Your Witness

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

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The lesson of Barion Baluchi

Barion Baluchi PhD, Consultant Psychiatrist, was nothing of the sort. The former taxi driver and dry-cleaner admitted 30 charges, including obtaining a false medical registration and perjury. He had written hundreds of 'expert' reports in asylum cases.

The editor of the *New Law Journal* asked me recently why the Baluchi case didn't support the calls for *Council for the Registration of Forensic Practitioners* (CRFP) accreditation of expert witnesses. The reason, of course, lies in the distinction between an expert witness who falls below some measure of quality and a criminal who impersonates an expert witness.

How can a professional body be expected to prevent criminals from committing crimes? The GMC's revalidation scheme, put on hold recently because of severe criticism by the Shipman Inquiry, is incapable of preventing, or detecting, a future Shipman because revalidation is designed to test a doctor's professional competence. That has nothing whatsoever to do with a doctor's propensity to commit murder.

Likewise, it must be highly unlikely that CRFP accreditation could have stopped Baluchi. Once he had fraudulently adopted the identity of a Spaniard to gain GMC registration, his job was done. The CRFP checks at the GMC would have come back positive. To trap him at that point would require the CRFP to verify the authenticity of the records the GMC hold. I suppose they may 'check the checkers', but as Alan Kershaw, CRFP Chief Executive is fond of saying, you have to trust someone.

Baluchi was ultimately caught by a vigilant lawyer. Quality assurance for expert witnesses cannot, as implied by the Legal Services Commission (LSC), come from CRFP accreditation. It can only come from a system that looks carefully at each expert, in each case, from many angles. And that's precisely the system we have in place already (the lawyers, the judge, the other experts) and perhaps the reason why no one is putting forward evidence for there being a general problem with the quality of expert evidence.

Prior authority

Whilst listening to Brian Stone, a senior wallah at the LSC, speaking at the latest *Society of Expert Witnesses* conference, I came across an interesting snippet on the topic of prior authority.

If prior authority to pay an expert witness is refused in a civil action that is publicly funded, the client cannot pay directly. However, if authority is refused in a criminal case, the client can pay for the expert directly. I struggle to understand the logic in that distinction, but feel sure some reader will enlighten me.

Unappealing

We have seen the potentially damaging effects of *apparent* Treasury-driven policy-making in action with the proposals made in the LSC consultation paper (which we cover in depth overleaf). But how about this for a concrete example from one who should know...

> *'I have spent over forty years of my life in the world of civil justice. Two and a half years ago I really thought we were on the way to creating new arrangements for civil and family justice of which this country could be proud. Now I see no light on the horizon at all. ... so long as the Treasury insists on its full cost recovery regime, things can only get worse. Much worse.'*

The speaker? Lord Justice Brooke, widely seen to be one of the few senior judges who actually understands IT, speaking at a Society of Advanced Legal Studies meeting last November. The target of his ire was the Treasury-driven policy that requires virtually all expenditure in the civil courts, including buildings, IT and judges, to be paid for by current litigants.

The reason all this caught my eye, apart from the confirmation it gives about the parlous state of funding for our civil courts, was that figures were published recently showing the continuing decline in the number of civil cases. *The Court Service Annual Report and Accounts 2003–2004* shows a drop of 35% in civil cases since 1998, with a 28% drop in the number of appeals filed in the Court of Appeal (Civil Division).

Just how does the Treasury expect the courts to improve when the pot of money it allows them to work with is getting smaller? Oh, yes. I remember. It doubles the court fees to compensate. Now, what was all that about access to justice?

Get down at the CJC

As this issue goes to press, the *Civil Justice Council* (CJC), the body set up under the Civil Procedure Rules to oversee the civil courts in England and Wales, is preparing to hold a forum on the accreditation of expert witnesses.

In preparation for this meeting, I invited all experts in the *Register* to contribute their views on the subject of accreditation through one of our on-line surveys. I was bowled over by the response! With 441 received in the first 24 hours, this topic is clearly one close to the heart of many. I will report on the outcome of the meeting, and the survey results, in the next issue.

Chris Pamplin

If it ain't broke...

As the Legal Services Commission seeks, once again, to tighten its belt, we ask whether the Commission's proposals represent value for money or false economy.

LSC sets out to get 'control' of experts' fees...

The Legal Services Commission (LSC) published its long-awaited consultation paper *The Use of Experts: Quality, Price and Procedures in Publicly Funded Cases* on 26 November 2004. As the consultation process has drawn to a close recently (the last date for submissions was 25 February 2005), it is timely to look at the rationale behind the exercise.

The 54-page consultation paper sets out a number of proposals that will affect experts instructed in publicly funded ('legal aid') cases in both the criminal and civil sectors. They can be grouped into three key areas:

- guidelines on the fees paid to experts
- proposals for accreditation, and
- standard terms of instruction.

LSC seeks control over fees

The increasing cost of legal services and the seemingly dwindling resources of the LSC have forced the beleaguered Commission to implement a number of measures that seek to make the provision of public funding an affordable option. Following tough controls on lawyers' fees, it is the turn of experts to fall under the Commission's economic scrutiny. According to the LSC, the intention of the proposed measures is to 'secure best value for money and assure the quality of expert witnesses paid for by the Commission'. We suggest that value for money and quality are not always synonymous. Perhaps a truer assessment of the Commission's priorities can be gleaned from LSC Senior Legal Advisor, Simon Morgans, who said that experts' fees, unlike lawyers' fees, had increased significantly in recent years. He said that these fees must be subject to control, and 'the pressures on the legal aid budget are such that no element of legal aid expenditure can go without scrutiny'.

Expert fees have risen

... despite not knowing the present position!

It is undeniable that experts' fees have increased to some extent. However, the LSC is hampered in its approach to expert fees because it does not currently gather data to enable it to know its annual spend on experts. Neither can it assess the differences there might be between the fees of experts working in the civil and criminal arenas, nor between the various specialties. Its best guess is that experts' fees accounted for £130 million of LSC funds in 2003/04. That was ~6% of the total LSC budget of £2,100 million. Nonetheless, the LSC sees such costs as a major area of expenditure that needs curbing.

Our own biannual survey of expert witnesses shows that fees have increased by less than 10% above the rate of inflation since 1997. During that time there have been a number of factors which have contributed to the increase, including the additional burden placed on experts by the Civil Procedure Rules (CPR) and the increased involvement of medical reporting agencies.

The fee scales proposed by the Commission in civil proceedings are linked to those already fixed in criminal cases. If the proposals are implemented, we calculate that the average fees of experts acting in civil cases are likely to be reduced by up to 50%.

Warning from the lawyers

The fees currently charged by most experts bear reasonable comparison with county court fee scales for solicitors working in the civil courts. In arriving at these scales the court takes into account the level of fee-earner involved, the overheads of the typical practice, its geographical location and other factors. Judges use these scales when assessing some types of cost in the county court. The allowable fees are not particularly generous, but they do, at least, enable lawyers to turn an honest profit. When the LSC introduced reforms and caps for lawyers' fees in civil cases, the effect was fairly dramatic. Solicitors simply stopped doing legal aid work on the grounds that it was no longer profitable. Legal aid franchising increased the amount of work solicitors were expected to do in publicly funded cases, but for ever-diminishing returns. Not surprisingly, some firms that had applied for legal aid franchises later thought better of their decision and politely told the Commission that they no longer wished to undertake it.

There are cynics who will say that these measures were designed precisely for that reason, and that public funding of cases was to be discouraged in favour of other funding options, such as Lord Woolf's much vaunted conditional fee agreements. Whatever the motivation, one thing seems reasonably certain: stringent caps on experts' fees will inevitably lead to fewer experts accepting LSC-funded cases, just as caps on lawyers' fees reduced the number of law firms offering legal aid. And fewer experts will inevitably mean that the range and choice of experts available will be restricted. In our response to the consultation paper, we predict 'a serious impact on supply and competition within the expert witness marketplace if the "meagre" fee scales on offer in the criminal arena are imposed on expert witnesses in the civil arena'.

One of the main planks of the Woolf Reforms of the civil court system was 'access to justice'. Any measure that effectively reduces the availability of expert evidence to litigators is inconsistent with this high ideal and appears to us to sit most uneasily with the tenets of the CPR. For it to come from the organisation whose very purpose is to provide public funding to run cases for the most vulnerable in Society is stranger still.

Is accreditation the answer?

This leads us to consider the second head of proposals contained in the consultation paper: those for accreditation.

The paper sets out to achieve a system in which the majority of experts will be accredited by the Council for the Registration of Forensic Practitioners (CRFP). It points to recent high-profile cases in which expert evidence has been discredited leading to miscarriages of justice (not to mention the resulting loss to public funds). Simon Morgans of the LSC said that he firmly believes that experts who regularly provide forensic services should be quality assured. He added that those experts who are already registered with the CRFP had shown that, after assessment, they were currently competent to provide forensic expert services.

Is the general quality of expert evidence in doubt?

In our response we comment that by seeking to achieve a position where all experts are CRFP accredited, the consultation paper implies that the quality of expert evidence, across the board, is in need of improvement. We point out that not one shred of evidence has been offered to demonstrate this. Moreover, the CPR have already introduced a perfectly adequate means of dealing with and testing the reliability of expert evidence in the civil arena.

Pre-CPR there was undoubtedly tactical misuse of expert evidence by lawyers and a tendency towards the 'hired gun'. However, as Graham Bennett, Solicitor, puts it in his letter to *The Times* (30 Nov, 2004):

> *'The present law requires the judge to satisfy himself that the witness is expert in the field in which the witness proposes to give evidence. This is done by reference to the witness's professional qualifications, his experience and, if need be, by questioning him as to his expertise.*
>
> *'It is only if the judge considers that the witness is properly an expert, and that the witness evidence will assist the jury to make its findings, that such evidence can be allowed. Courts can and do refuse to allow evidence to be given by those who cannot prove themselves to be expert, so there is already proper scrutiny of the witnesses' credentials.'*

As pointed out in our response to the consultation paper, there is currently no precondition imposed by English law on the qualities demanded of an expert witness. It is for the court to make a judgment of the individual's qualities and to weigh the expert's evidence in accordance with this judgment. It is clear to us, therefore, that the only distinction between experts and expert witnesses is that the latter undertake to bear witness to their expert opinions – and what is there to accredit in that?

The recent high-profile miscarriages of justice in child death cases appear to have been seized upon to justify the LSC's proposal for mass accreditation. However, we cannot agree that these cases reveal a general problem with the quality of expert evidence. When considering the case of Angela Cannings, the Court of Appeal made it plain. The reason for the quashing of the conviction *was not the expert evidence* that had been given but rather some *new evidence* that had been identified in relation to SIDS deaths and a possible genetic link.

LSC pushes CRFP as the route to quality assurance...

The Court of Appeal acknowledged that the way the courts currently handle expert evidence in some fields was the main problem – particularly when faced with dogma or evidence that deals with novel developments in science. (These are matters we have highlighted in previous issues of *Your Witness*. Indeed, we've already called for the civil courts to use the CPR and the criminal courts to use the rules of procedure to exercise more precise control over expert evidence. This should be particularly so in cases where the issues hinge solely on disagreement between reputable experts or where the evidence is at the 'frontiers of science'.)

Of course, experts sometimes get it wrong. And when they do, they may well attract the full glare of publicity. This was particularly true in the high-profile and emotive cot death cases. But it is difficult to see that the LSC's proposals for accreditation will have any impact on the incidence of such errors. We should not forget that the expert at the centre of the Sally Clark controversy, Professor Sir Roy Meadow, was pre-eminent in his field. There is, we suggest, no system of accreditation that would have excluded him. (We name Meadow simply to exemplify our point to a wide audience, and not because we believe he ought to have failed to pass any system of accreditation.)

Who's best placed to accredit?

If accreditation is to be carried out, who is to do it, and what makes the CRFP more suited to the task over and above the professional bodies that already provide peer review and monitor standards?

The CRFP was conceived originally to ensure that forensic scientists working for the prosecution in criminal cases met a basic standard of competency. This was because it was just these sorts of expert who had been found wanting in the previous two decades. Initially the organisation laid no claim to experts in the civil arena, and, importantly, its procedures were designed to meet its stated purpose of providing (mostly) state-employed forensic scientists, scenes of crime officers, and the like, with a professional qualifying body. In its original role, the CRFP has a valuable, and welcome, function to perform. However, in creating an overarching system of professional skills accreditation, the CRFP usurps the function of the true

... without any evidence of a problem in quality

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professional bodies and the courts by preselecting experts who are 'sufficiently expert' to be instructed.

LSC uses a circular argument to justify loss of prior authority

Accreditation will reduce choice

The effect of the proposals, if implemented, will be a general reduction in the pool of experts from which a litigator is able to draw, and hence diminished market choice and competition. The Law Society (speaking specifically about plans for the accreditation of experts used in asylum and immigration cases) stated that it would be opposed to any proposal that would result in practitioners being able to use only experts with certain accreditation, or those who had a particular qualification or belonged to a particular organisation. The Law Society pointed out that expertise in evolving areas was sometimes required, and that practitioners must be allowed the flexibility to instruct experts who may not be included on an 'approved list'.

Prior authority to end, new terms to be inserted

Finally, we come to the LSC's proposals for removal of the system of assured payment through prior authority and its proposal for standard terms of instruction.

As matters currently stand, a solicitor will make application to the LSC for a prior authority to incur expert fees in a publicly funded case. The LSC will grant prior authority if it considers that the expert's fee is reasonable. This effectively guarantees payment of the expert's fee and prevents any later attempt to reduce it, e.g. on taxation or assessment of costs at the conclusion of the proceedings. The LSC now proposes to move away from this system.

Instead of paying solicitors the expert's fee on a case by case basis, the LSC proposes, instead, to pay solicitors an annual or biannual sum to be used generally for the payment of experts. This would do away with the need for any consideration of the fee by the LSC, but would also remove the safeguard currently enjoyed by experts. Experts would then be reliant on the specific contractual terms existing between themselves and the instructing solicitors. One effect of this might be to force experts to accept any reduction of fees made on assessment of costs by the court.

Staged instruction may offer a solution

It is our view that prior authority is one of the reasons expert witnesses accept publicly funded cases, despite the existing low fee rates. In declaring that 'it is uncommon for experts' fees to be adjusted on costs assessments', the LSC is both stating the obvious and indulging in a circular argument. Of course expert fees are not reduced on assessment: prior authority currently prevents such interference!

Could staged instructions cut costs?

As an alternative to the removal of prior authority, we have suggested to the LSC that they might consider a system of staged instruction. This approach, already adopted by many experienced litigation lawyers in the civil arena, has the benefit of breaking potentially large expert witness assignments into smaller, more easily managed, parts. As each stage of reporting acts to inform the next stage, this would assist the LSC case workers to make informed judgments on applications for prior authorities, yet also maintain the safeguards for experts.

So far as proposals for specific terms of engagement are concerned, frankly we doubt that there are many who would argue against the need for clear, written, contractual terms in any commercial agreement. In *Your Witness* we have continually encouraged experts to adopt standard terms, and our regular surveys show that the number who now use them has increased from 32% in 1995 to 47% in 2001. Consequently, any encouragement given by the LSC in this direction should be welcomed. We doubt, however, that many expert witnesses will be attracted to the terms proposed by the LSC in its consultation paper. They do, in our view, represent an erosion of the freedom to set terms that make commercial sense to the expert. They should therefore be optional, not mandatory.

Penny-pinching, platitudinous nonsense

The proposals, boasts the LSC, offer 'benefits to the profession, the Commission, expert witnesses and clients, and ensure continued access to high quality, value for money experts in publicly funded cases'. Since 'continued access' must imply that the LSC currently has access to high-quality, value-for-money experts, what's the point of this consultation?

You will be unsurprised to learn that the LSC's website makes no mention of penny-pinching, false economies or platitudinous nonsense. The stark truth is that staff cuts at the LSC in recent years have reduced us to a position where the Commission seems loath to apply any intelligent assessment at any stage of legal proceedings. They would, no doubt, like to reduce the whole of the justice system to a sterile exercise in form-filling and box-ticking. That might suit the LSC, but we can see no benefit to the most vulnerable in Society, they who are the very reason for a system of public funding, that would flow from these proposals.

For a full transcript of our submission to the LSC, surf to *www.jspubs.com* and follow the link to the *Library*.

What you said

As always, part of the process of writing our response to the LSC consultation involved inviting all the experts in the *Register* to give us their thoughts about the proposals. In the event, nearly 200 experts contributed, and the results are shown to the right.

Experts' views

The LSC Consultation Paper was 54 pages long and made its proposals over the course of 7 parts and 8 annexes. To help experts get to grips with the material more quickly, we posted a number of resources on the *Register* website. These were:

- the Executive Summary from the consultation paper
- the specific questions set by the consultation paper, and our comments on them
- our initial response to the consultation paper
- the consultation paper in its entirety.

We also recognised that not all experts have the time to prepare full written submissions. Accordingly, we gave experts the ability to:

- lend support to, or record their rejection of, the views contained in our initial response – a kind of expert poll, if you will
- send us a written response
- use our on-line system to respond to the specific questions set by the LSC.

Of course, we also told experts how to respond to the LSC directly.

In the event, we had 186 experts take part in the poll (see Table 1), 15 responded to the specific questions set by the LSC, and a further 22 experts sent us written responses.

The input we received helped to refine our detailed response, and we submitted the final version, together with all the material we had collated from experts, to the LSC on 24 February.

I would like to thank all who found time to contribute to this effort. We will have to wait to see what conclusions the LSC draws from the consultation exercise, but I expect to have its initial views to report on the *e-wire* in March.

Chris Pamplin

Over 200 expert witnesses have their say...

... and conclude the LSC is on a dangerous course

	Agree	Neutral	Disagree
Quality			
Do you agree that there is no evidence of a general problem with the quality of expert evidence?	80.3%	8.6%	11.1%
Do you agree that the effect of the Civil Procedure Rules has been to solve many of the past problems that solicitor-based case management caused with expert evidence in civil cases?	76.4%	15.4%	8.3%
Do you agree that the problems that have arisen in the criminal courts are the result of the way the courts handled conflicting scientific evidence?	80.2%	15.5%	4.3%
Do you think pre-trial testing of expert evidence would be likely to deal with this problem?	70.3%	16.7%	13.0%
Do you agree that the existing system of combined control from professional qualifying bodies and the courts is the best way of ensuring competence amongst expert witnesses?	83.2%	8.1%	8.8%
Do you agree that no system of accreditation can prevent a first-class expert witness getting it wrong on the day?	91.8%	2.8%	5.4%
Price			
Do you agree that the statistics drawn from our biannual surveys of expert witnesses, showing that fees have increased by ~8% above the rate of inflation since 1997, are a fair reflection of the actual increase in expert witness fees over that period?	59.1%	24.8%	16.1%
Do you agree that there are inflationary pressures flowing from the Access to Justice Act 1999?	57.5%	33.6%	8.8%
Do you agree that our suggested changes would be likely to ameliorate these pressures?	46.4%	40.5%	13.2%
We predict a serious impact on supply and competition within the expert witness marketplace if the 'meagre' fee scales on offer in the criminal arena are imposed on expert witnesses in the civil arena. Do you agree?	91.9%	3.3%	4.8%
Do you agree that our suggested staged approach to the instruction of experts would be likely to help achieve proportionality between the cost of expert evidence and the quantum in a civil case, or the seriousness of the crime?	80.5%	15.1%	4.4%
Procedures			
Do you agree that removal of the prior authority system would have a serious impact on the number of expert witnesses willing to undertake publicly funded work?	82.8%	14.0%	3.2%
Do you agree that a staged approach to the instruction of experts would offer a way for the LSC case workers to make more informed decisions on applications for prior authorities?	77.7%	20.1%	2.2%
Do you agree that any pressure the LSC can bring to ensure expert witnesses adopt clear, written terms of engagement is to be welcomed?	89.5%	6.3%	4.2%
Do you agree that it is not appropriate for the LSC to stipulate mandatory clauses in those terms of engagement?	84.9%	11.0%	4.1%

Table 1 The questions asked and the percentage responses to each. n = 186

Joint and several liability

Here, we explain the law of joint and several liability, and explore how it might assist experts instructed on behalf of more than one party in proceedings or are appointed as single joint experts (SJEs).

Multi-party instructions can cause problems...

In contract, joint and several liability arises when two or more people enter into an obligation (such as a contract for the provision of services). The law will interpret this as an undertaking by those persons to be responsible, either individually or jointly, for any liability that may exist after any one of them has failed to meet an obligation under the contract. In the great majority of cases this will, of course, refer to the breach of some agreed term such as the payment of money.

How it works

The nature of joint and several liability will mean that both parties are 100% liable. They can be pursued separately or together. Indeed, a claimant is not obliged to go after both and, in the case of a debt, a creditor will often pursue the person thought most able to pay. There is no concept of 'proportionate liability' in English law. Thus, if some attempt is to be made to apportion liability, it would be necessary to make contractual provision for this in the shape of a net liability agreement. The only proviso is that a claimant is unable to recover more than 100% of the liability. Accordingly, if the claimant succeeds in recovering 80% from one party, only 20% may be recovered from the remaining party or parties. It is true to say, however, that those bearing a disproportionate share of the liability will often be entitled to claim an indemnity from the others.

For expert witnesses, the most common circumstance in which joint and several liability will arise is that of acting for two or more parties in proceedings or by appointment as an SJE.

SJE appointments

It is relatively common for instructions to be given to the SJE by solicitors acting for only one of the parties to proceedings. A potential difficulty therefore arises. Is there a contractual nexus between the expert and the other party's solicitor that will render both the instructing solicitor and the other party's solicitor jointly and severally liable for the expert's fees? If there are written terms of engagement, they will – or should – make provision for this.

... unless proper written terms are adopted

Even if this were not so, Part 35 of the Civil Procedure Rules (CPR) makes specific provision for this eventuality in the case of SJEs. Rule 35.8(5) states that, unless the court directs otherwise, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses. The court can also give specific directions in relation to the payment of an expert's fees and can order the whole of the money to be paid into court.

In the event that an SJE renders a bill for the work carried out and the instructing solicitor fails to make payment, he or she is fully entitled to pursue any other solicitor on whose behalf those joint instructions were prepared. There is no need to apportion the amount between them. As already seen, each is responsible for the whole of the debt.

There are, however, two points of which to be wary. First, if an expert is asked to render separate bills that apportion the costs between two or more solicitors, it should be made clear that this is done without prejudice to any right to recover *in full from both solicitors on a joint and several basis*. Second, the expert should be aware that, in the event of a dispute over expert costs, any compromise reached with one of the solicitors is likely to bind any dealings with the others. So, if the expert agrees to accept a lesser sum from one solicitor that is expressed to be in full settlement of that solicitor's liability, he or she may find that the right to pursue the others for the balance may have been lost.

Non-SJE multi-party appointments

It is important to bear in mind, however, that the protection afforded to experts by Rule 35.8(5) applies specifically to SJEs. Non-SJEs acting for more than one party would need to make specific contractual provision regarding payment of their fees if instructions are given by one solicitor but arrangements are to be made for payment by more than one party, whether or not these are to be apportioned.

Consider the position when an expert is instructed on behalf of more than one party but the terms of engagement are sent only to the main solicitor. There may well be an informal agreement by all concerned that the fees of the expert will be split between both solicitors. What, then, happens when one solicitor inflates the fee by posing numerous additional questions or requests the expert to carry out tests that were not foreseen by the other at the time the initial instructions were given? A dispute could easily ensue between solicitors as to how the additional cost should be split.

The firmest foundations

To avoid such disputes, experts instructed by more than one party should make sure that clear terms are agreed at the outset. The terms should be made binding on all solicitors involved – not just on the main instructing solicitor. If the fee is to be apportioned, the percentage payable by each should be specified in the written agreement.

However, so that the advantages afforded by the doctrine of joint and several liability are not lost, efforts should be made to make provision for this to take effect in the event of default by one or more party. If you have already achieved this in your contract, and are willing to share it with other experts, we would be delighted to hear from you.

Court reports

Can a party act as his own expert?

Just this question was considered, amongst others, in *DN -v- Greenwich LBC* (2004 *EWCA Civ* 1659).

DN was a child who brought proceedings against Greenwich LBC. He was claiming damages for the alleged failure of a school educational psychologist to properly identify his Asperger's Syndrome, as well as subsequent failure to cater for his special needs by sending him to an appropriate school.

At trial, the local authority did not call any independent expert evidence in relation to the standard of care to be reasonably expected of an educational psychologist working for a local authority. It did, however, call evidence from the psychologist himself. The judge held that the psychologist could not give expert evidence because he was a witness of fact. The trial judge found in favour of the claimant and ordered damages to be assessed.

Greenwich LBC appealed against the decision on the grounds that, *inter alia*, the trial judge had been wrong in finding that the psychologist could not give expert evidence in what was, essentially, his own defence. The Court of Appeal held that the psychologist's evidence – as to why he considered that his conduct had not fallen below the required standard – was admissible. It cited the case of *ES -v- Chesterfield and North Derbyshire Royal Hospital NHS Trust* (2003 *EWCA Civ* 1284). Although expert testimony given by a party might lack the objectivity of an independent expert, this did not rule it inadmissible. The danger that the evidence might lack objectivity related to the cogency of the evidence and not its admissibility.

Despite this finding, the Court of Appeal thought it would be wrong to order a retrial. It pointed out that whether or not the trial judge had allowed the psychologist to give expert evidence in his own defence, the judge had not failed to properly assess the evidence. He had stated in his summing up that he was 'balancing the psychologist's testimony against [the claimant's] expert's professional assessment of his failings'.

Further consideration of non-independent expert evidence was given in *British Sugar Plc -v- Cegelec Ltd*. As seen previously, there is no reason why a party should not adduce expert evidence from a witness who is not wholly independent, provided that the witness is truly an expert in his or her field and understands the overriding duty to the court. In *Cegelec*, the issue in the case was whether the failure of a generator owned by British Sugar was the result of an expansion of part of the end windings contained within the generator (as argued by the claimant), or the shearing of five heat sink fins (as argued by Cegelec). British Sugar contended that shearing of the heat sink fins had resulted from dismantling of the generator following failure, and that damage had occurred as a result of works carried out by Cegelec during a process of end winding. It had been the defendant's case that shearing of the fins had occurred as a result of works carried out by the claimant, and that the shearing had caused the damage and subsequent failure.

An expert can speak in his own defence

The trial judge found in favour of British Sugar and held that failure had occurred because Cegelec had used a process that had failed. Cegelec appealed on the grounds that, at the case management conference, the trial judge had refused leave for expert evidence to be given by Cegelec's central operations manager. This evidence sought to explain the reasons for failure of a generator.

In considering the appeal, the court did not question the admissibility, or otherwise, of the expert evidence Cegelec's manager was seeking to give or his competence to provide it. The Court of Appeal took the view, however, that the evidence was essentially advancing a new theory for the failure and was not being given in response to any evidence adduced by the claimant. In view of the close proximity to the trial date, and the fact that the witness had been available to the defendant since the beginning of proceedings, it was found that the trial judge had been right to refuse leave. The court was reluctant to interfere with the trial judge's discretion as exercised at the case management conference.

The conclusions to be drawn from these two cases are that:

- individuals and organisations remain able to adduce expert evidence to be given by the party itself or a suitably qualified employee
- such evidence should be introduced at an early stage and not left until the last minute.

There are, of course, sound tactical reasons why expert evidence should not be given by a party or an employee. There is always the danger that lack of independence will affect credibility and the weight that will be attached to the testimony. In some cases, however, the subject matter of the dispute may be a product or process so specialised that the only persons competent to give truly expert evidence will be those who are actually involved in its manufacture or development. In deciding whether such evidence is appropriate, a party will need to balance the value of that evidence against its lack of objectivity.

Judge may prefer witness of fact over an expert

Expert evidence -v- the 'reliable' witness

An interesting dilemma for the trial judge occurs when faced, on the one hand, by solid uncontroversial expert evidence and, on the other, by a lay witness who has otherwise demonstrated complete honesty and reliability. Such was the choice facing the trial judge in *Armstrong and Another -v- First York Ltd* (*The Times*, 19.1.2005).

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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.

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First York Ltd appealed against a decision in the lower court on the grounds that the trial judge had attached insufficient weight to expert evidence as to the likely causes of a road traffic accident. The company sought to argue that, in the face of this evidence, the evidence of the claimants (which was not supported by corroborative expert evidence) should have been disregarded. The Court of Appeal disagreed. Expert evidence is not a card that can be used to trump that of a lay witness, and it does not automatically carry precedence.

It was held that when the trial judge had found the claimants to have been 'honest and reliable' witnesses, he was entitled to find that it followed (from that finding of honesty) that there must have been a flaw in the uncontroversial evidence of the expert. This was so even though the 'error' in the expert evidence could not be identified. There was always the possibility that the expert (particularly in a developing field) could have been wrong.

Expert immunity

The vexed question of expert immunity from suit continues to fall under the spotlight. In *Karling -v- Purdue* (2004 *SLT* 1067), the Scottish courts were asked to consider a claim for damages against an expert witness. Briefly stated, the facts of the case were these.

Mr Karling was convicted of murder in 1995. Mr Purdue was the defence expert who had been asked to carry out a post-mortem examination of the victim. Mr Purdue's findings – that the victim had died of suffocation – were consistent with those of the prosecution case. Mr Karling was convicted and sentenced to life imprisonment.

In 2001, fresh scientific evidence came to light indicating that there was no sound evidence on which to conclude that the victim had been suffocated. There was an appeal, and Mr Karling's conviction was quashed. Subsequently, Mr Karling issued civil proceedings against the expert. He sought damages of £75,000 on the grounds that, had the expert performed the post-mortem with sufficient care and competence, there would have been a reasonable chance that he would have been acquitted of the charge.

Mr Purdue defended the action on the grounds of his absolute immunity from suit. He argued that, in the absence of malice, no liability could attach to him, regardless of how incompetently the post-mortem or the subsequent report was carried out. Counsel for Mr Purdue pointed out that the law in relation to immunity from suit was the same in Scotland as it was in England and Wales. He cited the cases of *Watson -v- McEwan* (1905 7 *F(HL)*) and *McKie -v- Strathclyde Joint Police Board*. The protection of witnesses was necessary, he said, for the administration of justice. Witnesses should give their evidence fearlessly, and a multiplicity of actions in which the truth of evidence would be tested repeatedly was to be avoided. In relation to a preliminary report, the fact that an individual might give evidence was sufficient to attract immunity from suit.

Mr Karling's response to this pleading was ingenious. He argued that by indicating in his report that he was attaching his conclusions separately, Mr Purdue was effectively admitting that part of his report was intended for Mr Karling's legal team only. This meant, argued Mr Karling, that the expert was acting in the role of advisor. Therefore the expert owed Mr Karling a duty of care that was capable of standing separately from Mr Purdue's role as expert witness. The claimant averred that the expert should have provided advice on any further investigations that should have been carried out in relation to the likely cause of death. In failing to do this, the expert had been negligent. He further argued that any immunity enjoyed by the expert was limited to the evidence given in court and the work intimately connected with that evidence. Immunity did not, said Mr Karling, extend to any work Mr Purdue had carried out in an advisory capacity.

In rejecting these arguments, the court said that the link in time and function with the criminal proceedings was more than sufficiently close to conclude that, in relation to his engagement to perform professional or expert services, Mr Purdue was immune from suit at Mr Karling's instance. The test imposed by the courts was whether the expert was preparing to give evidence in proceedings. It was the proximity of the criminal proceedings which, in effect, made Mr Purdue's 'advisory' capacity indistinguishable from the work done in the provision of services as an expert witness.

The fact that the expert might have been engaged in a dual capacity (to advise and to prepare and give evidence) did not mean that immunity applied to only one part of the expert's evidence. The position, said the judge, will often not be clear cut.

He gave the example of an expert who was particularly good at providing detailed background information which could be used in cross-examination, but who was not skilled at giving evidence or explaining a position simply and clearly to the court. Similarly, an expert might be engaged before an action is commenced. Their role might be restricted initially, but subsequently broadened. In both cases it was entirely possible that the expert might never give evidence in court.

There were, said the judge, many permutations when it would be possible to make distinctions in an expert's precise role and function. In this case, the preparing of a report in two parts was ample to demonstrate that Mr Purdue was preparing to give evidence. The court was rightly reluctant to make any neat distinction between the expert's two functions. To do so would have undermined the existing unequivocal rule.

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