Your Witness

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

The end of 2005 sees expert witnesses faced with a host of tasty dishes on the banqueting table:

- a consultation on the Criminal Procedure Rules publication of Part 33 on expert evidence
- a consultation on extending VAT to medico-legal reports
- the Civil Justice Council *Improved Access to Justice* document which, amongst other delights, proposes extending fixed fees for expert reports to **all** fast-track PI cases
- Lord Carter's Review on Legal Aid Procurement
- medico-legal reporting organisation action which is funnelling medico-legal work to GPs and away from consultants.

If anything looks set to give you indigestion this yuletide it's that little lot!

Naturally, we've been working hard to ensure the interests of expert witnesses are fairly represented in these matters. You can stay informed by reading our published digests of the important issues, and you can register your views by taking part in our on-line surveys. All these efforts have the twin aims of:

- helping you to assimilate quickly the important matters at the table, and
- providing you with opportunities to respond in ways that best suit you.

Our work on the Carter Review has now been completed. A summary of our submission can be read on page 5 of this issue.

Criminal Procedure Rules

The Criminal Procedure Rules (CrimPR), the equivalent of the CPR in the civil arena, were published in April 2005. However, Part 33 of the CrimPR, that relating to expert evidence, was left empty. The rules committee is now consulting on the text of Part 33, and we've been granted an extension running into mid-January to enable us to garner the views of expert witnesses on the proposed rules. If you undertake work for the criminal justice system and would like to have your say on how experts can be better deployed, then do please visit *www.jspubs.com* and follow the link to the *CrimPR Survey*. Our work on the Carter Review has greatly informed our views on this consultation.

VAT on medico-legal work: consultation

After nearly 2 years of gestation, the VAT authorities (HM Revenue & Customs; HMRC) have launched a consultation into the extension of VAT to medico-legal reporting. You may recall that the need to extend VAT in this way arose from a European Court decision in November 2003. Our advice to doctors at that time, and since, has been to 'not feel pressured into action just yet'. But we are now approaching the time when some decisions need to be made.

The purpose of this consultation is to ensure that HMRC has a full understanding of the implications that implementing this decision will have on the health sector and its clients, and to minimise the compliance burdens for those affected.

The *UK Register of Expert Witnesses* has been asked by HMRC to draw together the views of individual medical expert witnesses. To help in this task we have prepared a number of resources that can be found on our website. Simply point your browser at www.jspubs.com and follow the link to *VAT Survey*. The deadline for this consultation has been extended for *Register* experts to the middle of January.

CJC improving access to justice?

The Civil Justice Council (CJC) published its *Improved Access to Justice* report in August. It is the culmination of 3 years of investigation into funding and costs issues in civil litigation. The report seeks to tackle the unintended, but perhaps forseeable, cost-increasing effects of some of the Woolf reforms. Unfortunately, the CJC has not always been as open in dealing with expert witness issues as one would hope (see page 6 for an example). We will be analysing the 150-page document and will report back to you in the coming weeks.

Also in this issue

Being Christmas, this issue carries a lighter piece on the use of science in the courtroom. We also suggest a little yuletide homework: scrutinising your CV with a wily barrister's eye. Normally a document used to inform potential instructing solicitors, it can transform itself into a liability. Finally we consider a case in the Scottish courts in which a problem with population-based statistics suggests a fascinating parallel with the treatment of Meadow by the GMC.

New edition of the Register

Preparations for the new edition of the *Register* have begun. A draft of your entry for edition 19 will be sent 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 now to make appropriate arrangements. Meanwhile, everyone here at J S Publications sends their best wishes for a Happy Christmas and prosperous New Year.

Chris Pamplin

Inside

Issue 42

December 2005

Science on trial: a troubled history

With the festive season fast approaching, we wanted to give you some light reading for a change! Here we look at the historical problems associated with using science in the courtroom.

Faraday ridiculed for investigating only 'relevant' factors

Even the greatest men of science have found the going tough when they swap the safety of the laboratory for the hurly burly of the courtroom.

A cage of his own making?

In 1819, a company called Severn King and Co. was embroiled in litigation with its insurers following a fire at their sugar refinery. Severn King claimed that the refining method they had used was safe. The insurers, however, alleged that the process was responsible for starting the fire. To back up their arguments, the insurance company called upon expert scientific evidence. The expert in this case was some chap by the name of Michael Faraday!

Faraday conducted experiments into the likely cause of the fire. Being a man of science, though, he focused his efforts on only those factors he considered to be scientifically relevant. This was, of course, a mistake. The claimant's lawyers had a field day concentrating on all those 'irrelevant' factors Faraday had not deemed it necessary to cover in his testimony. Faraday may have been pre-eminent in his field, but this did not save him from ridicule in court and did not prevent the sugar refiners from winning their claim.

At the conclusion of proceedings, the judge made a point of declaring his exasperation and frustration at the mass of contradictory scientific evidence both sides had adduced.

A difficult relationship

In the course of nearly 200 years nothing much has changed. Scientists are still made to look foolish and judges are still having their patience tried. Science should be altruistic. In the search for truth, the scientist should rigidly apply proven scientific methods and should avoid any suggestion of being partisan or in pursuit of pet theories or personal advancement.

Every expert in the English courts has an overriding duty to the court, and any hint of bias will be squashed swiftly. Yet there are still a troubling number of cases in which experts and expert evidence have been severely criticised. In some instances the failure of the expert evidence is identified at an early stage; in the worst cases it goes unchecked and has led to notorious miscarriages of justice.

Lawyers need to improve their scientific understanding

What's to be done?

All manner of suggestions have been made for improving the way in which expert evidence is used in court. For example:

- rules to govern procedures for dealing with expert evidence, e.g. the Civil Procedure Rules
- a single, court-appointed expert in every case in which scientific expertise is required
- a register of vetted and approved experts from which experts should be drawn exclusively
- further limitations on the number of circumstances in which expert evidence is permitted at all
- tighter judicial control of experts
- a system for reviewing expert evidence at an early stage.

Tomorrow's chip wrapping

The Press, of course, has a field day whenever any new case goes to appeal on the grounds of flawed expert evidence. Even the heavyweight dailies are not above joining the witch hunt when yet another expert is shown to have erred. Again, however, press criticism of experts is nothing new. In 1885 the learned journal *Nature* published a savage attack on scientists who prostituted their skill and knowledge for non-scientific ends. The chief objects of the attack were scientists who appeared in court as expert witnesses.

Courts cannot work without expert evidence

The fact that seems lost amidst all the criticism of experts is that the courts and the justice system could not function without expert scientific evidence.

In *R -v- Turner* (1975, *QB* 834), Lawton LJ concluded that an expert's opinion is admissible to furnish the court with scientific information likely to be outside the experience and knowledge of a judge or jury. If, on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. It is on those matters that the ordinary man is *incapable* of forming a conclusion that expert evidence is vital. As Lord Gilbert pointed out in the leading legal text *Laws of Evidence*, the best evidence on the nature of things in such cases is produced by science, and by science alone.

The importance of expert evidence is not to be denied. If there are difficulties, these seem to lie in the way in which the expert evidence is sometimes treated by the courts. There should, perhaps, be a better correlation between the scientific evidence and the issues being litigated, and judges should act as better gatekeepers in the exclusion and interpretation of scientific evidence. An expert is not, as Robert Smith opined in the 1860s, 'a barrister who knows science', although the expert is frequently a scientist who knows some law. It is, perhaps, time that this was reciprocated by the legal community, and judges and barristers should gain some better understanding of science.

It might be achieved if judges were to be more fully involved with the expert evidence at an earlier stage in proceedings. A pre-trial review dealing exclusively with the expert evidence would enable judges to grasp the scientific

processes employed, understand the findings and better assess relevance to the particular facts at issue.

Pre-trial assessment

Such a system is in use in the United States following the ruling in *Daubert* (see *Your Witness* issue 37). Trial judges are required to ensure that any scientific evidence is properly 'derived by the scientific method'. The guidelines also include the requirement that any such evidence is based on theories that have been tested, data that have been peer reviewed and techniques with known and quantifiable error rates.

Novelty requires special consideration

There is a fundamental problem with any legal test of expert evidence, particularly evidence that advances a novel scientific theory or involves some new technique or process. It is entirely correct that such theories should be subjected to special scrutiny to determine whether they meet a basic threshold of reliability. But how should such a test be carried out?

The mistake made by the authors of the *Daubert* rules was the failure to give adequate definitions to a number of terms crucial to the application of the Court's decision. Without definitions of terms such as 'special knowledge', 'reliability', 'novel scientific theory' and 'technical matters', the lower courts were provided with little direction concerning the characteristics of 'expert' testimony or its reliability.

Often the only test that can properly be applied is the application of science itself. One shudders to imagine the possibility of calling expert evidence to test expert evidence, *ad infinitum*, and all this before the trial proper has even begun.

The experience in America, though, is that challenge to expert evidence has been increased by earlier review. Indeed, in many cases the barring of expert evidence has meant that the claimant's case never reaches court. Some lawyers have criticised this, whilst others simply point to it as a healthy indication that the courts are becoming more adept at winnowing out the wheat from the chaff.

Scientifically literate lawyers

Of course, the scientist and the lawyer will continue to be uneasy bedfellows until one better understands the other. Lawyers use a different language and have a different set of goals. What they understand as the scientific process and the nature of scientific method will not necessarily be the same as that of the experts.

A survey of American judges carried out in 2001 revealed that most judges had little understanding of 'the key concept of hypothesis testing or the significance of error rates'. Many judges wrongly assumed that the facts needed to clearly establish or reject causation in tort cases invariably exist somewhere. The plain truth of the matter is that most scientific data will have been developed to test an hypothesis quite different from the one being litigated. Scientific data that are an exact match for the issue in dispute might simply not exist. This fundamental misapprehension is one that appears to be equally held by the English judiciary.

Adopt Daubert guidelines with better definitions

The trouble is that the law requires certainty which science cannot provide – and that statement we can be certain about! Science is concerned with the search for objective truth, but it is always 'on the journey'. Scientists, particularly in new and developing areas, might fundamentally disagree about how a set of findings should be interpreted. The lawyer – who requires the scientist to extrapolate artificially created facts and apply them to the real facts of a particular case – will need to bear in mind:

- how scientific theories are developed
- how hypotheses are tested
- the significance of error rates in given processes.

Scientists are continuously evaluating and retesting data, and seeking a scientific explanation that best fits the cumulative findings of the scientific community. This does not mean that scientific hypotheses provide absolute truth. As every scientist will acknowledge, science is full of uncertainties, and what is accepted today will almost certainly be displaced by research carried out tomorrow. The courts look to expert evidence for clear proof that one thing caused another. However, it would be better to acknowledge that there are very few cases in which science can provide the conclusive truth the lawyer seeks.

Courts often find truth through conflict

Even in the 19th century experts were pointing out to the courts that there were invariably different shades of scientific opinion but that this did not make particular theories either right or wrong. This was all part of scientific debate, and an expert expounding a particular hypothesis was not necessarily being deliberately misleading or partisan. Indeed, in an adversarial justice system it is often a requirement that truth be established through conflict of evidence.

Danger in relying on one piece of research

Unlike the scientist, the judge is required to look at only one piece of research, i.e. the expert's report. Scientists, on the other hand, consider all relevant data and weigh it by applying their own criteria and scientific research principles. The scientist will recognise the limitations of a single piece of research, no matter how brilliant it appears. Lawyers, too, need to understand science and its limitations. If they did, we would have fewer experts blamed for miscarriages of justice, and the function of the expert within the court system would be improved greatly.

Philip Owen

Lawyers urged to learn more about hypotheses and error rates

CV: Curriculum Vitae & Care Vital!

If your opinion can't be attacked, your CV will be

There have been a couple of cases recently in which an expert's CV has been a source of trouble rather than a vehicle for promotion.

The case of Jessica Rees

Jessica Rees, who is totally deaf, has been involved in hundreds of police investigations using lipreading to analyse silent CCTV or police tapes. She has worked for both defence and prosecution lawyers over many years but has only given evidence in court in a handful of cases.

Ms Rees's credibility was challenged in a case at Snaresbrook Crown Court in London in 2004 by the defence barrister. He accused Ms Rees of misleading the court in her CV, which he felt suggested she had a BA in English from Balliol College, Oxford. Ms Rees readily accepted she had not completed her degree and said her CV was meant to show only that she had completed virtually all three years of the BA course at Oxford. The early arrival of her baby prevented her from sitting the final examinations. She holds a formal qualification of a 2nd at Honour Moderations in English as stated in her CV.

Following a review of her role as an expert witness in prosecution cases, a Crown Prosecution Service (CPS) spokeswoman said: 'The CPS has decided not to rely on Jessica Rees as a prosecution witness in current or future cases.'

The lesson for expert witnesses

Here we have a person who, through a lifetime's experience, can honestly lay claim to a skill in lipreading that is beyond that of the layman. The concerns expressed by the CPS appear not to be about Ms Rees's ability to lipread (How does the possession of a BA in English have any bearing on that skill?) but on her general credibility given the misleading impression defence counsel was able to take from her CV.

The lesson for expert witnesses, and those who instruct them, is clear: **a CV must tell the truth, the whole truth and nothing but the truth**.

Unlike expert witnesses, barristers have a partisan role to play in our system of justice. They are expected to put forward the very best case they can for their clients, and one element of this is attacking the credibility of experts. Barristers will test the logic of the expert's conclusions, probe any part of the evidence that appears to consist of generalisations and explore alternative hypotheses. It is far better to discredit an expert on the evidence itself than by personal attacks on professional reputation or credibility. But sometimes, needs must!

Ensure accuracy, expunge ambiguity

The cost of a simple error

An expert joined the *Society of Expert Witnesses* some years ago. The expert's CV was changed to include this information, but a small mistake was made: the word 'Institute' was substituted for the word 'Society'. Thus, the CV claimed membership of the '*Institute of Expert Witnesses*'. In fact, there is no such body. If you have just said 'Yes there is!', then you may be getting confused with the *Expert Witness Institute*. Perhaps this is demonstration enough that this type of error is not so difficult to make.

So you can imagine, then, the feelings induced by the expert's upcoming date with the Crown Court on a criminal charge brought by Trading Standards! Clearly these things matter.

Law Society Checked – a cautionary note

The dangers are ever present. For example, the Law Society of England and Wales entered into a relationship with commercial publishers in the late 1990s to create the 'Law Society Checked' logo for expert witnesses. By paying to be listed in a directory, and offering up a couple of favourable solicitor references, experts could gain kudos by displaying the 'Checked' logo.

In 2003, the Law Society, perhaps recognising the danger in it providing such pseudo-endorsement for experts, pulled the plug. An expert should now consider carefully whether any reference to having been 'Law Society Checked' should remain. To leave such a claim in a CV can impart little benefit, such checking having been disavowed by the Law Society. However, the claim could open the expert to the same style of attack as that suffered by the experts noted above. Why take the risk?

Better safe than sorry

In Rees's case, the wily barrister was faced with an expert opinion that, being subjective at its root and provided by a practitioner drawn from a very small field, was difficult to challenge of itself. So he resorted to demolishing her credibility in lieu of demolishing her opinion. That he was able to make such hay from a CV giving an accurate chronological account, yet open to misinterpretation, is a salutary warning to all experts. **Be very careful about what you say in your CV.**

CVs On-Line: a free service

If you can find a quiet period during your Christmas break, perhaps it would be wise to get out your CV and give it the once over with a fresh critical eye. Once amended, please send it through to us for free inclusion on our on-line and software versions.

Expert CVs are available through the *Register:*

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

To lodge your CV against your on-line entry, simply:

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

Submission using either of the above methods incurs no charge.

Lord Carter's review of legal aid

The aim of Lord Carter's Review of Legal Aid Procurement, with respect to expert evidence, is to seek more efficient and effective use of expert witnesses. After last year's ill-informed attempt by the Legal Services Commission (LSC) to reduce their spend on expert witnesses by the simple expedient of cutting expert fees in half, Lord Carter's review is most welcome. It offers the chance to design a coherent strategy by which the Department for Constitutional Affairs (DCA) and the LSC can deliver cost-effective and efficient use of expert evidence within the constraints of public funding limits. There is surely no better place to find these answers than amongst the expert witnesses themselves.

In September, the *UK Register of Expert Witnesses* was asked to draw together views of expert witnesses about the use of expert evidence in complex and costly cases, including fraud cases, with particular emphasis on:

- What costs are incurred when experts are used, and what factors cause these costs to escalate?
- Is there scope for greater efficiency in using expert witnesses?

It is self-evident that most expert witnesses will not have been instructed in the tiny number of complex and costly (fraud) cases. Yet, the lessons to be learnt from the generality of cases that are neither overly complex nor particularly expensive also apply to these exceptional cases.

Consulting the experts

We wrote an initial submission which we posted on the *Register*'s website in October 2005. All 3,000+ experts in the *Register* were then invited to consider the response and feed back their own views. We also enabled experts to contribute by lending their support to, or recording their rejection of, the views contained in our initial response through an on-line polling system.

In total we received 264 contributions from experts listed in the *Register*. The views expressed helped us to refine, and extend, our initial submission. The resulting final submission was sent to Lord Carter's review team at the end of November. You can find the full text of the submission by visiting *www.jspubs.com* and following the *Carter Review* link.

The problem for legal aid

The core problem for the legal aid system is how it can pay 'proper' fee rates to expert witnesses and thereby retain experienced expert witnesses willing to provide opinion evidence. Based on our analysis, the answer seems to lie in a combination of **early involvement of experts**, **staged instructions** and **pre-trial assessment** of expert evidence.

Early involvement of experts

The existing trend towards the earlier involvement of experts – noted by the DCA in *A Fairer Deal for Legal Aid* – must be reinforced. Expert opinion evidence, if used early enough, can stop weak cases from 'getting off the ground'. Trying to save public funds by paying expert witnesses less is tantamount to locking the stable door after the horse has bolted. Stopping the weak cases from ever starting, through the better use of experts earlier in the case management process, will return much greater cost savings than tweaking the fees of expert witnesses.

79% agree that staged instructions would be helpful

Staged instruction

An approach already employed by many experienced litigation lawyers in the civil arena is staged instruction of experts. Potentially large expert witness assignments are broken into smaller, more easily managed, stages, and each stage of reporting acts to inform the next.

The current court system requires that two 'Rolls Royce' reports are obtained, covering all aspects of the expert evidence, even if at trial a large proportion of the technical evidence is not disputed. The introduction of a staged reporting system would demand that a 'Rolls Royce' report be prepared only when the nature of the evidence, and the 'seriousness' of the case, justified it.

Pre-trial assessment of expert evidence

If introduced at the same time as changing the 'gladiatorial' culture in the criminal courts, pre-trial assessment of expert evidence has much cost-saving potential. Such assessment could take the form of meetings of experts, *Daubert*-style appraisal of expert evidence or even pre-trial hearings of expert evidence leading to juries being given the 'settled' expert opinions without ever seeing an expert witness at trial.

Conclusion

The legal aid system is in danger of creating a professional class of expert witness willing to accept 'meagre' fee rates in lieu of the professional fees experts can attract elsewhere. If this is to be avoided, approaches such as those noted above will need to be explored in place of simple-minded attempts to reduce further the fees payable to experts under legal aid.

92% agree that pre-trial meetings will save time – and money

Carter Review Survey 31 Oct–24 Nov 2005 n = 231	Agree	Neutral	Disagree
Do you agree that the current system wastes money by not having expert evidence available early in the life of a case?	90.1%	6.9%	3.0%
Do you agree that a 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?	79.5%	13.5%	7.0%
Do you agree that pre-trial meetings of experts would lead to a better, and earlier, assessment of the expert evidence?	92.3%	4.3%	3.4%

Earle -v- Centrica: MRO charges

Lack of transparency in MRO bills an abomination

There is a large, and growing, groundswell of doctors who are against the involvement of medico-legal reporting organisations (MROs). Our own analysis is that the MRO market tends to increase costs by selling on reports for two or three times the fee charged by the doctor. MROs simultaneously reduce report quality by interposing an (often non-legal) intermediary between the instructing solicitor and the doctor.

There is a perception that such high mark ups are accepted by the system because of the lack of transparency in the billing. This cannot be acceptable, and yet…

CJC enshrines the lack of transparency

The *Civil Justice Council* (CJC) held a meeting in November 2004. A key purpose of this meeting was to discuss a proposal put forward by the *Association of Medico-legal Reporting Organisations* (AMRO) to 'streamline' medical reporting in some claims. Under the spotlight were personal injury claims arising out of road traffic accidents (RTAs) with a value of less than £10,000, and where liability is agreed.

Now these may seem pretty specific criteria, but they catch in their net a very large number of fast-track personal injury claims. The outcomes of these deliberations are reported on the CJC website, but in short they were:

1. There should be a rebuttable presumption that in non-litigated road traffic claims under £10,000 medical evidence should be obtained from a GP.
2. Predictable fees for the cost of obtaining such medical evidence should be the subject of an industry agreement facilitated by the CJC.
3. These provisions should, after review, be extended to all fast-track cases.
4. There should be no enquiry by the paying party into the breakdown of the cost of obtaining a medical report where the clinician does not provide the report directly.

Furthermore, in amplification of point 4), the CJC specifically noted that there should be '**no disclosure of agency charge**'.

Natural justice demands transparency

Here at the *Register* we believe enshrining the lack of transparency in this way is wrong. We know that the *Society of Expert Witnesses* thinks likewise and has raised the matter with the House of Commons Science and Technology Select Committee.

Judge disallows MRO mark up

If there was transparency in the billing we predict that a large part of the MRO mark up would not be allowed on assessment of costs. We were most interested, therefore, to hear about a decision in the Ipswich County Court this July.

Earle -v- Centrica plc

The claimant in this case was injured in a road accident for which the defendant was to blame. The claimant's solicitors gave notice of the claim and it settled for £3,850. A bill of costs was drawn up in the sum of £2,422.10, but the defendant paid only £1,907.72. The defendant's insurers challenged the fees of the medical expert and the agency. Indeed, they sought clarification before paying what they believed was the proper amount.

The claimant issued proceedings for the balance of costs of £514.38. The original claim was covered by CPR Part 45(ii) which relates to fixed recoverable costs in road traffic accident cases. So the claimant was entitled to recover costs and disbursements calculated in accordance with CPR Part 45(ii). The disbursements being disputed consisted of:

- an invoice from MDL Medical Administration Ltd for £25 (plus VAT of £4.38)
- a GP note release charge of £50
- an invoice for £435 for the expert's report, of which the expert received £285 and the agency £150.

The claimant said that the use of medical agencies served to streamline litigation and was a *moderating* influence on medical fees.

The decision

DJ Bazley-White held that, based on *Stringer -v- Copley* and *Claims Direct Test Cases Tranche 2*, there was no principle which precluded the fees of a medical agency being recoverable between the parties. However, it had to be shown that the agency charges did not exceed the reasonable and proportionate costs of the work if it had been done by the solicitor. Any doubt as to reasonableness had to be resolved in favour of the paying party. But agency fees could not be charged as though the work had been done by the solicitors since the expert's fee had to be a *disbursement*.

The rules were designed to deliver a moderate and predictable scheme of costs. Yet there was an obvious risk that solicitors would seek to circumvent the restrictions on their *profit costs* by delegating matters normally viewed as solicitors' work to third parties. The third party could then claim as disbursements that which the solicitor would normally have been expected to perform within the predictable fee structure.

MRO mark up was completely disallowed

The judge determined that the claimant was entitled to recover only the record production fee of £50 and the medical expert's fee of £285.

Now, it is important not to get carried away. DJs in Ipswich have little power to bind any other court. But this case does provide some hope that current efforts to achieve transparency in MRO billing, if successful, will have the power to severely restrict the distorting influence that the parasitical MROs are having on the justice system.

Experts and a smoking statistic

An often-heard criticism is that too many trials become bogged down in expert evidence. It should be recognised, however, that in general the number of expert witnesses in a case is driven by the need to explore the technical aspects as fully as is proportionate to the seriousness of the case.

Since an expert witness must only give evidence on matters within his or her particular area of expertise, the needs of the case may well mean that additional experts are called. If that's the case, then so be it. The consequences of not using sufficient expert witnesses has been demonstrated by the recent Scottish Court of Sessions case *McTear -v- Imperial Tobacco Ltd* (2005) *CSOH* 69.

When the report on *McTear* was published it ran to 350,000 words and required an additional volume of the *Scottish Law Reports* for 2005. Its relevance to experts, in both Scotland and the rest of the United Kingdom, is likely to be profound.

Background

The *McTear* case concerned a claim by Margaret McTear, widow of a deceased smoker. Mr McTear had died of lung cancer after a lifetime of smoking. It was claimed by his widow that the illness was caused by smoking cigarettes manufactured by the defendant company, Imperial Tobacco. She claimed that the company's advertising and its failure to give any health warning had led to her husband taking up the habit in the first place. The arguments were lengthy, and a great deal of expert evidence was sifted and assessed.

Judgment

Lord Nimmo Smith found in favour of the tobacco company. In so doing, he delivered a full resumé of what the expert evidence was required to prove in this case. He said that for Mrs McTear to succeed, she was required to prove that:

- cigarette smoking could cause lung cancer
- her late husband's lung cancer was caused by smoking
- his cancer was caused by smoking the defender's products
- he smoked the defender's cigarettes because the defenders were in breach of a duty of care owed by them to him, and
- such breach of duty caused or materially contributed to his lung cancer.

Lord Nimmo Smith said that Mrs McTear had failed to meet every one of these requirements. One of the main reasons she failed was that in seeking to establish causation, the experts had used data and population-based statistical information that could not be tested by the court. Furthermore, and crucially, the statistics failed to address the cause of the lung cancer in the specific case of Mr McTear.

Use of published data

Of particular interest to experts will be the comments made by the judge when dealing with the wider questions of whether an expert is both entitled and qualified to rely on the published reports of others, and on population-based statistical data.

Mrs McTear had relied on epidemiology to prove general causation. Such evidence had been used successfully in the earlier case of *Main -v- Andrew Wormald Ltd* (1988) *SLT* 141 to show a causal link between asbestos and lung cancer. In *Main*, the medical witnesses were permitted to rely on epidemiological literature. In particular, they were entitled to refer to published papers by epidemiologists, even though they themselves were not epidemiologists.

All the medical witnesses in *Main* were, however, experts in chest disorders. Accordingly, they were fully entitled to have regard to medical literature bearing upon that subject. Their evidence was admitted, subject to the proviso that the views of epidemiologists had not been tested by cross-examination and were to be treated with caution.

Staying within one's area of expertise

The judge in McTear did not accept that *Main* provided a general authority for admitting such second-hand evidence. He said that there was still a requirement that the published material must lie within the field of expertise of the witness. It therefore appeared to him to be a question of fact to be decided on the evidence in a particular case as to whether or not published material lay within the field of expertise of the expert witness. He concluded that:

- It was necessary to consider with care, in respect of each of the expert witnesses, to what extent they were aware of and observed their function.
- It was for the judge to decide what lay within the expert's field of expertise.
- It was for the judge to disregard any expression of opinion on a matter that lay outside that field.
- Where published literature was put to an expert witness, the judge could only have regard for such of it as lay within the field of expertise of the witness, and then only to such passages that were referred to expressly.
- The purpose of hearing the evidence of any expert witness should be to extend the judge's knowledge of the subject matter, including published material, lying within the specialist area of the witness. It is then up to the judge to form his or her opinion about the subject matter and to draw conclusions.

The admission, or otherwise, of such second-hand evidence was held to be of particular importance in the field of epidemiology. Here, it is generally agreed that

Continued on page 8

Presented data must be able to be tested by the court

Second-hand published material must lie within the expert's expertise

Factsheet Update

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

where an association is found, e.g. between cigarette smoking and lung cancer, it is ultimately a question of judgment as to whether the evidence is sufficient to establish a causal relationship.

The experts in *McTear* had referred to research in medical literature, but no detail was given regarding this research. The result was that the basis upon which the conclusion of the expert's report was based had not been established before the court. The judge said that he had not been sufficiently instructed by the expert evidence relating to this discipline to be able to form his own judgment as to whether or not the expert's assertion was proved. Put simply, the expert evidence had not extended the judge's knowledge of this subject matter sufficiently to enable him to form his own opinion about it. The claimant therefore failed to prove the association.

Literature can't answer back!

McTear highlights the need for expert evidence to be fully and properly tested by the court. It is not sufficient for an expert report merely to cite important scientific literature, unless that expert is sufficiently qualified to respond to examination and cross-examination on the substance of such literature. It appears that no matter how well respected that literature might be, it is not something of which a court can take judicial notice. The judge is not obliged to accept literature referred to by a witness as an expression of reliable opinion, nor is the judge obliged to accept the witness's view that what was stated in the literature is correct. The judge is entitled, and indeed bound, to consider whether what is stated is convincing.

Meadow at the GMC

The parallels with the introduction of statistics on cot deaths by Professor Sir Roy Meadow in the *Clark* case are clear. The judgment in *McTear* makes it quite plain that judges are well versed, well able and well practised at recognising and dealing with material introduced by an expert *but that is outside* that expert's area of expertise.

Why, then, did the General Medical Council (GMC) feel that Meadow's behaviour was out of the ordinary? We now have it on high authority that such behaviour is both commonplace and proper. So why did the GMC conclude that not only did this behaviour amount to misconduct, but that it was so heinous an example as to warrant erasure from the medical register? It is difficult to conclude otherwise than that, sadly, the GMC was operating outside its own area of expertise!

Extrapolating from the general to the specific

In any event, in the judge's view Mrs McTear had also failed to prove individual causation. Epidemiology, said the judge, cannot be used to establish causation in any individual case, and the use of general population statistics to determine the likelihood of causation in an individual is fallacious. Given that there are possible causes of lung cancer other than cigarette smoking, and that lung cancer can occur in a non-smoker, it is not possible to determine in any individual case whether, but for an individual's cigarette smoking, he probably would not have contracted lung cancer.

Does working for free taint an expert?

Another aspect of expert evidence considered in *McTear* was the independence, or otherwise, of expert witnesses. In this case, all of the claimant's experts provided evidence without charging a fee. Three were connected with the anti-smoking organisation ASH and were, the judge said, clearly committed to the anti-smoking cause. By contrast, all the experts for the tobacco company were paid their usual fees. The judge was called upon to decide in relation to the experts whether, and if so to what extent, each may have been acting as an advocate rather than providing independent assistance to the court.

The judge found that a mere commitment to a cause and the willingness to give evidence *gratis* did not give rise to a presumption that the evidence was biased. It did, however, justify scrutiny of the evidence to ascertain:

- to what extent these experts had complied with their obligations as independent witnesses
- how sound were their views.

In so far as payment to the tobacco company's witnesses was concerned, the judge pointed out that experts are usually professional people who would normally be expected to seek appropriate remuneration for research, report preparation and court attendance. With regard to the remarks of the claimant's lawyer – about the witnesses being 'handsomely' paid for giving evidence, and the assertion that the court would need 'to be very careful with witnesses whose research was funded by the tobacco industry' – the judge considered the matter but found no basis for saying that any of their fees were anything other than properly charged.

Lord Nimmo Smith did not accept as an *a priori* assumption that funding from the tobacco industry was tainted. Everything depends on the independence of the researcher and the quality of the research. It may well be that ample funding leads to sound research. Again, the question to be asked was: Had the expert witnesses for Imperial Tobacco complied with their obligations as to independence, and how soundly based were their views?

Certainly, it is the current trend to limit expert evidence and the number of experts that can be called. Indeed, it is the rare judge who bemoans the lack of experts in a case already full of them. However, in a case involving many specialist disciplines and data drawn from several published sources, the court must be allowed direct access to expert opinion to fully test and evaluate the weight of the evidence. *McTear* makes it clear that second-hand expert evidence is just not good enough.

Address
J S Publications
PO Box 505
Newmarket
Suffolk
CB8 7TF
UK

DX 50519 Newmarket

Telephone
+44 (0)1638 561590

Facsimile
+44 (0)1638 560924

e-mail
yw@jspubs.com

Web site
www.jspubs.com

Editor
Dr Chris Pamplin

Staff writer
Philip Owen