Your Witness

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

I was talking to a forensic engineer recently who had been asked to accept a novel adjustment to his terms. The suggestion was that, having written an initial report, in the event the solicitor's risk assessment found the case was not worth running, the expert would agree to a cap on his fee.

Now, leaving aside the unattractive, and distinctly one-sided, financial nature of such a system, it seems to me that the solicitor was in contravention of his own Professional Code of Conduct in even **making** such an offer.

The Law Society of England and Wales has a lengthy Code under which solicitors have to operate (see *www.guide-on-line.lawsociety.org.uk)*. This states at section 21.11:

> *'A solicitor must not make or offer to make payments to a witness contingent upon the nature of the evidence given or upon the outcome of a case.'*

and by way of clarification, at note 4 it tells us:

> *'4. The court has disapproved of arrangements whereby expert witnesses are instructed to provide a report on a contingency basis. It is possible (subject to prior agreement, see 20.01) to delay paying an expert until the case has concluded, but the fee must not be calculated dependent upon the outcome.'*

That seems clear enough! And this restriction on solicitors as they dream up ways of reducing experts' fees should be borne in mind by all experts when considering any 'creative' scheme put forward by a solicitor.

Cost cutting gone mad at the LSC?

The rumour-mill is running overtime on the matter of a new consultation paper expected from the Legal Services Commission (LSC) in October. Reported in *The Big Issue* (July 19), a 'highly placed legal source, close to the consultation' said that the LSC was going to recommend slashing rates for expert witnesses in publicly funded cases: both criminal and civil.

This brought two interesting facts to mind. The first is that expert witness fees currently cost the LSC something in the order of £1 million per year – some 0.05% of the total budget of £2.1 billion. This doesn't seem like particularly fertile ground if one is looking for cost savings!

Secondly, LJ Auld recognised the problem of the existing low fee level for experts in criminal cases. In his review of the criminal justice system (see *Your Witness* 26) he said:

> *'I have had a look at the current scales, and without going into detail on the figures, they are meagre for professional men in any discipline. I am not surprised that solicitors complain that they have often had difficulty in finding experts of good calibre who are prepared to accept instructions for such poor return.'*

Whatever the package of reforms being considered by the LSC, I doubt that reducing experts' fees, which seems bound to reduce the pool of willing experts even further, is going to sit well with increased access to justice in criminal cases.

Simon Morgans, Senior Legal Advisor at the LSC, has confirmed that the *UK Register of Expert Witnesses* will be on the list of consultees – and I will ensure every expert in the *Register* has the opportunity to lodge views on the proposals during the autumn.

Conference season

The expert witness conference season is upon us once again, and I enclose further details of two of this year's offerings with this issue of *Your Witness*.

The *Society of Expert Witnesses* is holding its autumn conference on Friday 15 October 2004 in the East Midlands. The *Society* has put together a programme entitled 'An Expert's Guide to Getting Paid', which is designed to explore what is, if past *Society* conferences are any guide, the single most common cause of friction between experts and lawyers. The day aims to help experts understand how to avoid the problem. We have negotiated a discount for *Register* experts. For further information contact the *Society* on 0845 702 3014.

By an unfortunate coincidence, the Expert Witness Institute (EWI) is also holding its annual conference on the same Friday, but in London. Running under the title 'Forensic Evidence on Trial', this conference will bring together judges, barristers and solicitors, and not forgetting experts themselves, to look at how to 'restore the confidence of litigants, the judiciary and the public in the value and role of expert witness evidence'. If you want to 'help [the EWI] restore public confidence in the expert witness', call 0870 366 6367.

Finally, on 26 November in London is the Bond Solon Conference. Under the banner 'Experts: New Standards', the programme provides an eclectic mix of presentations from lawyers, judges and specialists. If you want to hear, on one platform, the views of the Attorney General and Angela Cannings on expert witnesses, then contact Bond Solon on 020 7253 7053.

Chris Pamplin

Inside

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Taking experts out of the court

Reports of alleged 'unsafe' expert evidence continue

The number of cases in which the decision of the court has been challenged on the basis of allegedly 'unsafe' expert evidence continues unabated. The recent high-profile case of Sion Jenkins is simply one more to be added to a growing catalogue. We have now reached a position where the mere fact that an expert has been involved previously in such a case appears to be sufficient grounds for launching a challenge.

Previous expert criticism counts

In *R -v- Kenneth Konrad Pedder* (2004) *CA (Crim Div)* (Latham LJ, Gray J) 15/7/2004, the defendant appealed against a conviction of murder. Dr Alan Williams, medical expert for the Crown, gave evidence that the death was caused by asphyxia, probably due to pressure from a pillow, the scene of death being entirely consistent with the cause of death. The medical expert for Mr Pedder did not discount asphyxia as one of the possible causes of death. However, the defence expert could not exclude the possibility that the death was an unexpected death caused by alcohol or an epileptic seizure.

On appeal, the defendant contended that the conviction was unsafe, and one of the grounds put forward was the court's criticisms of Dr Williams in *R -v- Sally Clark* (2003) *EWCA Crim* 1020. The appeal was dismissed. The Court of Appeal considered the criticism of Dr Williams in *R -v- Sally Clark* but found that this was not directed to the professional quality of his diagnosis but to the fact that he had withheld material that could have undermined his diagnosis. It was not the case here: the medical expert for Mr Pedder had been given access to all the material Dr Williams had used. Whilst it could be accepted that criticism of Dr Williams might affect a court's consideration of his credibility, the medical evidence in this case formed only part of the prosecution's case. The surrounding circumstances, said the court, pointed firmly to the conclusion that the death was caused by asphyxia as a result of the appellant's actions.

New scientific tests questioned

Dr Williams, lip-reading and ear prints all called into question

There have also been a number of challenges recently to convictions in cases where doubt has been cast on the credibility of expert evidence because of insufficient scientific evidence to support the techniques used. In *R -v- Gerrard Francis Luttrell and others (2004) EWCA Crim* 1344 the appellants appealed against a decision allowing lip-reading evidence to be admitted at their trials. They had been convicted of conspiracy to handle stolen goods. At Mr Luttrell's trial, a skilled lip-reader had given evidence for the prosecution as to what was said at a meeting between Luttrell and another co-accused and which had been recorded on CCTV. The judge had ruled that this lip-reading evidence was admissible. However, Mr Luttrell submitted that the lip-reading evidence via video footage should not have been admitted because it had not been shown to be reliable. He further submitted that a special warning had been necessary, the judge's directions had been inadequate and the prosecution had not disclosed all material relevant to the lip-reader's expertise and reliability.

The Court of Appeal held that lip-reading evidence from a video, like facial mapping, was a type of real evidence that was perfectly capable of passing the ordinary tests of relevance and reliability. It was, therefore, potentially admissible in evidence. Once ruled to be admissible, lip-reading evidence did, however, require a special warning from the judge as to its limitations and risks of error, because such evidence would usually be introduced through an expert who might not be completely accurate. The precise terms of the direction, said the court, would depend on the facts of the particular case.

Similarly, in the earlier case of *R -v- Dallagher* (2002) *EWCA Crim* 1903, there had been a similar appeal against a conviction for murder. The victim was a 94 year-old arthritic and deaf woman who had been killed in her bed by an intruder who had suffocated her with a pillow. The intruder had entered the woman's bedroom through a small window above her bed. The issue at trial had been whether Mr Dallagher was the intruder.

Ear prints were found on the glass of the window. Two experts matched those ear prints with control ear prints provided by Dallagher. Two experts gave evidence at trial: one was sure that they were Mr Dallagher's prints and the other thought it highly likely. The defendant, himself, had led no expert evidence.

Following conviction, however, some scientists had expressed misgivings as to the extent to which ear print evidence alone could be used safely to identify a suspect. Consequently, Mr Dallagher sought to bring fresh evidence on appeal from three expert witnesses casting doubt on the reliability of ear print evidence. He submitted that: (i) the trial judge had been wrong to have admitted the ear print evidence; and, alternatively, (ii) if it was admissible, his case could have been made more favourable by the inclusion of evidence from the experts he now sought to rely upon; and (iii) the judge had been wrong to allow the inclusion of evidence of previous burglaries committed by the appellant.

The court of appeal ruled that the developments that had taken place since the trial concerning ear comparison evidence constituted a reasonable explanation for the failure of the defence to adduce their expert evidence at trial. Therefore the evidence relating to these developments could be received if it might afford a ground for allowing the appeal. It was accepted, however, that there was no basis for

excluding the evidence of the ear prints found at the scene. It was difficult, said the court, to see how it was possible to exclude evidence that was part of the investigatory process. What mattered was the value of the conclusion drawn. There was no objection in principle to the criminal justice system taking into account modern methods of crime detection. The expert evidence in the instant case had not been irrelevant or so unreliable that it should have been excluded.

Where the problems lie

These cases highlight three areas of concern:

- The suitability and qualification of an individual expert and the reliability of that expert's evidence
- The problem of frontier science or pseudo-science, and what happens when there are new developments
- Risk evaluation in relation to expert evidence that is not guaranteed to be free from error

In previous issues of *Your Witness*, we have looked at various proposals concerned with the early review of expert evidence. In particular, following the Sally Clark appeal, there were calls for review panels to be appointed in cases involving children to test expert opinion prior to such evidence going before the court. But is it possible to construct a system of review that will reduce the number of cases where the value or probity of the expert evidence is later challenged, either at trial or on appeal?

Burden of proof in the UK

The burden of proof requires that the evidence in a case should be rigorously tested and evaluated at every stage. This should be done from the earliest pre-trial stage onwards. In reality, however, the expert evidence does not come under real scrutiny until trial, and sometimes even later than that.

The British civil and criminal justice systems are already taking steps to bring expert evidence under greater control by the courts. Permission to call such evidence and its admissibility are already matters that the courts seek to regulate. In reality, however, once expert evidence is admitted to proceedings, it is dealt with inside an adversarial system that places the burden of testing the evidence on the parties. The courts themselves will not examine the nature of scientific knowledge at any given time, and will rarely undertake a rigorous examination of the science or techniques used.

USA sets four criteria to test expert evidence

In the United States, where the problem of partisan expert evidence was even more acute than here, the case of *Daubert -v- Merrell Dow Pharmaceuticals Inc* (1992) 509 US 579 laid down a four-part test to be applied to all expert evidence.

Rule 702 of the Federal Rules of Evidence (FRE) states that if scientific, technical or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. Difficulty arose over how this rule should be interpreted and applied. In *Daubert*, the court set out four criteria for determining whether expert testimony met the requirement that it constitutes 'scientific knowledge'. These are:

- Whether the theory or technique 'can be (and has been) tested'.
- Whether the 'theory or technique has been subjected to peer review and publication'.
- In the case of a particular technique, what 'the known or potential rate of error' is or has been.
- Whether the evidence has gained widespread acceptance within the scientific community.

In addition, the court may have to weigh the probative value of the evidence against its possible prejudice under Rule 403 FRE. This rule gives the judge a discretion to exclude expert testimony where its 'probative value' is substantially outweighed by the 'danger of unfair prejudice, confusion of the issues, or misleading the jury'.

Furthermore, in making all of these determinations, the court may also have to consider whether any additional steps, such as the appointment of a court expert, are warranted.

The issue of testing was considered in *Gier -v- Educational Serv.* 845 *F. Supp*. 1342 (D.Neb. '94). This case concerned a claim of abuse by students in a residential home for mentally retarded children. The magistrate judge considered a motion to exclude the testimony of a psychiatrist and two psychologists who had examined the claimants. The examinations (which consisted of a history, a psychological evaluation utilising standardised tests and a clinical interview) concluded that the claimants had been sexually, physically and emotionally abused. The focus of the expert evaluation was 'to compare the behavior or symptoms of the child to that of victims of child abuse'.

The court, citing *Daubert*, inquired whether the methodology used was 'capable of being falsified', i.e. whether it actually employed the scientific method. Answering 'No', the magistrate found that this type of psychological evidence was both controversial and, for the most part, 'irrefutable', because it could only be tested by research on patients. As a result, the expert conclusions were not subject to the type of proof available in the physical sciences. In the absence of objective research to test the expert theories or to assess their conclusions, the court found that the expert techniques *did not* satisfy the *Daubert* standard.

Continued on page 7

Is presentation of opinion evidence at trial the problem?

USA has developed pre-trial systems for assessing expert evidence

The substance of instructions

Report need not refer to the letter of instruction...

Following the court's decision in the case of *Clough -v- Tameside & Glossop Health Authority* in 1998 it was necessary for lawyers to exercise extreme caution when providing an expert with instructions and materials. Otherwise, there was a real danger that there would be an unintended loss of privilege which would render such instructions or documents disclosable.

The court of appeal gave further consideration to this question in *Lucas -v- Barking, Havering & Redbridge Hospital NHS Trust* (2003) *EWCA* (see the Court Reports section of The Library at *www.jspubs.com*). In its decision, the Court of Appeal reaffirmed that the obligation of an expert is to 'state the substance of all material instructions, whether written or oral, on the basis of which the report was written' [CPR 35.10(3)]. The relevant Practice Direction provides that the report must contain 'a statement setting out the substance of all facts and instructions given to the expert that are material to the opinions expressed in the report or upon which those opinions are based' [CPR 35 PD2.2(3)].

Deployment required to waive privilege

The Court of Appeal took the view that the appeal raised a fundamental question as to what effect the Civil Procedure Rules were intended to have on the broader question of privilege. In the case of *Bourns Inc -v- Raychem Corp & Another* 1999 (*3 All ER* 154) it had been established that service of a witness statement, be it a statement from an expert or a witness of fact, waives privilege in that statement. Mere reference to a document does not waive privilege – there must, at least, be reference to the contents and reliance thereon. Simply stated, there must have been 'deployment' of the document for privilege to be waived.

Under CPR 35.10(3) there is a compulsion on experts to set out their material instructions. This contrasts with the discretion a party will otherwise have in choosing to refer to a document in a statement of claim or witness statement that might otherwise be privileged. CPR 35.10(3) compels disclosure of what would otherwise be privileged material. Indeed, by reference to the fact that experts need only refer to *material* instructions, it strongly implies that the documents have been material to the expert's consideration of the matter and have, therefore, been 'deployed' as opposed to simply 'noted'.

...only the substance of the material instruction

The Court of Appeal concluded that the intention behind the CPR 35.10(4) barrier to automatic disclosure must have been to encourage the expert to comply with the duty to set out the substance of all material instructions. Furthermore, because of the compulsory nature of this duty, it must be intended to afford some protection in relation to documents that would otherwise become disclosable and in respect of which there had been no other indication that privilege had been waived.

Defining the word 'instructions'

Waller LJ leaned towards the view that, in so far as material supplied to expert witnesses is concerned, a wide construction of the word 'instructions' was to be preferred. This would include all information supplied by the party, and all information the instructing solicitor might place before the expert, to obtain advice. Accordingly, it was held that material supplied by an instructing party to an expert witness as the basis on which the expert was being asked to advise should be considered part of the instructions and thus be subject to CPR 35.10(4).

'Material' does not necessarily mean 'all'

There would, of course, be an obvious answer to be made in opposition to any claim to protection under 35.10(4). The requesting party could continue to say that the documents were disclosable because the expert had not stated the substance of all material instructions. The Court of Appeal dealt with this question by clarifying the meaning of 35.10(3). It concluded that there was no requirement to set out **all** the information provided in the statement or **all** the material supplied to the expert. The only obligation on the expert is to set out *material* instructions. The protection applied to any particular document or any particular question over any area. This was because disclosure of any part of privileged material would otherwise imply waiver of privilege once deployed.

A note of caution

The decision of the Court of Appeal is regarded by some as a retrogressive step. Criticism centres on the fact that an expert witness might have access to materials upon which some reliance was placed but which are not accessible to another party or their expert. Take, for example, a case where the expert has been provided with a draft pleading or a draft witness statement which differs in substance from that eventually put before the court at trial. What mechanisms are in place to ensure that this is brought to the attention of the court and that the issues are dealt with justly?

The *Lucas* decision leaves many questions unanswered and should, therefore, be treated with caution. A solicitor who supplies an expert with documents intended to be privileged still risks the unintended loss of this privilege if the expert fails to set out the material instructions in such a way as to satisfy CPR 35.10(3).

It seems inevitable that this difficult area will be the subject for further appeals. In the meantime, expert witnesses should ensure that they comply with the rules governing the preparation of their reports and, if in doubt, seek guidance. In addition, it remains true that instructing solicitors should be extremely wary about sending an expert any materials that they do not wish the other side to see.

The reluctant expert

The *Register* helpline recently received an interesting question from a listed expert. He was appointed as a single joint expert in a case and wished to know whether he was compellable as a witness and whether his report could be used if it had not been paid for fully.

The circumstances of the case were as follows. One party had paid half of the expert's fees, but both the other party and their solicitor had then disappeared without trace. No address had been left for service and no contribution had been made towards their share of the expert's fee. Some time later the expert received a letter from another firm of solicitors which indicated that they had been instructed by the 'missing' client and requested the expert to attend court.

So, in such circumstances, is the expert under any obligation to attend court, and on what grounds can the part-paid report be used?

The proper use of the witness summons

The obvious means by which to force an expert into court is the witness summons. Whilst it is true that some solicitors summons their expert as a matter of course, this is done (usually with the expert's agreement) to help ensure the expert is free of any other appointments that might prevent attendance. Specifically, it is not done because there's any reluctance on the part of the expert to provide evidence.

This is a key point. If a solicitor has reason to suspect the instructed expert has become unwilling to act, the use of the witness summons may become justified. So, when in dispute with an instructing solicitor about matters such as fees, it is vital that an expert makes it clear that he or she remains ready and willing to continue to act – once the 'administrative matters' have been settled.

The improper use of the witness summons

Some years ago, the *Society of Expert Witnesses* reported on a case where, having paid for an expert's report, a solicitor attempted to avoid the possibility of having to pay a cancellation fee. To this end, the solicitor decided to summons the expert as a witness of fact – the 'fact' in question being the expert's report! Such a 'tactic' is easily blocked.

An expert served with a witness summons has a right of response. An application to have a summons set aside is made to the procedural judge in charge of the case. The judge's concern will be to determine whether or not the party that requested issue has abused its privilege in summoning the witness.

The summons may be set aside if those serving the summons had failed to meet the CPR requirements concerning payment to the witness or if it appears to the court that issue of the summons had been sought to avoid having to pay the expert a previously agreed fee – as happened in the case of *Brown and Brown -v- Bennett and others* (see *Your Witness* 22).

In the current case, the expert would certainly wish to inform the court that his fee had not been paid for report preparation. The solicitor in question would then have some embarrassing questions to answer. It is doubtful whether a judge would then compel attendance of the expert without ensuring the overdue payment was forthcoming from the requesting party.

It is hard to prevent the use of a report once issued

Use of the report

What is the position regarding the report itself? If the report is in the hands of the party, it is unlikely that the expert would be able to prevent its use. Whether or not copyright rests with the expert (see *Your Witness* 34), the report's use in court proceedings will not breach copyright. If the report is admissible in evidence, the party will be free to make use of it. The expert might consider taking out an action seeking damages in relation to lost fees or maybe seeking an injunction restraining use of the report. Whilst the expert might have some success with the former, we think it unlikely that much joy would be had with the latter: as a matter of pure practicalities, the time and expense alone would probably argue against such a course.

Clear written terms and conditions key

The best insurance an expert can have against the possibility of such difficulties is to have clear written terms and conditions which should be agreed with the solicitor at the outset (see Factsheet 15). They should, of course, include provisions governing payment of the fee for the report, together with the expert's fee for any court attendance. This will then form a contract between the instructing solicitor and the expert, and will be enforceable in the usual way.

Tracing solicitors

If the solicitor with whom you had the original agreement does 'disappear', it is rare that it will be without trace or recourse to information about their activities. An enquiry to the Law Society will usually provide some explanation. And if there has been an intervention into that solicitor's practice, you might be entitled to claim some compensation if funds had been held in the firm's client account for the purpose of paying your fees, even if those funds have been misappropriated or used elsewhere.

Witness summons cannot bypass an expert's Terms

Start afresh with the second solicitor

In the current case, the best course of action is for the expert to confirm his willingness to act, send through his terms of engagement and advise of the outstanding balance due from the solicitor's client for the original report. Faced with such a clear statement of the expert's position, it is unlikely that the solicitor would be able to continue the instruction without agreeing to settling the outstanding fees.

Getting paid III – enforcement

In the first two parts of this series, we suggested some ways in which the expert could maximise the chances of getting paid on time. We offered a step by step guide to recovery through the County Court. But what happens after you have obtained your judgment?

The court is not the least bit proactive

You have cajoled, pleaded and persuaded to no avail. As a last resort you have found yourself obliged to issue proceedings for recovery of your bill in your local county court and – eureka – you have obtained a judgment. The judgment provides a date by which the debtor must make payment to you, so you assume that the erring debtor will pay up or else face the wrath of the district judge.

Well, actually, no. It comes as a bit of a surprise to many litigants in person that, having given its decision, the court is not in the least bit proactive when it comes to enforcing the judgment. It is for the judgment creditor to decide upon when to take enforcement action and what form that action should take.

Assess the debtor's assets

All of the enforcement methods available to you will be an attack upon the assets or income of the debtor. Our enlightened society no longer casts debtors into the deepest recesses of the Fleet Prison until such time as they can see their way clear to making payment. Consequently, there must be assets or income that can be pursued.

Thankfully, the court provides a handy mechanism for establishing a debtor's worth and identifying what assets he or she has. This is in the form of an application to the court for an order to obtain information. Application is to the court from which the judgment was obtained and is by Form N316 (or N316a if the debtor is a company). A copy of this form is available from any county court office or can be downloaded from *www.courtservice.gov.uk*. The fee payable to the court is £40.

An officer of the court will conduct the examination on your behalf and will send you the results in the form of written answers to a questionnaire. If you wish specific questions to be put at the examination, you can submit these in advance. Alternatively, you may attend on the examination and put the questions yourself.

'Warrant of execution' is the preferred method

The court will issue the order requiring the debtor to attend. If you are an individual the court bailiff will serve the notice in Form N39 on your behalf. If you are acting on behalf of a firm or company, however, the court will send you the form to be served personally on the debtor.

The results of the examination, if properly conducted, will reveal the name, address and account number of the debtor's bank or building society and details of any funds held; whether the debtor owns or rents property; details of any other fixed assets; the name and address of any employer, together with details of income and earnings; investment or other income; and outgoings and expenses. In the case of a judgment against a company or partnership, a named representative will be required to give corresponding information. All of this is useful information to have when deciding on the best way to enforce payment.

Methods of enforcement

There are four methods of enforcement to choose from:

- Warrant of Execution
- Charging Order
- Third Party Debt Order
- Attachment of Earnings.

It is anticipated that the majority of experts will be concerned principally with debts owed to them by solicitors. Of these options, the issue of a warrant of execution is likely to be the most effective against such debtors.

Warrant of execution

Application for a warrant is made to the county court by Form N323. This must be completed with the claim number (as given on the judgment), together with the names of the parties, the amount remaining due under the judgment or order (together with court fees, fixed costs and interest); and, where the order made is for payment of a sum of money by instalments, a statement that the whole or part of any instalment due remains unpaid. You must calculate the amount of interest accruing since judgment and add the fees and fixed costs on the warrant. The fixed costs are set out in CPR Part 45. The form is filed at court with a fee calculated according to a scale based on the amount for which the warrant is to be issued. Where the sum to be recovered is not more than £125, the fee is £30. In other cases it will be £50.

The permission of the court will be needed to issue a warrant if 6 years or more have elapsed since the date of the original judgment.

Upon receipt, the court will issue the warrant under s.85 (2) of the County Courts Act and will direct the bailiff to levy execution on the goods of the debtor. Where a warrant is issued for the whole or part of the sum, the issuing officer will send a warning notice to the debtor and the warrant will not be levied until 7 days have elapsed.

The county court bailiff is only able to act on warrants for debts that do not exceed £5,000. Larger judgment debts must be transferred to the high court for execution by a sheriff's officer. This is done by applying to the county court for a Certificate of Judgment and lodging this, together with a writ of fi. fa. (the high court version of the warrant of execution in the county court), with the District Registry of the High Court for the jurisdiction in which the debtor resides. It is true to say that the sheriff's officer is usually more successful in extracting payment than the bailiff. A cynical observer might

attribute this to the fact that a sheriff's officer relies on enforcing a writ to earn his or her 'poundage', whereas a bailiff is merely a salaried employee of the court and has no financial interest in the success of the execution. The procedures of the high court are, however, rather more complex and unforgiving than those existing in the county court. Consequently, this is something best avoided by all but the most enthusiastic amateur.

If your debtor is a solicitor or firm of solicitors, they will not relish having a judgment registered against them. One hopes that they will have paid up promptly upon receipt of the judgment to avoid an entry in the Register. Such an entry would do nothing for their reputation. Still less will they welcome a bailiff turning up on their doorstep to carry off their computers and office furniture to public auction. Remember that solicitors have to work with their local court and will have daily dealings with the district judges, clerks and bailiffs. This makes them one of the few classes of persons to whom the issue of a warrant will have far-reaching consequences other than the mere threat to their assets. Put bluntly, the embarrassment factor is one of the sharpest weapons in your armoury.

And if all that fails...

Here is a final thought. An unsatisfied court judgment that exceeds £750 entitles a judgment creditor to proceed immediately to the issue of a bankruptcy petition.

Insolvency proceedings can be expensive. A short cut that might have the desired effect is to send the debtor a statutory demand. There are a number of statutory forms that can be used depending on the nature of the debt and the legal status of the creditor. All of the relevant forms can be found and downloaded from *www.insolvency.gov.uk/pdfs/forms*. The simple threat of bankruptcy is guaranteed to have any solicitor reaching feverishly for the cheque book, as an adjudication of bankruptcy will prevent that solicitor from practising and lead to an intervention by the Law Society.

You might even initiate bankruptcy proceedings!

Continued from page 3

Under the *Daubert* test, peer review and publication are 'pertinent considerations' for determining the reliability of scientific evidence. Where the evidence comes from the mainstream of its respective field, this consideration will weigh heavily in favour of admission. If the evidence is based primarily on principles that have commonly appeared in authoritative medical treatises, the court can presume it 'has been subjected to peer review and publication and accepted by the scientific community as having significant probative value'. Unusual or dogmatic theories are, so far as they can be, excluded. In cases where an expert presents a new or marginal theory, this factor is likely to fail the *Daubert* test. Thus, the magistrate hearing the *Gier* case gave little weight to controversial literature on the symptomatology of abuse. It was not sufficiently within the mainstream of scientific consensus.

The courts in America will take into account the existence of control standards that monitor the success or error rate of a particular scientific technique. The non-existence of such standards can, in some circumstances, render the evidence inadmissible.

So the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party. However, because there is a perception that expert testimony (as opposed to the evidence of a lay witness) is more likely to mislead, *Daubert* arms the district courts with broader discretion to exclude expert testimony.

In so far as the expert's past experience is concerned, the United States expects similar standards to our own. An expert in an American court is also required, however, to furnish a list of all the cases in which he or she has been involved over the preceding 4 years.

The Daubert effect

As a result of *Daubert*, expert evidence in America is likely to come under close scrutiny at a relatively early stage in the proceedings. The parties are aware of the requirements from the outset, and it is common for the court to hear applications in relation to the admissibility or desirability of such evidence well before any final hearing.

Would such rules applied to our own civil or criminal justice system have saved the jury from hearing Sir Roy Meadow's notorious statistical evidence in Sally Clark? Would they have spared Alan Williams the indignity of an appeal in the Pedder case? There would certainly have been an earlier evaluation of the expert evidence in both *Luttrell* and *Dallagher*, and there is also the possibility that such evidence would altogether fail to pass a test similar to that applied in *Daubert*.

Daubert is certainly not without its own problems, and it may, indeed, create more than it solves. However, American lawyers have, at least, made some attempt to address the particular difficulties surrounding the *nature* of expert evidence and its relationship to the judicial process. Perhaps it is time for the English courts to formulate similar rules. They might do better than the American model, but we think, at least, that they could do no worse.

Philip Owen

The Daubert test for 'scientific knowledge'

The Daubert material has been prepared from 'Assessing the Required Federal Relevance & Reliability Elements of Expert Evidence' published on-line at www.lectlaw.com

Factsheet Update

The following factsheets have been amended:

ID	Factsheet title
15	Terms of Engagement
50	VAT for Experts

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Letters to the Editor

Cash on account

Rex Grogan, International Tyre Consultant, writes:

On the subject of reluctant payers, readers may be interested in a recent experience. Like everyone else, I am sure, I keep a list of clients who pay up months, sometime years, late, clients who, putting it bluntly, are more trouble than they are worth.

Recently I had a request to investigate a case from a name on my 'black list'. I returned the file with an explanation that last time I had worked for them it had taken many months and many letters and 'phone calls before my account was settled. 'I was sure,' I said, tongue in cheek, 'that they would be able to get another expert who would be more amenable to their policy.'

This prompted a telephone call saying that my reply was offensive – it wasn't, but I felt I would have been quite justified had it been – and that it was not company policy to delay payment. I was ready for this and was able to quote chapter and verse, with dates and reference numbers. I stuck resolutely to my guns. 'No, sorry, I can't help you.'

Subsequently I had a much lower key call saying: 'Yes, we've looked into those other cases and find there was some justification for what you say.' (Round 1)

The client was still anxious for me to do the job. 'Was there any way to overcome this difficulty?' I replied that in the USA, where I do a lot of work, the common practise is 'money up front'. 'But of course,' said I, 'we could not contemplate such a system here!'

'No reason at all why not' was the surprising response. 'How much on account do you want?' I named a figure and next morning received the file back with a cheque (which I promptly banked). (Round 2)

The job was done and charges overran slightly. I submitted my report with a top-up invoice and it was paid promptly. (Last round)

So there it is, yet another introduction of a working practice from across the Atlantic, but this time possibly a beneficial one. We must overcome this coyness about talking money. After all, we are in business to earn a living, just as they are. Simply ask difficult clients for a retainer and see what happens!

This is a tactic we have suggested to experts over the years, but one we have tended to view as being for the unknown, or only too well-known, instructor. It is certainly one every expert should have in the locker. Ed.

Flat-Rate VAT

Dr Sally Ward, Chartered Clinical Psychologist, writes:

I am a Clinical Psychologist working privately and I have to be registered for VAT for all my work: therapy work and medico-legal reports.

It is important that people look at the possibility of registering for **Flat-Rate VAT** as this can save an awful lot of money and hassle in record keeping. It saves you money if you do not have many expenses that you can claim VAT on. You simply send the VAT man a set percentage of your outputs (i.e. the invoices you have sent in the quarter).

I am sending 9%, but it varies between professions. You do not have to deduct the VAT on expenses from the VAT on the outputs. You do not claim back any VAT on the expenses but have a lower rate of VAT to pay on the invoices sent out. You still charge out to patients at 17.5%.

It sounds complex, but is not really. It saves me hundreds of pounds every quarter. My accountant didn't tell me about it, and until I realised, I was overpaying.

Dr Ward wrote in relation to the coverage we are giving to the likely introduction of VAT on medico-legal reports (see *Your Witness* 35). This move is going to bring many medics into the arena of VAT for the first time – and the Flat-Rate Scheme is likely to be a most welcome simplification to many.

The Budget of 2002 saw the introduction of the Flat-Rate Scheme as an alternative to the normal method of VAT accounting. Brought in to help small businesses, the Scheme allows eligible businesses to calculate their net VAT liability as a flat-rate percentage of their total turnover.

To enhance the simplicity further, the Flat-Rate Scheme can be used in conjunction with cash accounting – so you don't have to pay any VAT until your bills have been paid.

To be eligible for the Scheme, a business must have a taxable turnover (excluding VAT) under £150,000 per annum and a VAT-exclusive total business income below £187,500 per annum.

The flat-rate percentages are based on historical data from various 'sectors' and reflect the average VAT paid across each sector. Under the Flat-Rate Scheme, tax paid on purchases is not recovered, and this was taken into consideration when the percentages were calculated. VAT can, however, still be reclaimed on single capital assets costing £2,000 or more (including VAT).

The HM Customs and Excise (HMCE) web site (*www.hmce.gov.uk*) has a helpful ready reckoner that helps you to work out what trade sector applies and therefore what flat-rate percentage you might expect.

As a sort of 'welcome gift', in your first year of VAT registration, 1% can be taken off the published flat rates until the first anniversary of registering for VAT. (So, using the reduction, a published rate of 8.5% becomes 7.5%.) After the first anniversary, the rates revert to the published level.

Joining the scheme involves completing a very simple application form (VAT 600 FRS) available on the HMCE web site, or calling the VAT National Advice Service on 0845 010 9000, who can take applications over the telephone.
Ed.