

Your Witness

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Forensic Science Regulator

On 15 January 2009 the Forensic Science Regulator, Andrew Rennison, published a consultation paper looking at the future of forensic practitioner registration in the criminal justice system (CJS). It proposes sweeping rationalisation of the present arrangements. In place of the hodge-podge of current systems, which are based on various criteria testing different aspects of forensic practice assessed against a multitude of standards, the Regulator is recommending a single accreditation system operated by the UK Accreditation Service (UKAS) based on internationally recognised ISO standards.

These changes would both sweep away the troubled quango the Council for the Registration of Forensic Practitioners (CRFP), and widen the scope of the accreditation to encompass:

- the companies providing forensic services
- their personnel and, crucially,
- the methods they use.

Instead of maintaining a specific 'register' of forensic practitioners, the existing UKAS database would become the place to check out the status of a given forensic provider.

Scope of the consultation

Whilst this consultation focuses on the scientific evidence used in the criminal justice system, the Regulator has flagged up his view that whatever comes out of this process could apply equally to the scientific evidence used in the civil and family courts. So, even if you don't work in the criminal courts, you may like to take this opportunity to influence the development of a policy that may later be visited upon your own area of work.

Understanding the issues

The Consultation Paper is 55 pages long, and has as many pages again in detailed appendices. We have prepared a number of resources on our web site to help you get to grips with the issues, and to enable you to respond.

To understand what the Consultation Paper is about, you can read:

- the executive summary of the consultation
- the specific issues set out by the consultation, and our comments on them
- our initial response to the consultation, and
- the consultation in its entirety.

To respond, you can:

- quickly lend your support to, or record your rejection of, the views contained in our initial response (see overleaf)

- use our on-line system to respond to the specific issues raised by the consultation
- send us your written response
- send your written response direct to the Forensic Science Regulator.

You can find all this material by pointing your web browser to www.jspubs.com and following the link to the *FSR Consultation* on the right of our home page.

Law Commission update

If you are waiting for the much-anticipated consultation from the Law Commission on proposals to introduce *Daubert*-style court testing of proposed expert evidence, the latest information we have is that it will not be published until late March at the earliest. Rest assured, as soon as it becomes public, you will be amongst the first to hear!

Expert Witness Year Book

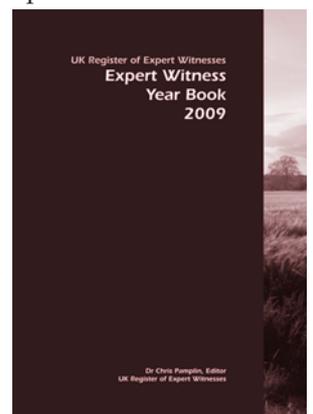
Our handy new reference work for expert witnesses has been well received. For example, "I received my copy of the [Year Book] yesterday and have already made reference to it on four occasions. An excellent publication." and "I have just received the new Year Book and wanted to drop you a quick line [to say] GREAT BOOK."

The *Expert Witness Year Book* has been designed to bring together in a handy reference book information of relevance to the busy expert witness. It contains the current rules of court, practice directions and other guidance for civil, criminal and family courts. And it offers ready access to a wealth of helpful practical and background information, including how to address the judiciary, data protection principles, court structures and much more.

The *Expert Witness Year Book* also provides contact details for all UK courts, as well as offices of the Crown Prosecution Service and Legal Services Commission. And with a year-to-page and month-to-page calendar too, you'll never be without an appointment planner.

Costing just £15.00 plus p&p for experts listed in the *Register*, the *Expert Witness Year Book* can become your constant companion. Slip one in your bag and you can be the expert with the facts at your fingertips. Call us on 01638 561590 to order your copy.

Dr Chris Pamplin



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Issue 55

The rising Tsar of accreditation

As detailed on page 1 of this issue of *Your Witness*, the Forensic Science Regulator has published an important consultation paper looking at the future of forensic practitioner registration. It has ramifications for both the civil and criminal justice systems.

The Regulator's recommendations

The Regulator makes the following recommendation.

'The majority of forensic practitioners work within organisations that will be required to be assessed against ISO standards. These standards already include robust assessments of practitioner competence that will be enhanced further by the roll-out of the new National Occupational Standards and the publication of the Regulator's industry specific standards. An important component of the assessment process will be the on-going assessment of individual competence in the work-place overlaid by accreditation as evidence of compliance with the standards.

'This approach is designed to move standards and the accreditation against them to a new level, with accountability for standards clearly placed on the shoulders of top management. This approach is supported by ACPO and major providers who between them make up the large majority of the practitioner population. It also has the support of the Forensic Science Advisory Council, the NPIA and the Crown Prosecution Service.

'The Regulator takes the view that it is unnecessary and disproportionate to demand further levels of practitioner assessment through the CRFP process, and questions what additional benefits, if any, registration with CRFP can add.

'The overwhelmingly sensible and most viable option is to use UKAS to assess and accredit against all the standards that are expected, standards that include more than adequate assessment of practitioner competence.

'The weakness in this recommended option is the increasing costs that are likely to be placed on sole traders or individual practitioners who opt to become accredited. However, UKAS accreditation will assess them to a wider and higher standard than the current process can. It must also be remembered that a section of this group are expert witnesses who are not full-time forensic practitioners.

'The figures provided by UKAS are provisional; it is recommended that UKAS works with the Regulator to develop a fees structure that covers all types of forensic practitioners.

'It is important to recognise that individual competence is a product of the culture and quality management approach of the organisation in which someone works, as much as it is a reflection of individual ability. It seems logical, whenever possible, to assess individual competence within the overall assessment of an

organisation. This is the standard adopted internationally for forensic science practitioners.'

Our initial response

In order to stimulate debate, the *UK Register of Expert Witnesses* has prepared the following initial response to the Regulator.

In seven short paragraphs detailing his recommendations, the Regulator succeeds in bringing some much-needed rationality to the debate over the accreditation of forensic practitioners who provide evidence to the criminal justice system (CJS).

What needs accrediting?

The *UK Register of Expert Witnesses* has long been sceptical of the need for general accreditation of experts as *expert witnesses* because no one has been able to show that there is any general failing in the quality of the expert evidence provided to the UK courts. In any event, we see little to accredit in the forming of opinions and bearing witness to them in court.

What does need accrediting is an individual's skill as an expert. For most who appear as expert witnesses, this professional accreditation is undertaken by a professional regulatory body. We believe that where a professional regulatory body already exists, that body should be left to regulate its members.

There is a view that many of the problems that have arisen in the criminal courts in recent years have flowed from the court's mishandling of conflicting scientific evidence. No system of accreditation can tackle this. But the ongoing work of the Law Commission – to introduce new powers for the criminal courts to assess opinion evidence **before** it comes before a jury – could.

An end to register-focused decision making

The Regulator rejects both the proposal from the Council for the Registration of Forensic Practitioners (CRFP) and that from Skills for Justice to continue the existing CRFP register. The CRFP was conceived originally as a professional regulatory body for forensic scientists who had no other professional regulatory body, and in that role it had a value. However, it has repeatedly tried to extend its remit into new territory such as, for example, the civil arena. The driver for this has seemed to many to have been based more on the need for it to make its register financially self-sufficient than an identified need in the areas it has coveted. This has wasted its original potential.

In opting instead for ISO-based assessments through UKAS, the Regulator has ensured that in future any drive to widen the scope of regulation does not arise simply through a need for a register to become self-financing.

Broader, deeper, better

The Regulator wants to move to a multi-faceted system of accreditation focused on the provider

Regulator turns the spotlight away from individual practitioners...

... and onto organisational quality assessment

organisations, and that must be welcomed. By integrating the assessment of practitioners and the scientific methods they use into an organisation's ongoing quality procedures, and all to internationally recognised ISO standards, a superior replacement for the existing system of practitioner accreditation will result.

Where international standards exist, it seems perverse not to adopt them. Not only would their adoption bring into the UK's quality assessment programme a level of objectivity, it would also allow comparisons to be drawn across national borders. This would be very helpful when monitoring the UK's performance in quality management of forensic science services, and would also aid in cross-border litigation.

Provided it is recognised that the aim is to allow independent assessment to be made of an individual's competence (i.e. that the individual has the necessary knowledge and skills to undertake a given task), and not whether the outcome of a given task is correct (i.e. even competent people can get it wrong on the day), we see little wrong with promoting the Skills for Justice National Occupational Standards (NOS).

However, it must be recognised that there is a danger of the NOS approach creating a barrier to innovation, especially if the absence of a NOS for a given task comes to be seen as a negative. This must be guarded against. Science develops through innovation, and novelty should be nurtured, provided only that the greater uncertainties associated with new approaches are made plain.

What accreditation can deliver

The CRFP, in creating an overarching system of professional skills accreditation and pushing for it to become mandatory, sought to usurp the function of the professional bodies and the courts by pre-selecting experts who are 'sufficiently expert' to be heard.

Yet the accreditation it offers would not prevent its members becoming involved in miscarriages of justice similar to those perpetrated in the 1970s and '80s. No accreditation scheme can prevent a thoroughly competent expert getting it wrong on the day. So, all that is left is the ability of the CRFP to deal with an expert found wanting after the event. The courts have a perfectly good, if slow, system of appeal to deal with such instances. Furthermore, those who have a natural remit to accredit experts – the professional regulatory bodies – already have far greater powers to discipline their members than the powers commanded by the CRFP.

The CRFP scheme always appeared to us to be unworkable, and the expert community has voted with its feet. If the Regulator's scheme is to avoid similar problems, he must be very clear about what it is he is attempting to do. Woolly phrases such as 'the regulation of the quality of the provision of forensic science' (para 1.10) should be

avoided – for how can any system of *a priori* checking guarantee quality when even the most pre-eminent expert can get it wrong occasionally?

Quality assurance of the evidence placed before the court can only come from looking carefully at each expert, in each case and from many angles. And that's precisely the system already in place in the form of the lawyers, the judge and the other expert witnesses in a case.

We believe that the best the Regulator can achieve is to imbue a culture of competency checking through the broad ISO-based assessment of organisations. This, it seems to us, is the closest we have yet come to an answer to the questions posed by the miscarriages of justice of the 1970s and '80s. The Regulator's scheme cannot guarantee quality, but it can guarantee competence within the major provider organisations. And that is a big step forward.

Professional regulatory bodies

But, in keeping with the central tenets of the Better Regulation Executive's principles of good regulation, the scope of the Regulator's proposed Scheme, as far as *individual* experts are concerned, should include only those who currently lack an existing professional regulatory body. This approach would accord with the findings of the Civil Justice Council's Expert Forum meeting on accreditation held in March 2005.

Rather than trying to adapt the UKAS methodology for the small number of individual forensic scientists, and the larger body of medics, engineers and other experts who provide expert evidence to the CJS, the Regulator should consider allowing the professional bodies to take up the slack. If any of these individuals lacks a professional regulatory body, encouragement to join the Forensic Science Society ought to be sufficient. With its new professional body status, this established body should be well able to ensure ongoing competence of these individuals.

Whilst considering the cost of these proposals, the Regulator will need to address the current attitude in the Legal Services Commission (LSC) that equates *lowest cost* with *best value*. It seems to us that the LSC chooses not to understand that quality forensic evidence does not come 'on the cheap'.

Given the recent cost-cutting measures introduced by the LSC, and its current proposals to arbitrarily cut expert fees still further, the Regulator may soon find that he has very few individual forensic scientists to worry about. Forensic scientists can ill afford to participate in his system if the LSC fee rates fail to cover even their operating costs.

For details on how to respond to the consultation, point your web browser to www.jspubs.com and follow the link to the *FSR Consultation* on the right of the home page.

**CRFP rendered
redundant**

**LSC must
recognise that
quality cannot be
got 'on the cheap'**

Efficient business

In the previous issue of *Your Witness* we showed how in the past an economic downturn has meant an increase in litigation and consequently more work for expert witnesses. If the same happens this time around, your expert witness practice could well help you take up any slack in the 'day job'.

But rather than sitting back and hoping for the forecasted rise in cases to roll your way, take a look at your business to see if it's as efficient as it could be. When times get tough, the most efficient businesses weather the storm best.

What follows is a quick summary of what might be considered the characteristics of an efficient business. Much may seem self-evident, but it never ceases to amaze me how often the problems that arrive through the *UK Register of Expert Witnesses* Helpline boil down to a lack of basic business nous!

Rising to the challenge

According to Paul Lynam, Chief Executive of Natwest Business Banking, 'When economic conditions deteriorate, small businesses are usually the most vulnerable. They tend to have fewer resources, less capital and typically rely on a smaller number of customers than larger businesses.'

Now the expert witness marketplace is not the typical small business sector. As shown last issue, expert witness business activity is likely to increase in the coming months as the recession continues to bite. Furthermore, there are not many expert witnesses who run a business dedicated solely to forensic work. With luck – or was it good planning? – the impact of the current malaise may be felt less by expert witnesses than by other professionals.

In general, now is not the time to launch into new and speculative areas of work. A little diversification may work well (if you don't already, try using your skills to move into alternative dispute resolution – see our factsheet on the topic), but consolidation of your core business should be the focus.

Fortune favours the prepared. So it's certainly worth considering your cashflow, how you deal with bad debts and how to spread the risk.

Cashflow

The reason most businesses fail is not that they are unprofitable, but because they **run out of cash** to pay the bills. And they run out of cash because there is a failure to keep on top of cashflow.

For many expert witnesses, of course, overheads are likely to be low and the old business adage, 'turnover is vanity, profit is sanity' is not news. But we all have taxes to pay. More importantly, **we have to pay tax on work done, whether or not we have yet been paid.**

While cashflow may not be a major concern for you, keep it in focus. After all, it's better to have

the money in your bank account rather than in your customer's.

So how can you keep control of cashflow? The focus should be to tighten up existing systems of credit control with lawyers. You'll need access to the right management information and the ability to act promptly on any warning signs.

- **Always use written terms of engagement** – For help preparing a standard set of terms, see information about our free Terminator application on page 8 or purchase a copy of *Expert Witness Fees* – call us on 01638 561590. Use them to state clearly your payment terms and procedures for late payment and cancellation fees.
- **Ensure your bill is accurate and complete** – Informal polling at various conferences has led us to believe that many experts undercharge by at least 20% because they fail to put in place accurate record-keeping systems. So subsequent billing does not fully reflect the amount of time spent on a case. A basic time-recording spreadsheet is essential; properly done, it will even write your invoices for you!
- **Encourage prompt payment through a carrot and stick approach** – You could offer a discount for early settlement. Or you could use your terms to impose interest on late payment, together with the contractual right to charge the lawyer for the cost of any debt recovery action. And remind your lawyer in a helpful way of the carrots and sticks that were agreed to in your terms. For example, include something like this in your accompanying letter (or, indeed, at the foot of your invoice as well) ... *'May I draw your attention to the [X%] discount I am offering favoured clients for payment within [2 weeks] of invoice. To take advantage of this privileged offer, please ensure payment reaches me by [DATE1]. Should you prefer to wait the full [30 days] before settling the account, please be aware that this invoice must be paid by [DATE2] to ensure contractual late payment penalties are not incurred.'* Obviously you need to replace bracketed text with your specifics.
- **Improve your report follow up** – Speak to your lawyer to ensure he is happy with the report. If he is and he has had this extra bit of client care, he will find it a bit harder to delay payment. If he's not happy, you can act quickly to resolve the matter and work towards securing timely payment.
- **Send out prompt, clearly structured and detailed invoices** – The more detail the better, and the less likely that spurious queries will be raised to delay payment.
- **Demand staged payments** – Staged payment systems may be useful if you have any concern about a particular customer's creditworthiness or the potential size of an

Quick guide to help weather the economic malaise

Fortune favours the prepared

invoice. Agree to a planned series of invoices, each of which must be paid before work continues.

- **Monitor payment schedules** – If a customer seems to be taking longer to pay bills, intervene early. Don't wait for a bad debt to arise.
- **Follow up invoices promptly** – Once you have sent an invoice, give your client a call to ensure it has arrived safely and that there are no problems. Our experience is that many Accounts teams in law firms wait for a telephone call chasing payment before an invoice is passed for payment. If your terms give 30 days to pay, your second call should be to the Accounts Department on day 25 to check payment will be made on time.

Some experts find it best to separate themselves from these administrative steps. By all means use someone else to deal with the money side of your business. But don't let this artifice confuse you. It's your business and it will pay dividends to keep on top of finances.

Your overheads can also impact on cashflow. While these are likely to be fairly low for self-employed or small-business expert witnesses, a number of simple changes can prove effective.

- Turn off office equipment at night.
- Make best use of teleconferencing, rather than travelling to meetings.
- Check you have the most cost-effective rate for your telephone/electricity/gas tariffs.
- Check with your accountant to ensure you are using all of your tax allowances.
- Re-negotiate with your bank for mortgage payments and banking services.
- Re-negotiate contracts with other service suppliers, e.g. accountants, cleaners, office accommodation.
- Assess your staffing levels. Could improved office efficiency save on wages?

Dealing with bad debts

How many invoices did you have to write off last year? In general, expert witnesses have fairly low bad debt – most lawyers pay eventually! It is the often unconscionable amount of time it takes lawyers to pay that is the real cause for concern. In our 2007 survey of expert witnesses, close to 40% of the 400+ respondents had written off invoices in the previous 5 years. However, that accounted for fewer than 1,000 invoices in total.

Of course, prevention is better than cure. Knowing your customer and setting prudent credit limits based on your assessment of the risk they pose to your business is the order of the day.

- Watch out for warning signs such as broken promises ('the cheque is in the post'), changes in openness (suddenly 'Mr Smith isn't available') and silly queries about the

report that appear to be merely delaying tactics.

- Beware those customers who constantly bump up against your agreed credit limit. Make a reasoned assessment about whether this is a warning bell or a sign that you need to raise their credit limit. A good payment record will be key to this decision.
- Be vigilant for late payers becoming bad debtors. Is it a case of can't pay or won't pay? Your attentive customer care will have alerted you to any problems with the report, so you should be able to spot 'won't pay' fairly easily.

Depending on your financial position, you may decide that pro-actively suggesting a staged payment plan, or indeed part payment, is preferable to court action. In any event, ensure that the customer has the resources to pay you, otherwise suing them will be a waste of your time and money. For lots more information about this topic, read our Little Book on *Expert Witness Fees*.

Spread your risk

Many small businesses rely on a handful of customers and a limited range of services or products, and therein lies danger. Clearly expert witnesses have only one main service to offer, but they should work hard to avoid becoming dependent on a small number of customers as well. This is particularly relevant to medical doctors who use medical reporting organisations which have grown like topsy in recent years.

Spread your risk by:

- taking pro-active steps to broaden your customer base and get more firms instructing you
- making objective decisions about the amount of credit to be extended to each customer.

And don't forget old Pareto and his principle. Vilfredo Pareto, an Italian economist, has been credited with developing the 80:20 rule. Look at your customers, rank them by the profit they generate and see what percentage of your customers brings in 80% of your profit. For many businesses something like 20% of customers account for 80% of profits. Is this true for your business? Perhaps more importantly, how quickly could you find out? And what does that tell you about your management information systems?

The most robust businesses will *not* obey the Pareto principle – they will have found a way to spread profitability across a wide customer base. So they are not overly reliant on a particular group of customers and are therefore less likely to be dragged down if one or two customers fail.

Finally, it is a commonly held belief that it costs up to five times more to win a new customer than to keep an existing one. So looking after your current clients is vital.

Take steps to stop late payment turning into bad debt

Monitor the credit you give to customers

**Manage your
customer's
expectations**

- Maintain strong productive lines of communication with your lawyers.
- Keep lawyers informed of progress and manage their expectations. It is better to promise the report in 12 weeks and deliver it in 9, than to promise it in 6 and deliver it in 7.
- Don't store up surprisingly large invoices – nothing spoils a business relationship more quickly than the arrival of a large and unexpected bill!

Effective use of IT

All the business management information you need can be captured and handled within commonly available office spreadsheet software.

- Aim to capture the data as it comes in.
- Keep detailed time records for each consultation, e.g. every telephone call received and made (whether or not answered), every written and answered e-mail or letter, every meeting.
- Note all expenses (potential disbursements) in detail, e.g. photocopying, travel, etc.
- Keep tabs on the paperwork generated in a case – What has been completed? What has been sent, and to whom? What are you waiting for?

Use these records to automate invoicing and credit control systems.

If you need help with any of the above, we do offer a bespoke consultation service to help expert witnesses create the right systems to optimise their office procedures. Just call us on (01638) 561590 to discuss this option.

Getting help

There are lots of free help resources available to you.

- <http://www.bdl.org.uk> – for free, confidential and independent advice on how to deal with debt problems
- <http://www.britishchambers.org.uk> – for business information
- <http://www.businesslink.gov.uk> – for free business advice and support services
- <http://www.companieshouse.gov.uk> – to search company accounts and information
- <http://www.creditmanagement.org.uk> – for tips on how to get paid on time
- <http://www.fpb.org> – the Forum of Private Business online credit reports service
- <http://www.insolvency.gov.uk> – for steps to take if you are owed money by an insolvent company
- <http://www.payontime.co.uk> – for details on charging interest and access to an on-line calculator
- <http://www.registry-trust.org.uk> – to check if a customer has a county court judgment for debt against him/them in England and Wales

**There's lots of free
help out there if
you need it**

Court report

Evidence in a 'developing' science

The cases of Sally Clark and others have raised a number of issues of particular relevance to experts, and in particular the presentation of expert evidence in criminal cases. One area that received considerable attention at the time, and which continues to be controversial, is the use and admissibility of expert evidence in emerging areas that might be considered to be at the 'cutting edge' of scientific development.

The question often posed is 'To what extent should such evidence be permissible and what tests should be put in place to ensure the correct weight is applied to such evidence?'

While we wait for the results of the Law Commission consultation on this very question, the Court of Appeal has been busy looking at some of the issues.

A recent case in the Court of Appeal addressed the problem that arises when a case has already been heard but fresh expert evidence comes to light – evidence that was not available at trial because the science is new and in a developing area. Should that evidence be made available to the court at a retrial, notwithstanding that the evidence might be disputed or controversial?

Background

In *R -v- Holdsworth*¹ a 2 year old child was left in the care of a babysitter while the child's mother went out for the evening with her older daughter. When they returned, the mother noticed some bruising on the child's head. There was some argument between the mother and babysitter as to what had happened during the evening and what might have caused it. The next day, the child's behaviour appeared normal and there was nothing to suggest to the mother that he had suffered any long-lasting or serious injury.

The following day, the mother took the child to the babysitter's house while she went out again. Approximately 1 hour and 20 minutes after the mother had left, the babysitter made a 999 call saying that the child had 'gone all floppy' and was 'not breathing'. An ambulance arrived 11 minutes later. The child was taken initially to the accident and emergency department at the local hospital, before being transferred to a general hospital. At the general hospital he was examined by a consultant neurosurgeon and a consultant child neurologist. Following both CT and MRI scans, the child was placed in the paediatric intensive care unit. The consultants found that he had suffered severe brain stem injury from which he had no chance of survival and life support was withdrawn. A Home Office pathologist was instructed to carry out a post-mortem and the babysitter was subsequently charged with the murder of the child.

The trial

At the trial, all three experts agreed that the cause of death was a blunt force head injury

causing acute cerebral oedema, increased intracranial pressure and irreversible damage to the nerve cells of the brain through disruption of the supply of blood and oxygen. They all agreed that the trauma would have been severe and that it would have had an immediate and noticeable impact on the behaviour of the child, who would have displayed severe symptoms of the impact within minutes. After an hour or so, it should have been readily apparent that the injuries had been catastrophic.

At trial, the babysitter called no expert evidence in rebuttal. The inference to be drawn from the evidence, therefore, was that the babysitter had caused the injuries, since the child had been in her sole care for more than 1 hour. Her statement that the child had behaved normally until just before her 999 call was not believed. She was duly convicted of murder.

On appeal

An appeal against the conviction was launched in the light of fresh evidence obtained from a clinical professor of paediatric neurology and an internationally acclaimed expert in epilepsy. This was augmented by evidence from a consultant neuroradiologist and a consultant neuropathologist. The new evidence suggested that the child's death might have been attributable to a number of pre-existing brain abnormalities predisposing the child to epileptic seizure. It was further suggested that the child might also have been suffering from a subdural haemorrhage as a result of whatever had happened to him on the previous evening. If so, that would have been an additional predisposing factor for an epileptic seizure.

The new evidence suggested, *inter alia*, that the symptoms described by the appellant during the course of her 11 minute call to the ambulance services had been consistent with an epileptic seizure and that this seizure might have led to cerebral oedema, a rise in intracranial pressure and starvation of blood and oxygen to the brain cells. This, it was argued, could have been the cause of death.

Dangers in novel evidence...

At the appeal, the prosecution called yet another expert, a consultant paediatric neurologist, who challenged the credibility of the new evidence. This, she said, had no sound theoretical basis. Furthermore, she stated that it was unsupported by any empirical evidence to be found in any of the medical literature. The babysitter's epilepsy expert said that case studies in this area would necessarily be rare because, in a clinical situation, a patient would not be allowed to go on fitting over a protracted time, and certainly no longer than 5 minutes or so, without some medical intervention. Accordingly, the results of a prolonged fit were rarely observed. When, in rare cases, deaths resulted, these were invariably

away from the hospital. Although such deaths were uncommon, they did sometimes happen and there would not always be a post-mortem. In this case, said the expert, the possible co-existence of a subdural haemorrhage would have been an unusual complicating feature. The babysitter's expert told the Court of Appeal that his theory was one of the main theories advanced to explain sudden death in epilepsy.

Casting doubt on this, the prosecution expert said that this was not a theory that was supported by other medical literature on the subject, and that she had never seen a paper which considered the effect of seizure in the context of subdural haematoma.

... argue for caution, not exclusion

The Court of Appeal took the view that conclusions of medical experts on the cause of an injury or death necessarily involved a process of deduction. Such deductions were to be drawn by a comparison of facts in a case with the fund of given knowledge and experience in relevant areas. The court recognised that in reaching their conclusions, experts were not always going to be in agreement. When contrasting the differing views of experts, the court said that special care was needed when dealing with developing areas of science. However, evidence should not be withheld from the court merely because it is novel. In allowing the babysitter's expert evidence, the court said that as scientific knowledge increases, 'today's orthodoxy might become tomorrow's outdated learning'.

The court was also mindful that, in cases where the expert evidence was not merely incidental to a party's case but fundamental to it, special caution should be exercised. Whilst doubt had been cast on the merit of the appellant's new evidence, it could not be dismissed as being definitely incredible. In the interests of justice, it was right that the new evidence should be allowed. Accordingly, the conviction was viewed as unsafe and was quashed.

The lesson

The Court of Appeal added that any retrial would require a high degree of case management and that the experts should be asked to come together to produce a schedule of agreement and disagreement with reasons. It was clearly the intention of the Court of Appeal that the new evidence should come under a great deal of detailed scrutiny at any retrial.

The implications of the case are that new scientific theories can still be advanced in expert evidence. However, attention must be clearly drawn both to any inadequacies in such evidence and to the dangers of reliance on expert evidence that has doubtful, inadequate or otherwise unsatisfactory foundations. The extra powers the Law Commission thinks the court should have to control expert evidence will be a boon in this area.

*Today's orthodoxy
might become
tomorrow's
outdated learning*

References

¹R -v- Holdsworth (2008)
EWCA Crim 971.

Services for registered experts

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Go to www.jspubs.com and follow the link to *Terminator* (look under *Resources for experts* on the right of the home page) and you will find our tool to help you create a personalised set of terms of engagement.

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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 61). You can read them all on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, disclosure and fees.

Court reports – FREE

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

LawyerLists

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. 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 is also available. So, successful re-vetting in 2009 will enable you to download the 2009 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 2009 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, 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

Use multiple entries to offer improved geographical and expertise coverage. If your company has several offices combined with a wide range of expertise, call us to discuss.

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

Since 1995, we have tapped into the expert witness community to build up a body of statistics that reveal changes over time and to gather data on areas of topical interest. If you want a say in how systems develop, take part in the surveys and consultations.

Professional advice helpline – FREE

Experts who opt for the Professional service level can use our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment, etc.

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.

Expert Messaging Service

Our Expert Messaging Service can be a boon for the busy expert witness. If you'd like to give the appearance of a manned office but do not wish to have the associated costs of a building and dedicated staff, then contact us to discuss your requirements. We can tailor a service to suit your needs. Choose from:

- occasional telephone answering service
- full telephone answering service
- message forwarding service
- mail collection and forwarding service.

For further details or to request a quote, call David Haley or Linda McKellar on (01638) 561590.