

Your Witness

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Debt recovery in Scotland

I had a call on the *Register* helpline recently from an expert based in England who needed to chase a debt owed by a Scottish law firm. As recovery of debts in Scotland differs substantially from proceedings against English debtors, I thought it worth offering a little guidance here.

The first question is that of jurisdiction, i.e. whether proceedings can be commenced in England and Wales or must be started in Scotland. This will depend on where the contract was made. Given that the expert was instructed by solicitors in Glasgow and in connection with proceedings in the Scottish courts, the default position is likely to be that the contract will be governed by Scottish law. But it is possible for experts to insist upon a term in their contract that all disputes will be subject to English law and the jurisdiction of the English courts.

In the instant case the expert's contract did not have such a clause. If it did, it would have been possible for him to sue the solicitor in the English county court. However, he would still have needed to make an application for enforcement outside the jurisdiction and to register the judgment in the Scottish court for recovery. In the absence of a 'jurisdiction clause', an expert will probably be restricted to action in Scotland.

The expert was attempting to recover some £2,500. The normal venue for such proceedings is the Scottish Sheriff Court, which is broadly analogous to our county courts and will usually be the court in the area in which the debtor resides. It may also be possible to initiate proceedings in the Scottish Court of Sessions (which is more like our old High Court), but this will normally be reserved for complex or defended cases involving more substantial sums.

Once proceedings have begun, there are various things a debtor can do to protect his position. This includes an application for an earnings arrestment or inhibition (a kind of freezing order). And once judgment has been obtained, the remedies available are similar to those in England and Wales but with some quite important procedural differences. Judgments are usually enforced by the Sheriff's officer, whose role is not dissimilar to the English county court bailiff.

It is still possible for litigants in person to issue proceedings and conduct cases in the Scottish court, as it is in the rest of the UK. However, because of the distances involved and the procedural differences which will be unfamiliar to English litigants and lawyers, it would be best to instruct a Scottish advisor. Before doing so,

however, it would be prudent to make some enquiries to establish that the law firm is still in existence, still trading and, on the face of it, fit to sue.

What if the court rules you aren't expert?

Imagine the effect on your legal practice if a court was to rule that you were not an expert. You would be duty bound to reveal this adverse ruling to anyone who sought to instruct you in the future, and it would be unlikely to have a particularly positive effect on your instruction rate! This is exactly what happened to Mr Doughty in the Ely Magistrates Court when he appeared as an expert instructed by the defence in a speeding case in February 2008.

The expert produced a lengthy report raising doubts about the procedures adopted in the use of a speed detection device and the reliability of its readings. He also wrote a supplementary report commenting on a report obtained by the prosecution. But, when he presented himself at Ely Magistrates Court ready to give his evidence, the magistrates ruled that he wasn't an expert on the matters before the court and that his evidence was, therefore, inadmissible.

Mr Doughty decided very quickly that his only option was to challenge the decision of the Ely magistrates by way of judicial review. He promptly lodged a claim for judicial review, which was equally promptly granted permission, and an expedited hearing was ordered. The review took place before Lord Justice Richards and Mrs Justice Swift on 7 March 2008.

The magistrates stated that their decision that Mr Doughty was not an expert was based on the fact that he hadn't used the particular model of speed camera since retiring from the police service in 1999 and hadn't attended the manufacturer's training courses.

Dismissing the latter reason (the manufacturer does not allow non-serving police officers to attend its training – an odd policy in itself), Richards LJ was very clear that the magistrates had got it completely wrong. They had badly confused matters that influence the weight that ought to be given to an expert's opinion with matters that affect the admissibility of the evidence. So, Mr Doughty's expert business is now back on track. And hopefully you are now better prepared to deal with a court that is minded to confuse matters of weight with matters of admissibility. Helping their honours get it right may well help you avoid a trip to the Royal Courts of Justice!

Chris Pamplin

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New GMC guidelines

In recent years we have reported in *Your Witness* many cases in which experts have been criticised for their performance in court. Medical expert witnesses, in particular, have attracted more than their fair share of attention, often in very high-profile cases.

Partly as a result of such adverse publicity, there has been a reported reluctance by doctors to put themselves forward as expert witnesses. President of the GMC, Sir Graeme Catto, writing in the *Law Society's Gazette*, pointed out that Society needs doctors to act as expert witnesses – they are essential to our judicial and tribunal systems and to help resolve disputes that require specialist medical knowledge. It is important, he said, that doctors who take on the role of a medical expert witness can do so with confidence, knowing what is expected of them. The courts need doctors who are confident in their abilities and expertise – and, most importantly, in recognising the limits of their expertise.

Despite this, the case of *GMC -v- Meadow* ([2006] *EWCH Admin* 146) has left many medics wondering whether the risk of taking on expert witness work is worth while. In view of the uncertainty felt by many doctors and the continuing criticism levelled at medical experts, steps have been taken to try to clarify both the role and duties of the medical expert and the risk involved.

The Chief Medical Officer in his report *Bearing Good Witness* recommended that the GMC should clarify its guidance to experts. And as long ago as 22 March 2006, the British Medical Association (BMA) began work on guidelines for its members.

The BMA's expert witness guidance was published in October 2007. Prepared with the stated intention of assisting BMA members who wish to undertake work in the expert witness field, it takes into account the law reforms relating to the preparation of medical reports and the guidance then available to experts in the civil and criminal fields. It also acknowledges that changes have taken place in the personal injury market which have influenced the way reports are prepared for fast-track personal injury cases, i.e. those where the value of the claim is less than £10,000 and which generally do not go to full trial. Usefully, the BMA guidelines also contain explanations of the procedural differences in the courts of Northern Ireland, England and Wales, and Scotland.

In March 2007, the GMC began consulting on its draught guidelines. The result of their deliberations was published at the end of July 2008 under the title '*Acting as an Expert Witness*'.

Introducing the new guidelines, the GMC says that, as well as being a source of guidance for doctors, it hopes that they will help to explain to the legal profession the boundaries within which medical experts operate. There is little in the guidance that is radical or new, but it does form

a coherent embodiment of the various existing guidelines and recommendations.

The guidelines recognise that when doctors act as expert witnesses they take on a different role from that of a doctor providing treatment or advice to patients. The GMC points out, however, that medical experts remain bound by the principles laid down by the GMC in its core guidance *Good Medical Practice*.

Acting as an Expert Witness is intended to expand on these principles and clarify how they would apply when giving expert evidence in legal cases. The GMC is at pains to point out that expert witnesses, if registered with it, are accountable to it for the work they carry out, as well as to the judicial system. Doctors must not assume, it says, that 'just because they are working outside a clinical setting, that their actions are somehow beyond the boundaries of their professional responsibilities.' This is a clear statement of intention by the GMC that it is determined to bring the conduct of medical experts firmly within the GMC's jurisdiction and control – if, indeed, there had ever been any doubt that such matters fell outside its remit.

The guidance emphasises that medical expert witnesses must:

- be clear about what they are being asked to do, by seeking clarification from those instructing them if necessary. If they are unable to obtain sufficient clarity, they should not offer an expert opinion or advice.
- recognise their overriding duty to the court and to the administration of justice
- give opinion and evidence within the limits of their professional competence
- keep up to date in their specialist area of practice
- explain where there is a range of views on a particular question, and
- take appropriate action when they change their opinion.

Whether the chief aim of the guidelines is to assist medical experts or to exercise greater and more effective control over their conduct is a matter of debate. The GMC says that 'in helping to address concerns about professional integrity and public trust, this guidance should be seen in the context of the GMC's wider role to protect patients and the public. When doctors act as expert witnesses, they are speaking from a position of authority. It is essential that their actions continue to justify the trust which the public, and the legal profession, places in them.' The GMC is unflinching in stating the consequences of a doctor's serious or persistent failure to follow the guidelines. This, it says, will put a doctor's registration at risk.

Is this going to encourage more doctors to venture into the medico-legal arena and should doctors still have lingering fears following the decision in *GMC -v- Meadow*? Lord Justice Wall in

Chief Medical Officer said GMC should revise its guidance

GMC hopes to educate lawyers and doctors

his *'Handbook for Expert Witnesses in Children Act Cases'* thinks not. His belief is that any difficulty stems from what he refers to as a 'continuing level of misunderstanding between the medical and legal professions about what is expected by the courts of expert witnesses'. This misunderstanding, he says, arises from the simple fact that, as a general rule, doctors do not read the law reports and lawyers do not read medical journals. Expert witnesses need to remember that most judges rarely have more medical expertise than the intelligent lay person. It is for this reason that they rely heavily on expert opinion, and are dependent upon the integrity of expert witnesses. He acknowledges that *Meadow* remains a 'very important decision for all expert witnesses' and recognises that experts may be concerned about its implications. Self-evidently, experts do not want to be reported to the GMC by a disaffected litigant or relative because of what they have written in a report or

stated in evidence. Lord Wall's assessment is that medical experts should not be concerned provided that they follow the principal message of the Court of Appeal in *Meadow*, namely:

- 1 that experts in their reports and evidence should never stray outside the particular areas of their expertise, and
- 2 if they are invited to do so in their instructions to advise or in their evidence, they should either decline the invitation, or make it very clear to the judge that the area on which they are being invited to comment is not one to which their expertise extends.

Offering some words of encouragement, the judge says that experts should do their work conscientiously. Provided that their report and oral evidence are honest, fair and well reasoned, and that they have always worked within the area of their expertise, doctors have nothing to fear and much to gain from participating as an expert witness.

Experts should be clear if taken outside their area of expertise

The GMC guidance

Acting as an expert witness

- 1 Our core guidance *Good Medical Practice* sets out the principles which underpin good care. When doctors act as expert witnesses, they take on a different role from that of a doctor providing treatment or advice to patients. The principles set out in *Good Medical Practice* also apply to doctors working as expert witnesses.
- 2 In paragraphs 63-67 of *Good Medical Practice* we say
 - You must be honest and trustworthy when writing reports and when completing or signing forms, reports and other documents.
 - You must always be honest about your experience, qualifications and position, particularly when applying for posts.
 - You must do your best to make sure that any documents you write or sign are not false or misleading. This means that you must take reasonable steps to verify the information in the documents, and that you must not deliberately leave out relevant information.
 - If you have agreed to prepare a report, complete or sign a document or provide evidence, you must do so without unreasonable delay.
 - If you are asked to give evidence or act as a witness in litigation or formal inquiries, you must be honest in all your spoken and written statements. You must make clear the limits of your knowledge or competence.
- 3 This guidance explains how the principles set out in *Good Medical Practice* apply to the

work of the medical expert witness. It also lists other sources of information and advice. If you have concerns arising from an appointment as a medical expert witness, you should consider seeking advice from the GMC, your medical defence body or professional association.

- 4 Serious or persistent failure to follow this guidance will put your registration at risk.

The role of the expert witness

- 5 The role of an expert witness is to assist the court on specialist or technical matters within their expertise¹. The expert's duty to the court overrides any obligation to the person who is instructing or paying them². This means that you have a duty to act independently and not be influenced by the party who retains you.

Giving expert advice and evidence

- 6 You must ensure that you understand exactly what questions you are being asked to answer. If your instructions are unclear, inadequate or conflicting, you should seek clarification from those instructing you. If you cannot obtain sufficiently clear instructions, you should not provide expert advice or opinion.
- 7 When giving evidence or writing reports, you must restrict your statements to areas in which you have relevant knowledge or direct experience. You should be aware of the standards and nature of practice at the time of the incident under proceedings.
- 8 You must only deal with matters, and express opinions, that fall within the limits of your professional competence³. If a particular question or issue falls outside your area of

GMC's Good Medical Practice applies to doctors even when working as expert witnesses

Doctors must understand the legal framework

expertise, you should make this clear. In the event that you are ordered by the court to answer a question, regardless of your expertise, you should answer to the best of your ability but make clear that you consider the matter to be outside your competence.

- 9 You must give a balanced opinion, and be able to state the facts or assumptions on which it is based. If there is a range of opinion on the question upon which you have been asked to comment, you should summarise the range of opinion and explain how you arrived at your own view. If you do not have enough information on which to reach a conclusion on a particular point, or your opinion is otherwise qualified, you must make this clear⁴.
- 10 You must make sure that any report that you write, or evidence that you give, is accurate and is not misleading. This means that you must take reasonable steps to verify any information you provide, and you must not deliberately leave out relevant information.
- 11 Where you are asked to give advice or opinion about an individual without the opportunity to consult with or examine them, you should explain any limitations that this may place on your advice or opinion, and be able to justify the decision to proceed on such a basis.
- 12 Your advice and evidence will be relied upon for decision-making purposes by people who do not come from a medical background. Wherever it is possible to do so without being misleading, you should use language and terminology that will be readily understood by those for whom you are providing expert advice or opinion. You should explain any abbreviations and medical or other technical terminology that you use.
- 13 If, at any stage, you change your view on any material matter, you have a duty to ensure that those instructing you, the opposing party and the judge are made aware of this without delay. Usually you need only inform your instructing solicitor who will communicate with the other parties. If the solicitor fails to disclose your change of view, you should inform the court. If you are unsure what to do, you should seek legal advice.
- 14 You must be honest, trustworthy, objective and impartial. You must not allow your views about any individual's age, colour, culture, disability, ethnic or national origin, gender, lifestyle, marital or parental status, race, religion or beliefs, sex, sexual orientation or social or economic status to prejudice the evidence or advice that you give.

Conflicts of interest must be resolved by the court

Keeping up to date

- 15 You must keep up to date in your specialist area of practice. You must also ensure that you understand, and adhere to, the laws and codes of practice that affect your work as an expert witness. In particular, you should make sure that you understand
 - how to construct a court-compliant report
 - how to give oral evidence
 - the specific framework of law and procedure within which you are working

Information security and disclosure

- 16 You must take all reasonable steps to access all relevant evidence materials and maintain their integrity and security whilst in your possession.
- 17 If you have reason to believe that appropriate consent for disclosure of information has not been obtained (from the patient or client, or from any third party to whom their medical records refer) you should return the information to the person instructing you and seek clarification.
- 18 You should not disclose confidential information other than to the parties to proceedings, unless
 - the subject consents (and there are no other restrictions or prohibitions on disclosure)
 - you are obliged to do so by law
 - you are ordered to do so by a court or tribunal
 - your overriding duty to the court and the administration of justice demands that you disclose information

Conflicts of interest

- 19 If there is any matter that gives rise to a potential conflict of interest, such as any prior involvement with one of the parties, or a personal interest, you must follow the guidance on disclosure in paragraph 13. You may continue to act as an expert witness only if the court decides that the conflict is not material to the case.

Footnotes

¹ Doctors are not necessarily expert witnesses. They may also be witnesses of fact (testifying about events that they themselves have observed) or professional witnesses (giving evidence regarding a particular patient that they have treated).

² Civil Procedure Rules Part 35.3, Criminal Justice Procedure Rules Part 33.2, Rule 156 of the draft Family Procedure Rules.

³ The same principle applies where doctors act in other roles, for example as an advisor in a case.

⁴ See judgement of Cresswell J in *The 'Ikarian Reefer'* [1993] FSR 563.

Court reports

Relevance of expert opinion

The Court of Appeal has emphasised that the role of the expert is to provide expert opinion only on those matters outside the ordinary knowledge of the court. Even when the case involves evidence and material of a technical or specialist nature, little is to be gained from the opinion of an expert when the tribunal is in a position to form its own view.

In the trademark case *Esure Ltd -v- Direct Line Insurance*¹, a branding expert was called to give evidence on the likelihood of the public confusing two trademarks – one being a computer mouse on wheels, which Esure was attempting to register, and the other being a red telephone on wheels, a registered trademark of Direct Line.

After an application to register a trademark has been made, anyone wishing to challenge it must give notice to the UK Intellectual Property Office. If agreement cannot be reached between the parties, the Office will convene an ‘Opposition Hearing’. The parties to such a hearing are referred to as ‘the applicant’ and ‘the opponent’.

At the original opposition hearing, Direct Line called a branding expert who gave evidence that the public would draw the conclusion from the marks that the two companies were associated. The hearing officer found that no threshold level of similarity had to exist between marks, and that there was confusing similarity between the marks under the Trade Marks Act 1994. He further upheld Direct Line’s objection under s.5(3) of the Act, having accepted the expert evidence that Esure’s mark took unfair advantage of Direct Line’s.

Esure appealed against that decision. The appeal judge found that the opposition hearing officer had made a material error of principle in relation to confusing similarity, in that a threshold level of similarity had to exist and there was no evidence of the likelihood of confusion. He found that he was entitled to form his own view in that respect because the hearing officer’s findings had been arrived at without any evidence. However, the judge upheld the hearing officer’s decision on s.5(3) on the basis that he was not able to intervene in those findings in the light of the expert evidence.

It is fair to say that neither party was happy with the outcome of the first appeal. Esure contended that the expert had given evidence on consumer perception, consumer confusion, the likelihood of association, unfair advantage, detriment, damage and a fettering of Direct Line’s future activity, and that those were matters for the tribunal and not matters of evidence to be given by an expert. Esure submitted that the judge ought to have rejected that evidence in relation to s.5(3) and reached his own conclusion. Esure argued that without the

expert evidence, the opposition would also have failed.

Direct Line contended that the judge had been wrong to interfere with the hearing officer’s holding on confusing similarity and should not have substituted his view in that respect. They further submitted that a hearing officer was entitled to make a decision based on his own experience, even in the absence of evidence, and that he should have reached the same conclusion under s.5(3) rather than relying on expert evidence.

Dismissing the appeal, the Court of Appeal held that whether or not there was likely to be confusion was a matter that had to be ascertained from the viewpoint of the average consumer in the light of all the relevant factors. What the hearing officer had to determine was what the average consumer would have thought of the two marks and whether they would have been confusing. The services sold by the parties had been identical and of a kind familiar to members of the public. In those circumstances, there was no reason why the hearing officer should not have decided the issue of similarity on his own in the absence of evidence apart from the marks themselves and evidence as to the goods or services to which they were to be applied. Given that the critical issue of confusion of any kind was to be assessed from the viewpoint of the average consumer, little would be gained from the evidence of an expert when the tribunal was in a position to form its own view. There might, however, be a role for an expert witness where the markets in question were ones with which judges were unfamiliar.

Challenging bias in expert evidence

In *G. Saunder -v- Birmingham City Council*² an appellant attempted to have the decision of an employment tribunal overturned on the grounds that the tribunal was wrong in refusing to disallow a medical expert’s evidence on grounds of apparent bias.

The appellant had successfully brought proceedings against a local authority claiming that unlawful racial discrimination had caused him to suffer severe psychiatric illness. The court had given directions for a remedy hearing and a direction for a jointly instructed expert to report on causation. The parties were unable to agree on a choice of expert and submitted lists of experts who had been instructed, from which an expert instructed by the local authority was selected by the court. That expert produced a report saying that the appellant’s mental illness had pre-dated the discrimination and so could not have been caused by it. The appellant sought to have the expert’s evidence excluded because of apparent bias and also to introduce the evidence of two further experts. The applications were both refused by the court on the grounds that any criticism concerning bias should be advanced by

When is a mouse on wheels like a ‘phone on wheels?’

Apparent bias goes to weight not admissibility

Use of an SJE does not prevent other experts being instructed

way of cross-examination of the expert against whom the claim was made. The local authority further submitted that it would be wrong for a party to introduce his own experts simply because he did not like the report produced by a properly qualified independent expert.

The Court of Appeal held that the tribunal had been right to refuse the application to disallow the expert's evidence. The test of apparent bias was not relevant to the question of whether or not an expert witness should be permitted to give evidence, *Armchair Passenger Transport Ltd -v- Helical Bar Plc*³ applied. If a party had reason to suspect bias on the part of the expert, then the proper course was to explore this in the course of cross-examination of that expert's evidence.

However, the Court of Appeal held that the tribunal had been wrong to refuse the appellant leave to call his own expert. The tribunal had failed to address the necessary factors when considering an application to adduce evidence, in particular the issue of causation and the effect of that issue on the amount of compensation awarded. As the appellant had already given instructions and the expert reports had already been produced, there would have been no delay caused to the proceedings by allowing that evidence to be adduced. The Court said, however, that it would be disproportionate to have more than one expert from the same discipline, and so the appellant was only permitted to call one of his experts to refute that of the local authority. (We look, on page 7, at the development of the Court's approach to dealing with apparent bias in expert reports.)

Waiver of privilege

Once again, the question of implied waiver of privilege has been considered by the courts.

In *Expandable Ltd -v- Rubin*⁴, the debtor was interviewed by solicitors acting for the supervisor of the debtor's Individual Voluntary Arrangement. The supervisor subsequently referred to a letter received from his solicitor (in which the solicitor had enclosed his notes of the interview with the debtor) in a witness statement. Those notes had been disclosed to the other side in the present proceedings but the covering letter had not. The solicitors claimed privilege for the letter, but the creditor's solicitors contended that privilege had been waived by the reference to it in the supervisor's statement and that they were entitled to see it. Rix LJ took the view that the mention of a document in pleadings amounted to a form of disclosure.

CPR 31 contains the rules on disclosure. For the purposes of this case, the following are the relevant parts:

- '31.14 (1) A party may inspect a document mentioned in -
 - (a) a statement of case;

- (b) a witness statement;
- (c) a witness summary;
- (d) an affidavit

31.14 (2) Subject to r.35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings.'

31.15 deals with the right of inspection.

The document in question had not been disclosed by list, but it had been disclosed by mention in what, for the purposes of litigation, is another important and formal category of document. That being the case, the party deploying that document by its mention should, in principle, be prepared to produce it for inspection. However, the judge went on to make a distinction between the 'mention' of a document and an 'allusion' to a document. He concluded that one has to guard against the casual mention of documents whose privilege would thereby be automatically and absolutely waived. On the face of it, the covering letter was 'mentioned' in Mr Rubin's witness statement and therefore subject to disclosure, but was this equal to an automatic and absolute waiver of privilege? Rix LJ thought not.

In his view the drafters of the CPR had never intended that the price of the mere mention of documents in a statement should be an automatic waiver of privilege. The CPR, he said, was:

'of general application and not intended to set aside a fundamental right - that of privileged communication between client and solicitor.'

At best, it could only operate as a qualified waiver. Given the particular circumstances of this case, the Court of Appeal held that privilege had not been lost and the letter need not be disclosed.

A degree of uncertainty

We have reported in this issue on the publication of the GMC's new guidelines to medical experts, which include the requirement that experts should always be honest about their experience, qualifications and position. Experts will hardly need reminding of this requirement following recent cases in which the credentials of the expert have come under the severe scrutiny of the court. If a salutary reminder were needed, however, it comes in the shape of Mr Terence Bates (*R. -v- Bates (Terence)* unreported, April 2008). He has recently been convicted of perjury for claiming that he had a degree when he had, in fact, never attended a university.

While experts might still enjoy immunity from suit, like everyone else experts can face a criminal prosecution for perjury if they lie or knowingly mislead the court. A misleading claim to qualifications or expertise that one does not possess is an instance that is likely to attract such a sanction.

References

¹*Esure Ltd -v- Direct Line Insurance* LTL 23/7/2008.

²*G. Saunder -v- Birmingham City Council* EAT 21/5/2008.

³*Armchair Passenger Transport Ltd -v- Helical Bar Plc* (2003) EWHC 367 (QB).

⁴*Expandable Ltd -v- Rubin* CA (Civ Div) 11/2/2008.

Dealing with biased experts

The decision of the Court of Appeal in *Saunders -v- Birmingham City Council* clarifies the position on challenges to expert evidence on the ground of apparent bias. This has been quite an active area for the appeal courts recently, and the following is a brief review of judicial opinion on this topic.

Original position was to bar experts

The courts had long taken the view that where there is an obvious and close relationship between a party to proceedings and the expert witness, it would be inappropriate for that expert to give evidence.

In *Liverpool Roman Catholic Archdiocese -v- Goldberg*¹, the claimant brought proceedings for professional negligence against a barrister who specialised in taxation law. The defendant wished to adduce expert evidence from another barrister in the same chambers who was a friend of the defendant. This relationship was disclosed in the expert's report, but he said that he did not believe that this would affect his expert opinion. When examined on this question, however, the expert did acknowledge that 'his personal sympathies were engaged to a greater degree than would normally be the case'.

Considering whether the expert's evidence should have been admitted at all, Judge Evans-Lombe held that:

'where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions of the expert might probably be.'

In this instance, the judge took the view that justice must not only be done but must be seen to be done. In reaching his decision, Evans-Lombe was effectively applying the same test for bias as would be applied to a person hearing the case.

Court of Appeal removes the bar

This appears to have been an accepted test for apparent bias until *Factortame (No 8)*². In that case Lord Phillips MR considered the question afresh. He held that the presence of a potential conflict of interests should not automatically disqualify an expert witness from giving evidence. Lord Phillips said that:

'the public policy in play... is that which weighs against a person who is in a position to influence the outcome of litigation having an interest in that outcome'.

Where there is a potential conflict of interest because of a relationship between the expert and a party to proceedings, but the evidence is given objectively and without apparent bias, then such evidence should not automatically be disqualified unless the expert can be shown to have an interest in the outcome of the litigation.

In *Toth -v- Jarman*³, the Medical Defence Union (MDU) was defending a case on behalf of an allegedly negligent doctor. An expert witness was instructed to prepare a report but failed to disclose that he had been a member of the Cases Committee of the MDU at the time he had written his report (although he'd ceased to be a member by the time he gave evidence). An attempt was made to exclude the expert's evidence because there had been a conflict of interest and also a failure to disclose this. There was no suggestion that the expert had been influenced by his interest in the MDU or that he had a personal interest in the outcome of the case, but it was suggested that he might have been subconsciously influenced by his connection with the MDU.

In *Toth*, the Court of Appeal followed the reasoning of Lord Phillips in *Factortame* and went on to lay down some important guidelines. First, the expert should have no interest in the outcome of the case, financial or otherwise. For example, an expert who accepted instructions on a contingency fee basis would be barred absolutely from giving evidence. The expert must be able to give a fully independent and objective opinion, and the existence of a material or significant conflict of interest would make it unlikely that the court would be persuaded by that evidence. Indeed, in some cases the court might not even give permission for that evidence to be adduced.

The question was again considered in *Armchair Passenger Transport -v- Helical Bar*⁴. The defendant, a party to proceedings arising out of a traffic collision, wished to call an expert witness to give opinion evidence as to car hire charges forming part of the claim. Objection was taken that the proposed expert had formerly been employed as a chief executive of the rental firm from whom the first claimant had hired a replacement vehicle. A judge sitting in the county court first permitted the defence to rely on the expert report, but a second judge later revoked permission. That ruling came before Nelson J on appeal.

Applying the Court of Appeal decision in *Factortame* and disapproving of the approach of Evans-Lombe J in *Goldberg*, Nelson J directed himself as to the guiding principles emerging from the cases. In particular, he held that the test of apparent bias is not relevant to the question of whether an expert witness should be permitted to give evidence, applying in particular the passage from the judgment of Lord Phillips MR in *Factortame*. The appeal against the second county court ruling was allowed and the order of the first judge reinstated.

It will be apparent that the trend in these cases has been away from the exclusion of evidence on grounds of apparent bias but, instead, to strengthen the view that the weight to be given to the evidence should be tested by examination of the relationship between the expert, the parties and any apparent interest the expert might have in the outcome of the proceedings.

Apparent bias goes to weight not admissibility

References

¹*Liverpool Roman Catholic Archdiocese Trustees Incorporated -v- Goldberg* (No 2) [2001] 4 All ER 950.

²*R (Factortame Ltd and others) -v- SoS for Transport, Local Government and the Regions* (No 8) [2002] 3 WLR 1104.

³*Toth -v- Jarman* [2006] EWCA Civ 1028 (CA).

⁴*Armchair Passenger Transport Limited -v- Helical Bar Plc* [2003] EWHC 367 (QBD).

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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 58). 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.

Court reports – FREE

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

LawyerLists

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!

Register logo – FREE to download

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*.

Profiles and CVs – FREE

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
- a **CV**.

Extended entry

At a cost of 2p + VAT per character, an extended entry offers experts the opportunity to provide lawyers with a more detailed summary of expertise, a brief career history, training achievements, publishing record, etc.

Photographs – FREE

Why not enhance your on-line and CD-ROM entries with a head-and-shoulders portrait photograph?

Company logo

If corporate branding is important to you, for a one-off fee you can badge your on-line and CD-ROM entries with your business logo.

Multiple entries

As well as saving you money, multiple entries offer improved geographical and expertise coverage for multi-site firms. If your company has several offices around the UK combined with a wide range of expertise, call to discuss the options.

Web integration – FREE

The on-line *Register* is also integrated into other legal websites, effectively placing your details on other sites that lawyers habitually visit.

Surveys and consultations – FREE

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.

Professional advice helpline – FREE

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.

Software

Drawing on over 20 years' experience of working with the expert witness community, we have designed a suite of task-specific software modules to help keep experts informed.

Discounts – FREE

We represent the largest community of expert witnesses in the UK. As such, we have been able to negotiate with publishers and training providers to obtain discounts on books, conferences and training courses.