Your Witness

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Editorial

The long-awaited Legal Services Commission (LSC) consultation on expert witnesses in publicly funded cases was published on 28 November 2004. I am assured that, unlike so many such exercises, this consultation really is interested in the views of experts. Given that the challenge facing the LSC is how to retain expert involvement in publicly funded cases when only bargain-basement fee rates are on offer, they are going to need all the help they can get!

One area they may consider is whether there is scope in civil cases for experts to be instructed to prepare, well, let's call it, an 'outline' report, rather than the 'fully detailed' report currently required under the Civil Procedure Rules (CPR). Whilst the CPR have been a source of major improvement in the conduct of civil litigation, one consequence has been the move towards every expert report being written as if it will be put before the court. Great care must be taken over the writing of such reports. Inevitably, this increases costs. And this will be one reason why the LSC has seen the cost of expert reports rise in recent years. However, something over 95% of cases never get to the court – instead they settle. In such cases the expert's report is used as a negotiating tool between the parties.

Is it necessary for reports used in this way to be as detailed as those that will go before the court? If not, then the LSC could reduce costs by ensuring experts are instructed to prepare an initial 'outline' report at an agreed cost, proportionate to the (likely) quantum of the case, that would allow the parties to seek a negotiated settlement. Only in the small number of cases that do not settle would the additional expense of a 'fully detailed' report, for use in court, need to be incurred.

The LSC consultation is being conducted online. Whilst you are perfectly at liberty to visit their website (*www.legalservices.gov.uk*) to take part, I would urge you to consider using the *Register* website instead (visit *www.jspubs.com* and click on the *LSC Consultation* link). We will pass on all submissions, untouched, to the LSC, but will also be able to collate the responses of experts listed in the *Register.* This has the twin benefits of allowing me to report back to you on the views expressed by registered experts, and of comparing that with the LSC's conclusions.

VAT on court fees

A call to the *Register* helpline raised a problem that a registered expert had in recovering VAT from a magistrates court. The expert had applied VAT on his fees when billing the court for the provision of oral evidence following instruction by the defence in an action heard in the magistrates court. The Determining Officer in the North Yorkshire Magistrates' Court Service refused to pay the VAT because he was 'not aware of any provision which will allow for payment of VAT on [expert witness bills]'!

It seems pretty clear to me that as the expert in question is VAT registered, and is providing a VATable service, there is no alternative but for VAT to be charged. The real problem in this type of case is finding someone whose opinion the Determining Officer will accept. Accordingly we contacted HM Customs & Excise (HMCE) and had the following advice from David M. Smith (david.smith7@hmce.gsi.gov.uk):

> *'There are no special provisions relating to such activity. This is because any expert witness will be acting as a consultant in his specific field, and who actually employs him in this capacity is irrelevant to the supply he makes. Therefore, the VAT liability of his supply is the same no matter who his customer is.*
>
> *'In conclusion, then, if somebody is providing an expert opinion and charging for this service, and he is VAT registered, the services will attract VAT. There is no justification for someone to refuse this payment based on the fact that they think it shouldn't be charged, or more likely because they are not in a position to reclaim this.'*

I think that is quite clear. But it might help to be able to point any 'confused' Determining Officer to Mr Smith for enlightenment!

VAT on medical reports

Whilst on the subject of VAT, almost a year on from the decision of the European Court of Justice, the situation with respect to VAT on medico-legal reports remains unchanged. HMCE remains locked in discussions with the various interested parties, and the latest advice from HMCE is that the matter is not likely to be resolved any time soon. So, our advice to medics remains the same. Do not feel pressured into any action just yet.

New edition of the Register

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 18th 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

Experts may pay for wasted costs

Costs recovery from experts affirmed

In October this year the Chancery Division heard an application in the long-running case of *Phillips & Others -v- Symes & Others* (2004; *EWHC* 1887 Ch). One of the questions the court was asked to determine was whether an expert (whose report had been largely discredited and criticised at a previous hearing) could be added as a party in the case pursuant to CPR 48.2. In other words, the successful party wanted to try to recover some of the costs in the case **from the expert witness**!

Background

The details of the original action are long and complex. In brief, though, Mr Symes and a partner, now deceased, ran a successful antiques business. The current litigation centres on a dispute that arose between Mr Symes and the administrators of his deceased partner's estate.

Of particular interest to us is the expert in question, a consultant psychiatrist, who was asked to provide an opinion on whether Mr Symes was capable of understanding the nature of the case, instructing his solicitors and undergoing cross-examination.

The expert had produced several reports, including a signed, written report in October 2003, in which he opined that Mr Symes was not fit to provide evidence, to go through cross-examination or to give reliable accounts about past, present or future events. According to the expert's report, the cause of this mental incapacity was a stroke that had occurred in 1980, together with the surgery that had followed. The impact of this opinion had been to call into question Mr Symes' capacity to effect any transaction since 1980. For the purpose of the proceedings, this would have included any transaction effected by Mr Symes with the other parties to the case, including administrators in the insolvency and a raft of solicitors who had been involved in the case over time.

Alleged failings of the expert

At the hearing the expert evidence was highly criticised. It was alleged that the expert had formed his initial report on a wholly inadequate basis. The expert examined Mr Symes for 1 hour and, according to the administrators' solicitors, was working on incomplete materials sent to him by Mr Symes' solicitors. For example, the bundle did not include any evidence on how Mr Symes had functioned in the 20 years or so since his stroke. The expert had also relied upon the report of another consultant who had made it clear that she had not carried out any tests designed to expose simulation on the part of Mr Symes.

Act diligently and reasonably and you have nothing to fear

Well before trial, solicitors acting for the administrators had sent the expert a letter enclosing further materials they had asked him to consider. It appears that this material was sent at the specific request of the trial judge. The expert was asked, in the light of this additional material, to reconsider his original opinion.

The expert, however, refused to do so. He replied to the administrators' solicitors' letter stating that, as he had not been paid (something like £26,000 of fees were outstanding), he would not do any further work until his invoices were settled. At the trial, the expert gave evidence based upon the original report he had prepared. He admitted that he had not read materials submitted to him. Having read the material in court, at the insistence of the judge, he finally concluded that his original opinion was wrong. In the view of the administrators' solicitors, the expert chose to ignore or disregard any evidence inconsistent with the original opinion and actively tried to find material to support that opinion.

Although the administrators were successful in their claim in the original action, they were faced with grave difficulties in recovering from Mr Symes the substantial costs incurred in the proceedings. In the view of the administrators, the costs had been greatly inflated by the conduct of the expert. Consequently, an application was made for leave to add the expert as an additional party to the proceedings, purely as a means of being able to pursue the expert for costs.

Sanctions against experts

In considering the application, Mr Justice Peter Smith was at pains to point out that he was not making any finding against the expert that was tantamount to a finding of breach of duty or negligence. The purpose of the preliminary hearing was merely to decide whether, as a matter of law, it was possible to add the expert to the proceedings and for an application for costs against him to be subsequently considered.

Experts owe a duty to the court and they are required to behave objectively and not be partisan. But what are the consequences of breaching these duties? Currently, they might be summarised as follows:

- The expert can be said to be in contempt of court, or even guilty of perjury, depending on the extent of the dereliction.
- It might be possible in an appropriate case to order that the expert's costs be disallowed. In this context the costs can be either those between the expert's 'client' and another party to the litigation, or those between the client and the expert – in neither case, though, does this have any impact on the contractual obligation for the solicitor still to pay the expert.
- The behaviour of the expert can be a matter for referral to the expert's professional body (if such exists). This was the course famously taken by Judge Jacobs in *Gareth Pearce -v- Ove Arup* (see *Your Witness* 32).

The administrators argued that none of these provided a sanction that would compensate the true 'victim' of the expert's breach of duty, namely the parties. They further argued that the development of the law in relation to the ability to order payment of costs by non-parties meant that it was now possible for the courts to order experts to pay compensation to parties who had suffered loss 'by reason of their gross dereliction of duty'.

It was submitted that the position of experts was analogous to that of advocates, who have long been subject to sanctions as regards wasted costs orders. Representing the administrators, Mr A Steinfeld QC described experts as being 'quasi Officers of the Court' and said that, in the modern world, there should be an effective sanction capable of being imposed on them.

In view of the clearly defined duties enshrined in CPR 35, the court has the power to make a costs order against an expert who causes significant expense to be incurred 'in flagrant, reckless disregard of his duties to the Court'.

An immunity objection

The judge was faced with some obvious difficulties. Not least, he had to consider the general immunity from suit of all witnesses in respect of any evidence given, and whether this should also apply to the sanction of costs.

In his ruling, Mr Justice Peter Smith points out that the immunity previously enjoyed by advocates flows from the more general immunity of witnesses. Those immunities, he said, have now diverged. Since the decision in *Arthur J S Hall -v- Simons* (2002; *1AC* 615 *HL*), there is no longer any immunity from suit for advocates in respect of things done in court or in close proximity to the court. He makes a very careful reference to the 'witness analogy' cited in Lord Hoffman's judgment in *Arthur J S Hall*, and concludes that it is not sufficient to explain any immunity by saying that the people involved should be free from avoidable strain and tensions.

The rule in relation to immunity of witnesses depends upon the proposition that, without it, witnesses would be more reluctant to assist the court. In *Stanton -v- Callaghan* (2000; *QB* 75), the Court of Appeal held that an expert witness could not be sued for agreeing to a joint expert statement in terms the client considered to be detrimental to his or her interests. This was postulated on the general principle of witness immunity – that the administration of justice would be adversely affected if witnesses felt unable to give their evidence freely and without fear. Mr Justice Peter Smith agreed that there was a need for witnesses to give their evidence freely, but he considered that, although this right was paramount, it was not absolute. Indeed, blanket immunity has been discouraged by the European Court of Human Rights since the *Osman* decision (29 *EHRR* 245), and each case must now be considered on its own merits.

If witnesses tell lies, they can be prosecuted for perjury; if they sign a false declaration of truth to a witness statement, they can also be said to be in contempt of court; an expert who signs a false declaration is equally open to contempt proceedings. What is currently prohibited is litigation seeking damages or other remedy arising out of the evidence itself.

Experts' immunity not a bar to cost sanctions

The expert witness *chooses* to be a witness and, in this way, differs from the lay witness. Unlike lay witnesses, experts are paid, professional and uncompellable. Why, then, should immunity be regarded as a necessary corollary of independence? But if the expert is not to be held liable for professional negligence, should there be a compromise remedy in the shape of a wasted costs order? In the view of the judge, this would, at least, give the criticised expert an opportunity to defend him- or herself at a proper hearing.

Flagrant, reckless disregard

The judge considered that the question to be posed was: 'Do expert witnesses need immunity from a costs application against them as a furtherance of the administration of justice?' Although there was nothing in the *Arthur J S Hall* and *Stanton* cases to suggest that a witness could be made subject to an order for costs, there was equally nothing to say that they could not.

Judge Smith said that, in his judgment, the question should be looked at in the light of modern developments of the law relating to litigation. The courts had already decided that loss of immunity would not prevent advocates from fearlessly representing their clients. Wasted costs applications against advocates had been decoupled from the immunity and this had effectively destroyed the immunity. In *Stanton*, the Court of Appeal had been equally dismissive of the belief that experts would be deterred from giving proper evidence because of a potential action against them.

In view of the clearly defined duties enshrined in CPR 35, it would be wrong, said the judge, for the court to remove from itself the power to make a costs order against an expert who, by his evidence, causes significant expense to be incurred and does so 'in flagrant, reckless disregard of his duties to the Court'. He did not believe that the other available sanctions were effective or anything other than 'blunt instruments'. The proper sanction was, in his view, the ability to compensate a person who has suffered loss as a result.

Judge asserts such action will not scare off experts

Floodgates and fear

The judge did not accept that experts would be inhibited from performing their duties by reason

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Development not so dramatic for experts...

of a potential exposure to costs. That, he said, was a *cri de coeur* often made by professionals. Any suggestion that the floodgates would be opened was one that was unlikely to carry any real weight as it failed to take account of the **very high level of proof** that would be required to establish the breach of duty. The floodgates argument had failed with regard to lawyers, and the judge did not believe that the position of experts would be any different.

Impact for experts

While this case has the potential to be far-reaching, and doubtless some commentators will use it to create fear in the minds of expert witnesses, our assessment is less dramatic.

This case has, for the first time, opened up the way for failing experts to be penalised by paying the wasted costs of proceedings. We understand that in *Phillips -v- Symes* these costs are likely to be substantial and to exceed £400,000 – although it is important to stress that there has yet been no finding of fault in relation to the expert concerned.

However, to fall foul of this sanction an expert would have to act in a way that is so far removed from what can be considered proper conduct that few would ever find themselves so lost. The test Judge Smith imposed was to ask whether the expert acted 'in flagrant, reckless disregard of his duties to the Court'. Such a test would exclude mere carelessness and perhaps even incompetence. To pass such scrutiny it is necessary for the expert to act in accordance with the Civil Procedure Rules and with reasonable care.

Opportunities missed

Let's consider the sequence of events and the missed opportunities for the expert witness in the *Symes* case.

1) **The expert wrote an initial report based on limited material supplied by the solicitor.** There is nothing wrong with that, provided the report makes clear the basis of the report.
2) **The expert extended a sizeable line of credit in the case – something upon which the trial judge felt obliged to pass some comment.** There are, we suggest, very good reasons why successful business people do not extend large credit facilities to individuals involved in insolvency proceedings. It was unfortunate that, in this case, the expert allowed a situation to develop where he was already owed a considerable sum. For whatever reason, the expert did not succeed in collecting the money and felt obliged, therefore, to refuse to carry out further work.
3) **Consequently, the expert refused to consider additional evidence when supplied by the parties, in part, at least, because of the outstanding fees.** Again, there is nothing wrong in that approach provided:
   - the expert's fees have been properly incurred
   - the fees are due under the terms of the contract between the expert and the instructing solicitor, and
   - the expert makes it clear that the failure of the solicitor to honour the contractual terms is the sole impediment to the expert undertaking further work.

   However, it was the judge's view that an expert in this position should have notified the **court** of the problem and warned that the existing report could no longer be relied upon. What we are asked to accept from this is that a judge and lawyers (who plainly consider some new information is likely to cause the expert to change his opinion) are not able to conclude for themselves that the existing expert report can no longer be relied upon when the expert refuses even to read the new material. Yet, whatever the rights and wrongs of that, the judge's request is so easy to implement that we suggest it would be prudent for any expert in a similar position to follow the advice.
4) **The expert is alleged to have chosen to 'ignore or disregard any evidence that was inconsistent with the original opinion and actively tried to find material to support that opinion'.** If true, this amounts to a serious breach of the expert's duty to the court. At trial, the expert attempted to defend the original opinion. This was despite the duty owed under the CPR to 'draw to the attention of the court all matters, of which I am aware, which might adversely affect my opinion'. Only when directed by the trial judge to consider the additional material provided previously did the expert change his opinion.

   It seems much more likely that this behaviour lies at the root of the expert's current predicament, rather than the fact that he failed to tell the court not to rely on his report when the new information surfaced.

... provided they don't behave recklessly

An extreme case

The expert had many opportunities to take steps to guard against possible censure and sanction from the court. None appear to have been taken. The circumstances of this case do appear somewhat extreme, and similar cases are unlikely to be common. The expert who acts diligently and reasonably has nothing to fear from this judgment. But there is now a new danger for those who flout the rules with a cavalier disregard. We will watch with interest the outcome of the hearing to decide whether the expert is landed with a wasted costs order.

Draft disclosure danger

Disclosing draft reports

It is clear from the Civil Procedure Rules (CPR) and Practice Directions (PD) that no expert report prepared for the purpose of litigation can fall into that class of document that is privileged from disclosure. This flows from two parts of the Rules – CPR PD 35.2 and CPR 35.13 (see box).

But what of earlier reports that are produced for some other purpose, or upon which the party does not intend to rely? The Court of Appeal has been considering this very matter.

Jackson -v- Marley Davenport

In *Jackson -v- Marley Davenport Ltd*[1], the court was asked to rule whether an earlier report should be disclosed in a case where a later disclosed report has been relied upon.

The case was a personal injury claim in which the claimant had sustained serious injury as a result of an industrial accident. Mr Jackson's solicitors asked a consultant forensic pathologist, Dr Rutty, to produce an initial report. This report was intended for use at a conference with counsel, and Mr Jackson's solicitors had raised several questions in their instructions which were answered in Dr Rutty's report. In his later and final report, Dr Rutty referred to this earlier report and to the questions he'd answered. His final report was disclosed and the references it contained alerted Marley Davenport's solicitors to the existence of the earlier report. An application was made for disclosure of the earlier report. The District Judge, relying on CPR 35.13, allowed the application. Mr Jackson appealed against the decision.

On appeal

Lord Justice Longmore re-affirmed that if an expert makes a report for the purpose of a party's legal advisers being able to give legal advice to their client, or for discussion in a conference of a party's legal advisers, such a report is privileged at the time it is made. It is common, he said, for drafts of expert reports to be circulated among a party's advisers before a final report is prepared for exchange with the other side. He confirmed that such initial reports are privileged.

Longmore LJ went on to say that he could not believe that the CPR were intended to override that privilege. CPR 35.5 provides that expert evidence is to be given in a report unless the court directs otherwise. CPR 35.10 then changed the previous law by providing in sub-rule (3) that the expert's report must state the substance of all material instructions (whether written or oral) on the basis of which the report was written. By sub-rule (4) it is, moreover, expressly provided that these instructions should not be privileged. But the reference in Rule 35.10 to 'the expert's report' is, and must be, a reference to the expert's intended evidence, not to earlier and privileged drafts of what may or may not become the expert's evidence.

In support of Carlson

The Court of Appeal had already held in *Carlson -v- Townsend*[2] that the pre-action protocols were not intended to override the privilege attaching to the report of an expert a party has instructed but decided not to call. Longmore LJ held that, although the facts of *Carlson* were very different, it provided analogous support for the conclusion that it cannot have been intended that the Rules should override privileges in earlier reports of an expert called to give evidence at the trial.

The report Mr Jackson intended to use at trial was Dr Rutty's later report. The later report was not a partial or incomplete document. If it were, said the judge, the position might be different. The Court of Appeal considered that it would be 'a retrogression and not an advance in our law if earlier reports of experts, upon which they did not intend to rely, had to be routinely disclosed before they could give evidence'. The appeal was, therefore, allowed.

Carte-blanche for the lawyer who would be an expert?

There has been criticism of the decision in *Jackson -v- Marley*. Some have said that the decision gives a licence for reports to be altered or shaped to a party's cause before disclosure. It has even been suggested that if a party does not like the report, it can be rewritten. The party can add the appropriate 'spin' and, so long as the opinion itself remains unchanged and the expert is prepared to put his or her name to it, the redraft can then be disclosed and the party claim privilege for the original.

These criticisms are, for the most part, overstated. There is, of course, nothing in the judgment that diminishes the overriding duty of the expert as set out in CPR 35.3, namely:

> *'(1) It is the duty of an expert to help the Court on the matters within his expertise.*
>
> *'(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.'*

The decision does not allow an expert to remove anything from an earlier report with the intention of concealment or misleading the court. And no expert should ever allow a situation to develop where the party from whom instructions are taken misrepresents the expert's opinion.

Drafts do not assist the court

Thankfully, the Court of Appeal has sensibly confirmed that preparatory reports by experts can remain privileged, even if they have been disclosed to the instructing party. So draft reports to instructing solicitors are privileged, as are the many draft versions seen by nobody but the expert and which are eventually consigned to the bin. A draft is, after all, merely a draft, and its disclosure would be more likely to hinder the Court, rather than help it.

Preliminary, or draft, reports are privileged

CPR PD 35.2(1)
An expert's report should be addressed to the court and not to the party from whom the expert has received instructions.

CPR 35.13
A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.

[1] *Jackson -v- Marley Davenport Ltd* (2004; *EWCA* Civ 1225)

[2] *Carlson -v- Townsend* (2001; 1 *WLR* 2415)

Training of experts...

Judicial support for training...

R -v- Salisbury

Many will remember *R -v- Salisbury* as the case in which a nurse was accused of attempting to hasten the deaths of patients on her ward to free up beds. The trial concluded on 18 June 2004. She was convicted on two counts of attempted murder and sentenced by Mr Justice Pitchford to 5 years on each count to run concurrently. When sentencing her, the judge described Mrs Salisbury as 'callous and unprofessional'.

Expert witnesses may remember the case for the ruling by Mr Justice Pitchford which, for the first time, expressed judicial approval for witness preparation training.

The witnesses in question – all due to be called by the Crown – were staff at the Mid-Cheshire NHS Trust. They had been interviewed initially as part of the painstaking police enquiry. However, as the trial approached, and faced with the prospect of giving evidence, the witnesses were reporting severe anxiety and stress. A manager at their hospital felt that they might be helped by outside assistance. The Trust turned to the specialist medico-legal training consultancy *InPractice*, which is run by a barrister and a solicitor and is part-owned by Radcliffes Le Brasseur, a London law firm that specialises in healthcare cases. A course run by a barrister was arranged, which included advice on giving written and oral evidence, and was open not just to the trial witnesses but to all employees of the Trust.

Having received information about the witness training course, the defence applied:

- for a stay of the indictment on the grounds of abuse of process, or, alternatively,
- to exclude the evidence of the witnesses who had undergone the course under section 78 of PACE, on the grounds that its admission would have an adverse effect on the fairness of the trial.

In other words, they wanted the trial stopped or some of the prosecution witnesses' evidence excluded because of the training that had taken place. This would have had a very damaging effect on the prosecution case against the defendant.

Mr Justice Pitchford heard from Trust Managers and the barrister who delivered the training. She gave detailed evidence about the training that had occurred. The judge was told that:

> *'She decided to issue a warning to those attending her classes at the commencement of each day. She informed them that she was aware a number of them were witnesses in a forthcoming trial. She did not know and must not know anything about the trial.'*

She made it clear there was to be **no coaching**. In the event, there was no criticism of her delivery of the course.

The defence application failed. No doubt, the Crown Prosecution Service, the Trust, *InPractice* and the trainer were all relieved that Mr Justice Pitchford did not rule the evidence inadmissible. He commented:

> *'True it is that witnesses would have undergone a process of familiarisation with the pitfalls of giving evidence and were instructed how best to prepare for the ordeal. This, it seems to me, was an exercise any witnesses would be entitled to enjoy were it available.'*

The lesson of *R -v- Salisbury* is that witness preparation training is to be encouraged, but only if it is done properly. But, as an expert witness, how do you guard against bad training and the problems that could follow?

... when done properly!

Check your training provider's credentials

Before you part with your hard-earned cash, find out what quality checks exist in relation to the training materials and the trainers. Ask 'awkward' questions, such as:

- Has the organisation offering the training ever been on the receiving end of judicial criticism?
- Have any of their trainers been disciplined by the Law Society or the Bar Counsel?
- Has evidence ever been excluded on account of training they have provided?

Check your trainer's credentials

Make sure your trainer has relevant court experience. Some witness preparation trainers will gladly prepare witnesses even though they have little or no trial experience. Furthermore, don't assume that the trainer is regulated by either the Law Society or the Bar Council. Witness training arguably falls outside practice as a lawyer.

Whether barrister or solicitor, the trainer should never be coaching, i.e. suggesting or advising what to say in evidence (see next article). Also, dress rehearsal cross-examination based on the evidence in the case is out of bounds, although mock cross-examination on a fictional matter is allowable to give you experience in the process of being cross-examined.

For a long time I have been an advocate of witnesses preparation that is, to quote Mr Justice Pitchford, 'the process of familiarisation with the task of giving evidence coherently'. Ultimately the whistle blowers at the hospital where Mrs Salisbury worked were brave enough to speak out against her in the first place, and the witness training course they attended helped to reduce their anxiety and supported them in the run up to the trial. If, as an expert witness, you feel anxious and think your nerves will adversely affect your ability to give evidence, then by all means seek witness preparation training. Done properly, it serves a real and legitimate purpose.

Penny Cooper is a Barrister, Director of CPD at the Inns of Court School of Law and Witness Preparation Specialist

... or is it coaching?

The role of the expert witness is not as simple as it once was. An expert witness in today's courts should be conversant with a whole raft of rules, to say nothing of procedural conventions and codes of conduct. However, experts are not lawyers, and will often have had little exposure to the litigation process before embarking on a career as an expert witness.

Despite this, an expert who goes into court unprepared and ignorant of the rules and conventions is taking quite a risk. These include:

- attracting the ire of the judge
- damaging one's own credibility and reputation, and
- since *Phillips & Others -v- Symes & Others* (see page 2), being on the wrong end of a wasted costs order.

It is, then, unsurprising that many experts feel the need for some training, particularly when faced with giving oral evidence in court for the first time. This was the situation in *R -v- Salisbury* (see previous article), and that case resulted in judicial approval for **properly conducted** witness training, which can include general training in delivery and confidence building.

A barrister's duty

Indeed, permission to instruct a witness on procedure is enshrined in Paragraph 6.1.3 of the Bar Council's *Written standards for the conduct of professional work*. Paragraph 6.1.4 makes it the:

> *'responsibility of the barrister, especially when the witness is nervous or vulnerable, to ensure that those facing unfamiliar court procedures are put as much at ease as possible'.*

However, in paragraph 6.2.4 barristers are warned that they:

> *'should be alert to the risks that any discussion of the substance of a case with a witness may lead to suspicions of coaching, and thus tend to diminish the value of the witness's evidence in the eyes of the court...'*

It will be noted that there is no suggestion that it would be appropriate for a witness to receive training in the presentation of evidence in the particular case in which he or she is involved. Whilst there is no reason why general training should not be given immediately prior to, or even during, the course of a case, there is a greater danger that this will raise the inference of coaching (as in *R -v- Salisbury*). So what constitutes coaching?

What is coaching?

Elements of 'training' that may amount to coaching will include:

- a discussion of the evidence in a specific ongoing case
- rehearsing the giving of evidence in a future case by question-and-answer sessions in a mock cross-examination (as frequently happens in the United States)
- giving tips on how to present the facts in a case, how to prevent unwanted facts from being drawn out and how to maintain a particular stance under fierce cross-examination
- knowingly and overtly inducing a witness to testify to something that is known to be false
- manipulation of the expert evidence to fit a general case strategy, or to patch up any holes that would otherwise undermine a client's case.

The greatest risk for expert witnesses arising from this list is training that moves into a discussion of the evidence in any ongoing case. This is to be avoided at all times.

So, what will happen to an expert witness who is found to have undergone coaching?

Consequences of coaching

Witness coaching is not actually a designated offence but its consequences might be. A person who 'coaches' a witness (as well as the witness) may be guilty of perverting the course of justice. The coached witness may also be open to a charge of perjury. The evidence of a coached witness might be ruled inadmissible with the result that an entire prosecution case collapses or a conviction is quashed. A witness, then, should never engage in coaching and should also avoid any process that has the appearance, or raises an inference of, coaching.

Lord Justice Nolan, in the case of *Arif* [1], pointed out that each case will be dealt with on its own facts. He said that:

> *'in some cases it may emerge in the course of cross-examination at the trial of the witnesses concerned that discussions may well have led to the fabrication of evidence… . In such a case the court might properly take the view that it would be unsafe to leave any of the evidence of the witnesses concerned to the jury.'*

Information on training and trainers

Registered experts have access to two factsheets dedicated to matters of training.

Factsheet 16: Expert Witness Training considers the various groupings in the training arena, their vested interests and, crucially, the views of experts themselves on the benefits to be derived from, and objections to, the training of expert witnesses. It also gives advice on how to select the most appropriate and cost-effective course for your needs, together with a list of the main players in this market.

Factsheet 25 lists full details of the main providers of training courses together with information on the types of course on offer. Many providers give discounts to experts listed in the *Register*.

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

'Coaching' should be avoided at all times

Information on trainers available to registered experts

[1] *R-v-Arif (Dogan)* (1993) CA 26/5/93. *The Times* 17 June 1993

Factsheet Update
There have been no factsheet changes in the past 3 months.

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

Money Claim Online

Wig and Pen-tium – the Virtual Court

In our series of articles on Getting Paid (*Your Witness* 33, 34 and 37), we have observed that the majority of experts turning to the courts for help in recovering their fees are concerned with extracting payment from solicitors. Anecdotal evidence suggests that, in the bulk of cases, the problem is more a matter of tardiness than of genuine dispute. In such cases, Money Claim Online might be a handy tool for experts who have gone beyond the chase letter or telephone call and wish to bring some real pressure to bear to aid extraction of payment.

Money Claim Online

As part of the Lord Chancellor's continuing drive to save money in the running of the county courts system, a pilot claims scheme was operated from December 2001 to June 2003. The scheme enabled some types of county court claim to be dealt with on the internet.

The pilot scheme resulted in a significant saving of time and money for the government – and so was judged to be a resounding success! Consequently, it is now possible for some county court claims to be issued directly via the Court Service Money Claim Online website (*http://www.moneyclaim.gov.uk*). All the information needed to commence an action can be entered electronically and the court fee paid by credit card.

A claim may be started using Money Claim Online if it satisfies *all* of the following requirements:

1. The claim must be for money only and for a specified sum of less than £100,000.
2. The claim must be one that can be brought using CPR Part 7 – which is the norm for claims for non-payment of invoices brought by experts against solicitors.
3. The claimant must not be a child, a patient under the Mental Health Acts or publicly funded by the Legal Services Commission.
4. Proceedings can only be brought against a single defendant (or two defendants if the claim is for an identical amount against each defendant) – when suing a law firm, a partnership is counted as one defendant and would bring joint and several liability against all the partners in the firm.
5. The defendant must not be the Crown, a child or a patient under the Mental Health Acts.
6. The defendant's address for service must be within England or Wales.

In action

The mechanics of the operation are quite simple. The website displays an electronic form that is similar to the paper version of the Part 7 claim form. The claimant completes the details of the claim, makes secure payment by credit card and sends the form over the internet. Once the online form has been received by the Money Claim Online website, it serves a printed version of the claim form on the defendant. Service is effected by post, in the normal way, and is deemed to be served the fifth day after the claim was issued, irrespective of whether that day is a business day.

The rules for acknowledgement of service are the same as for normal claims, save that it is also possible for a defendant to acknowledge a claim by telephoning the Money Claim Online customer helpdesk on 0845 6015935 or by e-mailing acknowledgement to them on customerservice.mcol@courtservice.gsi.gov.uk. Similarly, the defence can be either filed and served by post or sent via e-mail, provided that it does not include a counterclaim.

Handled in Northampton

The scheme is administered by the Northampton County Court, and the action will remain in that court unless it is transferred to another court. In defended actions, it is usual for the case to be transferred to the court having jurisdiction for the address at which the defendant is residing.

Considering the relatively short time the scheme has been operating, the take-up rate has been remarkable. According to government statistics, Money Claim Online has had more filings than any other county court in the UK. We suspect that this has more to do with the ease of use than the reduced cost of such proceedings. Using the online service saves just £7 on the standard court fees (see *Your Witness* 33, p. 7).

Default judgment and enforcement

The scheme is at its most effective in undefended claims that are concluded by a request for default judgment. Once judgment has been entered electronically, it is possible for a claimant to proceed immediately to enforcement by requesting a warrant of execution. This application can also be made and paid for online. (However, see *Your Witness* 37 for an overview of enforcement procedures and the effectiveness of warrants of execution.)

In this way, the busy or indolent creditor is able to pursue payment of a debt through the county court without ever once having to leave the comfort of the armchair, provided there is a computer and internet link to hand.

Defended claims

As always, it is the filing of a defence that is likely to be the impediment to a life of ease. No scheme has yet been devised that would enable defended claims to be adjudicated online. Consequently, the filing of a defence or an application that can only be determined by a hearing will result in the claim being dealt with in the conventional way.

If you have used the scheme to put pressure on a solicitor, we would be interested to have your views on how the service works in practice.

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