs were then used in 46% of all trials involving expert evidence. Strangely, however, the number of trials in which experts are used has actually increased. It is unlikely that this was a trend

envisaged or intended by Lord Woolf. Indeed, in *Daniels -v- Walker* (2000) 1 WLR 1382, Lord Woolf said that there was a new duty on the courts to restrict expert evidence.

The increased use of the SJE within the English adversarial system has, if anything, elevated the role of the expert to that of witness, judge and jury. The future trend is likely to be towards the management of experts by systems of accreditation. Unfortunately there will be a tendency towards testing the quality of the expert rather than the quality of the evidence... but then governments like to be seen to be doing something!

France

Let's contrast this with the role of experts in the French commercial courts. The French system is a marriage between the inquisitorial and the adversarial. As with the English system, French litigants must produce sufficient evidence for their action. However, when dealing with disputes involving technical issues, French commercial judges can appoint *experts judiciaires.* These are court-appointed 'surveyors' whose role is to assist the court in deciding the facts requiring specialist knowledge.

A French judge who feels that he or she has insufficient information or knowledge to make a judgment can, at the request of one of the parties or at his or her own discretion, take steps to:

- investigate relevant facts personally
- interview witnesses
- order that a court 'survey' be taken.

Any questioning of witnesses is usually undertaken at a survey meeting, with all the parties present and outside the adversarial forum of the courtroom. Indeed, oral evidence is rarely given at a French trial – the majority of which last for 2 hours or less.

The court survey is intended to 'enlighten the court on a question of fact which requires the knowledge of an expert' (Article 232 of the Code of Civil Procedure). Involvement of the parties in the survey process is supposed to enable them to establish the existence of facts upon which they want to rely. One advantage of the *expert judiciaires* is that he or she is usually appointed at a fairly early stage in the proceedings – sometimes within hours of a party's lawyer being instructed. They are:

- empowered to call for documents and interview witnesses (there is no provision in the French Code of Civil Procedure for the court to examine witnesses)
- usually able to do all of these things while the evidence is still fresh and the events giving rise to the dispute are recent history.

Conversely, the English expert is a fairly late arrival on the scene and much of the expert's work is undertaken only shortly before the hearing takes place.

The French expert, then, is distanced from the adversarial system. Whereas the evidence of an English expert is likely to be examined and tested by the court, the French surveyor's report, once completed, is rarely challenged and is likely to be accepted by both the parties and the judge without dissent. In theory, the neutrality and quality of the expert is ensured by choosing an individual from a court-approved and court-maintained list.

Whilst the courts help to impose harmonisation across the EU…

Germany

In Germany, evidence is taken in the civil courts only after a claim has been brought before the courts. The parties submit their own documents and do not provide witness statements or other forms of evidence. Indeed, it is considered to be inappropriate interference if a party's lawyer questions a witness outside the judicial process.

Under paragraph 485 of the German Code of Civil Procedure (ZPO), evidence can only be taken by a German court outside contentious proceedings if both parties consent or if there is a danger that evidence will be lost or concealed. Upon application, the court can order that a written expert report be obtained.

The parties are permitted to assert facts that they presume to be correct. Applications to adduce evidence that are not assertions of fact are inadmissible. It is then for the court to establish, on the basis of written pleadings, which facts are in dispute. In each case, the court will then decide on the evidence to be taken and which witnesses are to be examined (paragraphs 358–360 ZPO).

In cases where expert evidence is being contemplated, the judge will first consider whether the facts are material. If so, the judge will then examine whether the question can be answered from his or her own expertise. If not, the judge will select a neutral expert who will act as a judicial assistant. Questioning of the expert is almost entirely inquisitorial. It is the judge who will put the questions and decide which matters of fact are to be addressed. It is for the judge, too, to supervise the expert and advise on appropriate duties.

The German expert's report will, in the first instance, usually be given in writing. Prior to the court giving its decision, the parties will be invited to comment on the report. They may put questions to the expert, but only by verbal examination at the hearing.

... court procedures will not be so easily reconciled

In complex cases it is not uncommon for the parties to instruct their own experts simply for the purpose of examining the findings of the court-appointed expert. The party-appointed experts may, in those circumstances, submit written opinions to the court, and the judge may then call on the court-appointed expert to provide a supplementary report. The judge may even instruct a fresh expert.

Short of appeal to a higher court, the German litigant's ability to challenge the findings of a court-appointed expert is extremely limited. It is, however, possible to challenge an expert on the ground that he or she is biased – a challenge,

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Factsheet Update

The following new factsheets are now available:

ID	Factsheet title
20	The Bond Solon Conference
51	A Practical Guide to Securing Payment from Lawyers
52	Copyright for Experts

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

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incidentally, that a German litigant is also able to level at the judge!

Innovative Italy

It is only in Italy that there has been some attempt to create an entirely new system that seeks to take advantage of both the inquisitorial and adversarial approaches.

Traditionally, Italian criminal courts have had an entirely inquisitorial system that relies on single court-appointed experts. In 1988, though, the *Codice di Procedura Penale* marked a shift from the inquisitorial to the adversarial system.

Previously, Italian litigants had been able to instruct their own technical consultants only in cases in which there was a court-appointed expert. Whether any expert evidence could be called at all was wholly in the hands of the judge. Under article 223 of the new code, parties are now free to appoint their own experts, regardless of whether the court appoints its own. This preserves the judge-led inquiry into the evidence but affords the parties the opportunity to present expert opinion or challenge the findings of the court expert.

The Italian hybrid is unlikely to find favour with English jurists. Indeed, the prospect of a multitude of experts appointed not just by the parties but by the court too is sufficient to raise the spectre of *The Ikarian Reefer*. It can't happen – and it won't. But with an increasing need for co-operation and harmonisation between European jurisdictions, one wonders where the middle ground will be found.

Conclusion

Throughout Europe the courts have developed different approaches to expert evidence in both the civil and criminal justice systems. Whether it is an adversarial approach as in England or the inquisitorial systems adopted by both France and Germany, the fundamental problems presented by expert evidence remain.

Since the introduction in the UK of the Civil Procedure Rules there has, at least, been a consensus in all jurisdictions that it is paramount to ensure:

- neutrality of the appointed expert
- wherever possible, that the expert is competent.

There have been calls for a more inquisitorial, judge-led system in relation to expert evidence. And such calls have been particularly vociferous in child abuse cases (as reported in previous issues of *Your Witness*). The adversarial system is, however, fundamental to the English legal system, and a drift towards the European system is almost inconceivable. If it happens, it will be a slow and painful process.

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Well, yes. But the difficulty now is no different from that facing the courts in the Cleveland cases. When a court is faced with expert evidence based on original research and at the 'frontiers' of science, how should it be dealt with? Should the expert opinion of a respected man of science, at the pinnacle of his profession, be rejected out of hand because it cannot be corroborated?

The answer was spelt out by the Court of Appeal in the Cannings case. When a court is presented with evidence that is solely or mainly expert medical evidence and there is a divergence of opinion between experts regarding that evidence, the court should not be confident of reaching a verdict.

The test is 'beyond all reasonable doubt'

Courts should therefore proceed with the utmost care. Indeed, one presumes that in the majority of such cases the court will err on the side of caution and acquit.

If this sensible advice had been followed in the Sally Clark case, the barrage of conflicting scientific evidence would have prevented her conviction. Likewise, in the Cannings case, the array of defence experts disagreeing with the views expressed by the Crown experts should, in the absence of corroborating evidence, have introduced sufficient doubt to prevent a guilty verdict. In the Trupti Patel case it did.

'Better' understanding

The answer, though, might not be quite this simple. What happens in cases where what was seen previously as sound science is displaced by a new discovery and scientific advances?

Let's consider shaken baby syndrome (SBS). Currently there is a recognised and orthodox test for SBS which relies on evidence of bleeding around the brain and at the back of the eye. In Britain alone there are approximately 200 cases a year of SBS. In a number of such cases the diagnostic test has been sufficient to convict parents – in some cases of the charge of murder. This theory had been regarded as relatively safe evidence. Research, the results of which were published in *The Lancet* in March this year, has now called into question the association between retinal bleeding and SBS. It appears that retinal bleeding might not be the result of shaking at all – or, at least, not in all cases in which the association has been made.

So we now wait to see whether the SBS cases are to go the same way as the Cleveland cases, and whether SBS is to be the next 'expert witness scandal'. No doubt, there'll be more bad publicity for medical experts. But one can scarcely blame the experts for pushing back the frontiers of science – and, as the Court of Appeal says, it is for the court to tread carefully in weighing expert opinions in such cases.

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