Your Witness

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Our item on retention of documents in the last issue gave rise to some correspondence which suggests I can usefully expand on the topic as below.

Retention in medical negligence cases

Two questions arose out of medical negligence casework:

- What is the limitation for appeal?
- What about medical records?

Leave to appeal must be requested of the trial judge, and this must usually be done within a very short period, typically 24 hours. Notice of Appeal must then be issued and served.

There are different time limits for different appeals. Generally, an appellant has 14 days to file an appeal, but time limits depend on the type of order to be appealed. Generally, these vary between 7 days and 6 weeks from the date of the decision. The trial judge has a discretion to allow a longer period, and the Court of Appeal also has the power to grant an extension of time for filing an Appellant's Notice. There is no real limitation on this but, as a general rule, the greater the delay in seeking leave, the less likely an extension will be granted, unless there are compelling reasons to do so. In the magistrates court the time limit is generally 21 days.

Turning to the medical records, assuming they are copies, then they could probably be securely disposed of once there is no likelihood of their being required in the proceedings and assuming they do not fall into the class of essential documents discussed in our article. However, it is always best to check with the instructing solicitor before destroying any documents (even if they are copies). Barristers, for instance, habitually return **all** documents supplied with their instructions or during the course of proceedings.

Retention in RTA cases

Next we had a traffic accident investigator write in to check whether he had understood the article correctly:

> *'Most of our cases involve personal injury following an RTA. Therefore 3 years after the date of accident we may destroy/shred our paperwork unless they are minors, and then we would need to wait until their 21st birthday.'*

Claims for damages in RTA cases must normally be brought within 3 years of the event giving rise to the claim (the *cause of action*). There are exceptions to this rule:

- in the case of latent damage (i.e. where the damage caused was not apparent until a later date and could not be reasonably discovered earlier), and
- in the case of minors where the time limits do not start to run until they reach adulthood (18).

Accordingly, the expert's surmise is broadly correct in so far as the claimant is concerned. But where proceedings have already been brought then it is unlikely that the same accident will become the subject of further proceedings between the same parties and in relation to the same subject matter because the issues will have become *res judicata* once a final decision has been reached by the court.

However, this still leaves the question of the expert's contractual relationship with the instructing solicitor and any questions in relation to professional negligence. Actions in contract will be statute barred 3 years from the date of the instructions or from the date of the expert's advice, and claims of professional negligence will be statute barred after 6 years. Experts should note that this is calculated from the date of the expert's advice or other action and not from the date of the original accident. Of course, this is only a precautionary measure to protect the expert, and I don't think that a court would necessarily criticise an expert for disposing of bulky papers once the proceedings have been concluded and reasonable time for an appeal has elapsed.

General principle for retention

If you read our article in the previous issue you will have concluded that there are no hard and fast rules relating to the retention of documents. The advice given in our article was, essentially, that documents should be retained for the period of the trial and for a reasonable time thereafter (at least to cover the time for appeal). After that, it is a matter of discretion as to how long they are kept.

The overriding tenor of our advice is that, wherever possible, papers should be returned to their original source – thereby placing the burden on someone else! In the majority of cases this will be the instructing solicitor. Non-essential documents and routine copies could probably be safely disposed as soon as the trial has ended and the appeal period has elapsed. The question of retention should, therefore, only arise in relation to the expert's own essential documents connected with the proceedings.

Chris Pamplin

Inside

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When lawyers go bust

When the lawyer flees to Rio and all else fails…

In their dealings with solicitors, experts will often rely on the integrity and the professional and ethical standing of a firm or individual. So what happens if a solicitor who has instructed an expert becomes insolvent, is struck off, dies, flees to Rio with his client's money or simply retires from practice?

In cases of retirement there are complex rules and regulations designed to ensure a smooth transition of cases from the outgoing lawyer to the new. This should cause no great difficulty for the expert provided that the contractual nexus is not disturbed (see *Peripatetic solicitors* in *Your Witness* 48). But if the expert's original agreement was with the named retiring individual rather than the firm, it would be wise to ensure that the agreement of the incoming practitioner is obtained to the existing terms of engagement before carrying out further work.

Death, destitution, desertion

The position is rather different, however, if a solicitor is the victim of sudden demise, becomes insolvent or absconds. In these circumstances the Law Society will 'intervene' in the practice and there should be no situation that would leave a 'live' case in a state of limbo. The real difficulty for an expert arises when the case has effectively concluded and there remains an unpaid bill. If the former solicitor is insolvent, to whom should the expert look for recompense?

The first port of call should be the intervening firm. That firm will normally have access to all the files and records of the original firm. It will be able to make payment to the expert out of any funds held on account. If it transpires that the previous solicitor had already received payment from the funding party and then failed to pass this on to the expert, the expert may find himself in a difficult position.

Neither the Legal Services Commission (in cases funded by legal aid) nor the intervening firm will wish to shoulder responsibility for this, taking the view that the issue of payment remains a matter of contractual enforcement between the expert and the original solicitor. If the solicitor has been adjudicated bankrupt, then the expert can, of course, make a claim as a simple unsecured creditor in the bankrupt's estate. This is done by lodging a 'proof of debt' form with the Official Receiver or the Trustee in Bankruptcy (if a trustee has been appointed). The expert's prospects of getting payment, even in part, in those circumstances are doubtful.

… it's just possible the SRA will foot the bill

If the solicitor concerned has not been adjudicated bankrupt but has simply failed to account to the expert for payment of his fee, the expert can pursue his normal civil remedies. This will usually involve the expert in issuing proceedings for recovery in the county court.

But is there any way in which an expert can seek compensation when a solicitor has demonstrably received payment of the expert's fees from the funding party but failed to account for it or, at worse, has stolen it? The conduct of solicitors is, of course, regulated by the Law Society. It is to them that any complaint concerning the activities of a solicitor should be addressed. In England and Wales, any claim for compensation will be dealt with by the Solicitors Regulation Authority (the SRA).

SRA compensation

Generally, the SRA compensation fund exists to protect the interest of a solicitor's clients. Trade debtors (e.g. experts) will be required to pursue payment of their bills using the ordinary remedies available.

However, the SRA has told us that experts may be entitled to compensation in cases where:

- they have sustained loss due to a solicitor's dishonesty, or
- the solicitor's failure to account for money is causing the expert *exceptional hardship*.

The first head, dishonesty, is very difficult to prove. However, the second head, exceptional hardship, is one that the Law Society will look at on its merits. We are informed by the SRA that 'exceptional hardship' does not mean that the expert is in abject poverty as a result of the solicitor's failure but rather that the expert has sustained a 'loss he can ill-afford'. If the expert is an individual in private practice, a fee of £1,000 or more might easily fall into this category. But each case will be looked at on an individual basis. In some circumstances it should be possible to show that the loss of a lesser sum would be a loss worthy of consideration.

Assuming that it can be shown that the solicitor received payment from the funding party, the SRA has said that it is happy to investigate all claims for compensation from experts if the expert will supply:

- the name of the solicitor or firm concerned
- the name of the client
- a copy of the expert's invoice.

Time limit

There does not appear to be a time limit on claims, but there is clearly merit in pursuing a claim at the earliest opportunity. In any event, experts should keep in mind that all claims against solicitors for losses occasioned by breach of contract will be statute barred after 3 years. Those arising out of a solicitor's professional negligence will be statute barred after 6 years.

Real-life example

The experience of one expert in the *Register* is instructive. When the instructing solicitor went to the wall the whole of the expert's outstanding fee was recovered. But he found the compensation fund to be very poorly organised. He would advise anyone dealing with it not to accept anything from them at face value, so it is clearly to be used as a last resort. But the SRA compensation fund may just help *in extremis*.

Low Copy Number DNA profiling

The history of the criminal justice system and the detection of crime are marked by a great many 'breakthroughs', where science appears to offer a solution to previously insurmountable problems in the identification of suspects. Some have proved more reliable than others, however, and occasionally techniques once held to be state-of-the-art and foolproof have become altogether discredited.

Print of history

Fingerprint evidence is now regarded as relatively safe and persuasive. One must bear in mind, however, that its development was not without considerable controversy.

Alphonse Bertillon's initial idea (out of which the science grew) was one of anthropometry. This sought to take accurate measurements of different features of the body to create a profile that was unique to each individual. This system resulted in 241 successful convictions in 1884, and his methods were swiftly adopted by British and American police forces.

Bertillon's anthropometry led to data being collected on a great number of criminals and suspects, and there were some that thought they detected a pattern in these profiles. Early eugenicists sought to take this further and claimed that it was actually possible to identify criminal propensities from the shape of the ears and the head! One advocate of this system was Cesare Lombroso (sometimes called the 'father of modern criminology'), who claimed to be able to identify lunatics and criminals from the measurement of physical characteristics. Those who have read Joseph Conrad's *The Secret Agent* will know something of the injustice caused by such misguided thinking.

Of course, the most momentous breakthrough to date has been in the field of DNA evidence. The work done by Crick, Watson, Wilson and others not only had far-reaching consequences for medicine, but also revolutionised forensic science.

Just like its preceding techniques, identification through DNA profiling has undergone numerous refinements. Similarly, it has been a cause of considerable debate and controversy. Such has been the explosion in this field of forensics that there are some who now question whether we are too accepting of new techniques that might not yet be fully understood.

Low Copy Number DNA

On 30 November 2002, the Forensic Science Service (FSS) published a Factsheet on a new technique it had developed called Low Copy Number DNA (LCN). This, it said, was 'the most sophisticated DNA profiling service to date'. LCN testing is an extension of the existing profiling system and allows genetic profiles of offenders to be created from very small tissue samples, e.g. a few cells of skin or the sweat left in a fingerprint.

LCN, it is claimed, has the same discriminating power as the routine technique. This means that if the DNA found at a crime scene matches a suspect, then the chance of obtaining the profile if it had originated from someone other than (and unrelated to) that suspect is ~1 in 1 billion.

LCN profiling works on tiny samples

This would be fairly damning evidence. It is, therefore, unsurprising that juries are not easily persuaded against it. Suspects faced with such evidence will have a difficult task in establishing their innocence. However, like all identification evidence, DNA evidence in isolation is not capable of establishing guilt – it only proves the DNA has been found at the scene, not how it got there.

So DNA evidence must be corroborated by other cogent evidence. The danger is that such is the credibility given by ordinary people to DNA 'super-science', the existence of any other evidence at all will be taken as corroborative and the identification evidence provided by the DNA profile will simply be 'rubber stamped'.

Having accepted the scientific reliability of the technique, the courts and the jury will be tempted to seize on the impressive statistic of '1 in 1 billion' rather than questioning some more fundamental underlying difficulties inherent in such evidence.

The problem with LCN is that the quantities of material needed to generate a profile are so tiny that the possibilities of cross-contamination are that much greater. Because of concerns over its accuracy, LCN evidence has only been adopted in two other countries, namely New Zealand and the Netherlands. In the UK, however, the technique has been used since 1999 and has already been employed an astonishing 21,000 times. It has been used to generate profiles from matchsticks, weapon handles, clothing and other items allegedly touched by the accused. High-profile cases in which the new technique has been employed include the case of serial rapist Antoni Imiela, and that of Ian Lowther, convicted of the Leeds–Liverpool canal towpath murder. In the latter case, the technique allowed scientists to generate a profile from minute traces of DNA found on clothing 23 years earlier. It has also been reported that LCN was used by the FSS to examine the car hired in Spain by the McCanns.

LCN severely criticised in the Omagh bombing trial

LCN and the Omagh bombing

A crisis point has now been reached following the acquittal in December 2007 of the Omagh bombing suspect Sean Hoey, who was cleared of a total of 58 charges, including 29 murders. The prosecution in the Omagh case claimed that LCN analysis had shown links between the bomb timers used in the attack and Mr Hoey, a South Armagh electrician. The defence called a succession of experts who questioned the reliability of the evidence. This questioning of

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Trial judge found LCN to be too 'unscientific'

the method was aided by a test result from a failed bomb explosion in Lisburn, in April 1998, that Sean Hoey was also charged with. When the defused device was analysed, using the FSS's own technique, the strongest initial DNA profile was found to be that of a teenage boy from Nottinghamshire – and no-one had suggested he was involved in any way. Faced with this, the prosecution called one of the inventors of the technique, Peter Gill.

In cross-examination Mr Gill admitted that LCN was 'a complex area' in which there were 'shades of grey'. In acquitting Mr Hoey, Mr Justice Weir rejected the use of the technique. He said it was not seen to be 'at a sufficiently scientific level to be considered evidence'. The judge remarked that the prosecution had been quick to allow that there were 'shades of grey' when it suited their case to do so, but that when leading the evidence they had put it forward as evidence which could be relied on.

Review, review, review

Following the Omagh bomb verdict the use of LCN testing has been suspended. Indeed, the Crown Prosecution Service (CPS) has carried out an internal review of live prosecutions in England and Wales where the technique has been used. Northern Ireland's Chief Constable, Sir Hugh Orde, also announced that there was to be an immediate review of cases there. This followed criticism of the police, who had been accused by some of having a 'cavalier disregard' for the integrity of evidence, with two officers being accused of 'beefing-up' evidence and lying in court about how forensic material was gathered. Forensic scientists from the province have also been singled out for failing to wear masks, and possibly gloves, while handling evidence, and losing key items.

In England and Wales, too, Tony Lake, spokesman for the Association of Chief Police Officers (ACPO), said that there had been an interim suspension of the use of LCN testing by the FSS. The newly appointed independent forensic science regulator (see *Forensic science Tsar* in *Your Witness* issue 50) has also commissioned an expert review into 'low template DNA analysis', which includes the FSS's LCN technique.

Tsar to set minimum standards for all to meet

There is, however, no indication that there will be any review of concluded cases (nor are there any plans to review the more established DNA profiling techniques). This is despite a number of convictions obtained using the LCN technique since its introduction in 1999. Indeed, far from reviewing concluded cases, it seems clear that the FSS, the police and the Tsar all consider that there is a future for LCN profiling.

Sir Hugh Orde said that it was at the very cutting edge of science and had been used in the trial because of his 'determination to build a case'. Despite the problems of the Omagh bombing case, he maintained that the technique remained 'a vital ingredient of cases in the future which will bring very guilty people to justice'. This appears to be a view shared by the FSS. A spokesman for the Attorney General said that while a small number of active cases would be reviewed 'as a precaution', there were 'no current plans to review past cases'.

The CPS's internal review of current cases took place between 21 December 2007 and 14 January 2008. In a press release published last month it said that, following this review, the CPS had 'not seen anything to suggest that any current problems exist with LCN'. The CPS concluded that LCN analysis provided by the FSS should remain available as potentially admissible evidence. The only proviso was that the weight such evidence is given (by the court) in any individual case remained a matter to be considered in the light of all the other evidence.

Quality criteria

The CPS points out that, in recent years, the science in this area has developed at a very fast pace, particularly with the growth in forensic science providers who compete with one another. Far from treating such developments with extreme caution, the CPS seems swift to embrace each new development and say that 'such developments should ensure these techniques become an ever more compelling tool in the criminal justice system, as long as they are supported by transparent quality assurance processes, set against clear standards, and verified by independent peer review'.

But therein lies the rub. The forensic science regulator tells us that LCN has 'been validated by FSS Ltd in accordance with their internal validation procedures'. But is that good enough? Does it meet the CPS's quality criteria of 'transparent quality assurance processes, set against clear standards, and verified by independent peer review'? The Tsar thinks not. He goes on to say that his review will allow him 'to prescribe standards against which all suppliers of [low template DNA analysis] will be required to validate their services'.

Given the low adoption rate of LCN evidence in other jurisdictions, it is surprising that there has been such ready acceptance by British courts. Would it have been better to wait for the kind of quality assurance the CPS says it requires?

A thorny problem, then, for the new forensic science Tsar. There are, though, salutary lessons to be learnt from history which should warn against a too rapid acceptance of forensic science developments. Whilst the underlying science might be perfectly sound, spin-offs and refinements of established techniques should be treated cautiously until their full implications are understood. Confidence in such developments should be hard earnt, particularly if the liberty of an individual depends on it.

Court digest

Expert fees in lands tribunals

Expert fees in lands tribunals have traditionally been calculated on an *ad valorem* basis, i.e. fixed in proportion to the level of compensation paid in a case. This became commonly adopted for surveyors's fees in railway and other compulsory acquisition cases. It was the basis for a scale devised by Edward Ryde, known as Ryde's Scale (now defunct), which provided the first set of uniform charges to be widely observed by the profession. Following abolition of the non-statutory Ryde's Scale, a claimant's surveyor must now demonstrate that the fees proposed were properly incurred, are reasonable and proportionate to both the compensation at stake and the complexity of the claim, and are commensurate with the time, effort and expertise required to deal with the case.

A further consideration now arises regarding the fees. Potentially, it will have a significant effect on the claimant's ability to recover expert costs. Experts who appear in lands tribunals and other similar quasi-judicial public tribunals frequently occupy the multiple roles of expert, case manager and advocate. When considering costs, however, the tribunal has now made clear its right to distinguish between these roles when determining the hourly rates allowed.

In *Charles McCann -v- Department for Social Development*[1], a Chartered Surveyor had not only supplied an expert report to the tribunal but had also acted as the case manager, expert advisor and advocate for his instructing client. The applicant, Mr McCann, had made a claim for compensation for compulsory acquisition against the Department for Social Development (DSD) in Northern Ireland. Following the successful resolution of his claim, Mr McCann sought the expert's costs.

The expert had already been paid a fee based on the settlement fee and Ryde's Scale. This covered all work done by the expert other than time spent on preparation of the expert evidence, preparation for the hearing and attendance at the tribunal (including advocacy). It was submitted that the expert was entitled to claim 30 hours for time spent in preparation of the expert evidence and 33 hours 15 minutes for his role as case manager and advocate. The claim for costs applied a flat rate of £150 per hour, and this rate was supported by evidence that, in England and Wales, this was a fair and proportionate rate for surveyors engaged in such work.

The DSD opposed the claim for costs on several grounds. It was argued that:

- the claim for preparation of the expert evidence should be reduced to 27 hours because the evidence had been criticised at a fairly early stage in the proceedings and had, in fact, become partially redundant.
- the claim for the expert's time as case manager and advocate was wholly disproportionate to the value of the claim and the amount of the award, and it should be reduced to 9 hours 20 minutes.
- the hourly rates applied elsewhere were irrelevant, and the rate should be calculated at no more than £100 per hour, being the rate approved by the Northern Ireland Housing Executive. It was argued that the expert did not have additional overheads because he worked from home, and it would be wrong to apply the sort of rates more appropriate to an expert who worked from an expensive city centre office.

In lands tribunals experts can take on the role of advocate…

This gave the tribunal much to consider! It started by making it clear that where a Chartered Surveyor had acted both as an expert witness and a case manager/advocate in proceedings before the lands tribunal, it was appropriate to distinguish the hourly rate to be applied to each role in determining costs. Whilst accepting the criticism of the expert evidence, the tribunal also found that some of the work claimed under this head should, more properly, have been attributable to case management and advocacy. In preparing the evidence, the expert had, in some areas, departed from the role of expert and strayed into territory that was in the nature of advocacy. The distinction was important because the hourly rates to be applied to both roles were not necessarily of equal value.

Applying this test, the tribunal held that only 27 hours had been spent on preparation of the expert evidence. However, it also found that the expert's estimate of time spent on case management was both fair and proportionate. It even rounded this up to reflect the time claimed incorrectly under the head of 'expert's fees'. Thus far, the expert's time had been little reduced. However, when the tribunal moved to determining the hourly rate, the distinction it had made between the dual roles was made to bite.

The tribunal agreed with the DSD's submissions with regard to location. It held that, as the work had been carried out in Northern Ireland, local rates were to be applied, regardless of the rates charged for the work or allowed elsewhere. The tribunal did say that the place from which the expert worked and the nature and amount of his overheads was a factor that could be taken into account. In this case, though, there was no evidence upon which a view could be taken. Having thus apportioned the expert's time, the tribunal applied an hourly rate of £115 to the time attributable to his preparing the expert evidence and only £100 to the time attributable to case management and advocacy. Costs were determined at £5,555 plus VAT (to include agreed out-of-pocket expenses of £50).

... and, as might be expected, suffer the consequences

Whilst, at first sight, the distinction made by the tribunal and the difference between the hourly rates might appear inconsequential, the overall reduction in the total fees claimed was significant. The two telling factors were these:

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Lands tribunal relaxes the rules for litigants in person…

- the work was carried out in a locality where expert surveyor costs were generally cheaper
- case management functions and attendance on the tribunal as an advocate were distinguishable from the functions of an expert witness and, consequently, could be assessed separately in any claim for costs.

Just how satisfactory it is for an expert witness to take on the additional role of advocate in a case, we leave for you to mull over!

Disregard inadequately prepared evidence

Just as with the small claims track in the civil courts, procedures in the lands tribunal (and similar bodies) are intended to be accessible to applicants without legal representation. To facilitate this, strict rules of evidence are frequently relaxed, if not waived altogether. However, where expert evidence is adduced, the tribunal will expect this to be in proper form if any weight is to be attached.

In *Karan Singh Lathar -v- Sandwell Metropolitan District Council*[2], Mr Lathar challenged the amount of compensation to be paid to him by the district council following the compulsory purchase of his shop premises. The shop, which was situated in a terrace of similar commercial properties, had been used by Mr Lathar's wife for the sale of clothing. In 2000, Mrs Lathar ceased business due to ill health and all of her stock was removed from the premises to the couple's home. According to Mr Lathar, it was always intended that the business would reopen when his wife's health improved. In the interim, Mr Lathar used one room at the rear of the premises as an insurance agency.

The area in which the shop was situated was approved for commercial re-development. After the compulsory purchase order had been made, but before the date for valuation and prior to being forcibly dispossessed, Mr Lathar moved all of the fashion garments back into the shop, or otherwise restocked it, with the stated intention of continuing his wife's former business. He made a formal claim for compensation from the local authority. The parties were, however, unable to reach agreement on a figure.

... but not for the quality of the expert evidence

The matter was referred to the tribunal for determination of the value of the freehold interest in the subject premises under the *Land Compensation Act* 1961 s.5(2) and disturbance under s.5(6) of the Act. Mr Lathar relied upon three valuations from local estate agents. On average, they valued the shop at £220,000. Comparisons were made by the agents with similar properties in the terrace, and one agent noted that in the whole of the preceding year, no similar property had sold for under £200,000. In addition, Mr Lathar claimed £45,000 for the loss of his business, including goodwill. This latter figure was based on his assessment of the worth of the business and other items of disturbance.

Although the applicant relied on the estate agents's valuations as expert evidence, having regard to their expert knowledge of prevailing market conditions and local valuations, he did not commission formal expert reports. He merely produced letters in which the agents's valuation opinions had been given.

The Council, on the other hand, had produced a formal expert report from a Chartered Surveyor, Mr Page, with over 30 years' experience, who opined that the premises had a value of only £95,750 (less than half the valuation placed on it by Mr Lathar's experts). He had produced a series of photographs taken on the day that possession of the property had been obtained, attesting to the generally run down and dilapidated state of the premises. A large number of transactions were analysed by the surveyor, including sales, where the relevant details were derived from information supplied by the Land Registry, and from discussions with the agents involved. He also provided detailed analyses of all the comparable settlements that he had agreed on other properties required in connection with the re-development scheme, where the valuation date was the same as in the instant case.

In addition to the submissions made regarding the value of the premises, the Council also argued that, as trading had ceased before the valuation date, any goodwill attributable to the business had dissipated. The authority therefore offered £4,282 for loss on forced sale of stock, but argued that the applicant was not entitled to be compensated for storage or transport costs for restocking the premises in the full knowledge that he was about to be dispossessed.

The tribunal, faced with what was a clear conflict between the experts as to the valuation, decided that the nature of the expert evidence produced by the applicant could not be relied upon. In reaching its decision, the tribunal said: 'none of the agents instructed on [Mr Lathar's] behalf had produced expert witness reports and no weight could be given to their opinions, whereas [Mr Page] had produced a fully reasoned and thoroughly professional expert witness report. His detailed and comprehensive analyses of both open market sales and scheme-related settlements were persuasive and clearly pointed to a value of the freehold interest in the subject property at the valuation date of less than £100,000. As to disturbance, the claim for goodwill relating to Mr Lathar's former business had to fail. Trading had ceased long before the valuation date, and the restocking of the shop before the impending acquisition had not generated saleable goodwill. Disturbance payable under s.5(6) of the Act should be no more than the sum offered by the local authority. Accordingly, compensation for the compulsory acquisition of the property under s.5(2) of the Act would be assessed at £95,750, and for

disturbance under s.5(6) at £4,282, with the court awarding a rounded total sum of £100,000'.

This case provides a clear reminder, if one were needed, that leeway given to parties who appear without legal representation in a tribunal is unlikely to be extended to their expert witnesses. In any event, faced with an informal statement of expert opinion on one hand and a fully reasoned, professionally produced expert report on the other, the tribunal is always going to prefer the latter. In clear cases of disagreement between experts, it may disregard expert evidence entirely if it is not in proper form.

Expert evidence shouldn't be in a vacuum

Sometimes the weight of expert evidence, taken in isolation, can be compelling and almost overwhelming. Consequently, it can come as a complete surprise to the observer when the court reaches a conclusion that seems contrary to the weight of that evidence.

It is frequently a ground for appeal that the judge at first instance failed to take account of the expert evidence or failed to attach sufficient weight to it. However, as highlighted in the case of *Re. J and Another* (see the last issue of *Your Witness*), the expert is not the arbiter of fact and may not usurp the judicial role of the court. There may be any number of other factors that influence the decision of the court, in addition to the expert evidence.

In an interesting recent case the court was asked to rule on the extent to which a tribunal was obliged to reach its decision based on expert testimony given before it.

The case (*C -v- Special Educational Needs and Disability Tribunal*) was somewhat unusual as there was dispute and uncertainty about what the expert had said at the tribunal, the extent to which he had been challenged and to what extent, if at all, contradictory evidence had been given by witnesses called on behalf of the local authority. The court was required, therefore, to deal with the appeal on broad principles. The brief facts of the case were as follows.

The appellants were the parents of a girl with significant hearing difficulties. The child had previously attended a non-maintained residential school for children with hearing impairments. But in a statement of special educational needs, the local authority had upheld a decision to transfer the child to a mainstream school. The parents appealed against the decision to the Special Educational Needs and Disability Tribunal.

An expert audiologist had attended the school proposed by the local authority and had found that the noise levels in the classroom where not suitable for a person with hearing impairment. The evidence of this expert was an important part of the parents's argument against the local authority's decision. Despite oral evidence given by the audiologist, the tribunal rejected it and dismissed the appeal. The parents then appealed against the decision of the tribunal on the ground that the expert had given evidence that when classroom activity began, the noise level in the room meant that the child could not hear appropriately and so could not learn. They claimed that the tribunal had misunderstood the evidence, failed to take it into account or given no adequate reasons for rejecting it.

An immediate difficulty for the appeal court was the lack of a transcript of the tribunal hearing. Furthermore, the written decision of the tribunal did not contain details of the audiologist's evidence.

There was considerable disagreement between the parties about what, precisely, had been led in evidence by the expert and to what extent his evidence had been challenged by the local authority. Neither was it known whether there had been any contradiction of the evidence by witnesses called on behalf of the local authority. In deciding whether the tribunal had erred, therefore, the appeal court had to look at the broader picture. Judge Wyn Williams reasoned that the expert must have given evidence that the proposed school was unsuitable, as there would otherwise have been no point to the appeal. That being so, he further reasoned that such evidence must have been weighed and considered by the tribunal in reaching its decision.

Dismissing the appeal, the judge said that, although the tribunal's decision did not contain details of the expert evidence, it was, nonetheless, clear from the decision that his evidence was considered properly in its context and weighed against many other factors in deciding whether a placement at the mainstream school was suitable. The important point made was that it is never appropriate for expert evidence to be considered in a vacuum and accepted or rejected without reference to a host of other factors relevant to the issues. In this case, the parents had been properly informed why their appeal was unsuccessful on a major issue. The reasons provided identified all the factors that influenced the tribunal. There was not such a deficiency of reasons so as to render its decision unlawful. It was therefore an inevitable conclusion, said the judge, that the tribunal did not act unreasonably or irrationally in its assessment of the audiologist's evidence, and had obviously taken it into account. It had weighed the evidence in the balance against a host of other factors, and the weight to be attached to the expert evidence was for the tribunal to determine.

Of course, in the absence of any other reasons, the rejection of what is seemingly sound and compelling expert evidence would be unreasonable and a valid ground for appeal. However, expert evidence is not to be considered in isolation, and it does not automatically carry more weight than other relevant factors the court is required to take into account.

Philip Owen

Expert evidence is just one part of the evidence base

References

[1] *Charles McCann -v- Department for Social Development (Costs)* Lands Tr (NI) (Michael R Curry FRICS) 30/10/2007

[2] *Karan Singh Lathar -v- Sandwell Metropolitan District Council* Lands Tr (PR Francis FRICS) 2/10/2007

[3] *C -v- Special Educational Needs and Disability Tribunal* [2007] *EWHC* 1812

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Expert witnesses listed in the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 55). You can read them all on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, privilege, disclosure and fees. When you need clarification, the Factsheets should help. If not, call us for assistance on 01638 561590.

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Accessible freely on-line at **www.jspubs.com** are details of many leading cases that touch upon expert evidence.

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How would you like to have a database of 10,000+ litigation lawyers at your fingertips? Based on the litigation lawyers on the *Register*'s Controlled Distribution List, *LawyerLists* enables you to purchase top-quality, recently validated mailing lists of litigators based across the UK. Now you can have fast, easy, flexible and cost-effective access to top-quality address data for litigation lawyers. Getting your own marketing material directly onto the desks of key litigators has never been this simple!

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All experts vetted and currently listed may use our undated logo to advertise their inclusion. A dated version of the logo is also available bearing the year of most recent recommendation. Successful re-vetting in 2008 will enable you to download the 2008 logo.

General helpline – FREE

We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for assistance, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2008 dated logo. The results of the re-vetting process are published in summary form in the printed *Register*, and in detail in the software and on-line versions of the *Register*.

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As part of our service to members of the legal profession, we provide free access to more detailed information on our listed expert witnesses. At no charge, experts may submit:

- a **profile sheet** – a one-page A4 synopsis of additional information
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We bring together the largest community of expert witnesses in the UK. Since 1995, we have tapped into this community, through our survey work, both to build up a body of statistics that reveal changes over time and to gather data on areas of specific and topical interest. If you want a say in how systems develop, take part in the surveys and consultations.

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A valuable benefit for those experts who opt for the Professional service level is our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment and commercial legal issues.

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