Your Witness

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Jackson puts experts in hot water

Lord Justice Jackson has been working on a fundamental review of the rules and principles governing the costs of civil litigation in England and Wales. He published his final report in January. His key idea for experts is to pilot the use of the Australian practice of *concurrent expert evidence*, colloquially known as 'hot tubbing'.

Expert opinion is recognised by the courts as being a special type of evidence. But the adversarial system has shown that it is not well suited to working out who is 'correct' in a disagreement between experts. Ideas coming from the Law Commission's work on pre-trial testing of expert evidence should help to address this problem in criminal cases. Could the 'hot tub' do the same for civil cases?

By allowing the court to hear the experts' views given side by side, and having a judicially guided impartial exploration of the differences between the opinions expressed, a better understanding of the evidence should emerge. But the chairing skills of the judge will be important if the court's ability to gain a proper appreciation of the importance of the opinions expressed is not to be frustrated by the assertiveness of one or other of the experts. There is also the risk of a judge covertly favouring one party and adopting an advocate's mantle in choosing how to question the experts.

The one thing the hot tub is unlikely to do, though, is to save much money. By the time two experts are in court ready to jump into the tub together, most of the opportunities for cost saving through the better use of expert evidence will have passed.

Immunity under threat

On page 6 we report on a potential new threat to an expert's immunity to suit. This latest attempt to overturn an expert's immunity is based mainly on drawing an analogy between the immunity of an advocate and that of an expert. Since the Court of Appeal has removed an advocate's immunity, the argument goes that it is no longer tenable for expert immunity to remain.

We do not agree that this analogy works. As we said in our response to the recent Ministry of Justice (MoJ) consultation (on whether expert witnesses should face the imposition of arbitrary fee caps and limits, as have lawyers), expert witnesses are *not* the same as lawyers. Lawyers are part of the legal system, but expert witnesses are simply guests in it. Whilst the MoJ pays lip service to the fact that expert witnesses have a vital role to play as guests in the system, its proposals take no account of the reality of the disruption that forensic work can cause to professional people's working lives. For example, consultants in the NHS have to use annual leave to free themselves for court appearances that frequently are cancelled at the last minute. It should come as no surprise that if you ask a consultant to undertake this work for far less than he could earn in private medical practice, whilst exposing himself to an environment that could give rise to serious professional risks, few will bother.

If expert witnesses have their immunity to suit for damages removed, they would need to be prepared to deal with actions brought against them by disgruntled clients who had lost their case. How many professionals will trouble themselves to assist the court in such a situation? The danger is that a move like this would tend to promote the creation of a 'professional class' of expert witness which, with notable exceptions such as forensic accounting and some forensic sciences, is not what the courts need.

Call for a new role for experts in family law

We include on page 2 a contribution from Richard Gregorian (family lawyer) who thinks that the current demarcations in the family courts are damaging and need to change. He thinks that involving experts in family cases (about children) from the very earliest stages, and making experts an integral part of 'the team', will help such cases to be dealt with better. What are your thoughts on Richard's proposals? How do you think they would fit with the duties of an expert witness?

LSC under fire

The House of Commons Committee of Public Accounts has been looking into the procurement by the Legal Services Commission (LSC) of legal aid in England and Wales. It was not impressed! It described the LSC as an '*organisation with poor financial management and internal controls and deficient management information*'. The LSC is the sole buyer of legal aid, so it should know whether it is paying a fair price. Recently we have seen how little the LSC knows about what it pays for expert witnesses, but we now find that neither does it know much about what it is paying to lawyers – '*it does not know enough about the costs and profitability of firms to know if it has set its fees at an appropriate level.*'

The MoJ has already taken back the policy functions the LSC used to hold. It is tempting to think that, regardless of the outcome of the imminent general election, the LSC may not survive until the end of the year.

New role for experts in family law?

Following a recent article in Family Law Week[1] *(in which he argued for the greater use of non-legal skills in the family justice system), Richard Gregorian, family law solicitor, explains his practice model which enables mental health care experts to have a far greater influence in determining the outcome of disputes involving children.*

[1]*www.familylawweek.co.uk/site.aspx?i=ed52233*

There are many aspects of the family justice system that attract criticism and over which we have little power. These include court delays, insufficient public funding and the inadequate representation of children by CAFCASS as highlighted repeatedly by Ofsted.

Current approach causes lots of problems

Family lawyers must, however, accept their share of responsibility for the often significant levels of unhappiness their clients express about the manner in which parental disputes involving their children are resolved. It is too easy for family lawyers to dismiss their client's unhappiness with the service they provide as being the result of bitterness and upset at being subjected to public law interference (particularly if they have been unsuccessful in the litigation) transferred to the nearest convenient target.

The reason for the disillusionment felt by clients for their own legal team is invariably because the client feels neither listened to nor understood. This is hardly surprising when it is not the niceties of legal precedent and procedure that are at the core of the parental dispute, but human decision-making and interactional problems.

As well as troubling parents, the current practice model also marginalises mental health experts. Typically, the expert will be asked to prepare a report many months after the dispute first arose, before losing contact with the case until months later when required to attend court to answer questions on the report. For many experts, this method of working can be frustrating and disengaging.

Involving mental health experts from the very beginning of a case is, in my view, a 'no-brainer'.

- A more objective and informed understanding of the 'psychology' of the dispute and the individuals concerned is achieved by taking a full case history beyond the simple facts at the start of the case.
- The client's lawyer can then formulate strategies to ensure that those parental concerns which underpin any negotiations, mediation or litigation are presented in the most objective and child-centric way.
- Emotional and psychological support can be offered to the client to ensure they are capable of participating in the legal process as an objective advocate for their child.

Family lawyers should be less lawyer-like

The most common complaint amongst clients of family law firms is that solicitors approach the cases in a purely legalistic way – they seek only to acquire and utilise the core facts, provided they are consistent with legal precedent – and seem uninterested in the emotional and psychological factors the client considers to be the reason for the relationship breakdown and problems in post-separation co-parenting. The client feels that the uniqueness and importance of the case is diminished in the eyes of their legal team. The client is also exposed to the possibility that their case is run on too narrow a basis. Without a more holistic strategy, the client also runs the risk of being unable to give the judge an alternative child-centred reality in which to believe, rather than the usual stereotype of two warring parents who have forgotten the interests of their children in the often vitriolic round of allegations, denials and counter allegations.

A new approach

A joint legal-psychological approach has been developed which satisfies a demand not only from clients and mental health practitioners, but more widely from the political environment which increasingly sees family breakdown as being an issue of public health and in the context of its socio-economic consequences. The new approach:

- is a fully integrated joint legal-psychological approach to managing family breakdown
- does not depend upon any legal or policy changes to the present family justice system
- stops mental health care practitioners having to wait for the next instruction from a family lawyer
- recognises and deals with the important issues of the mental health care professional transitioning from 'objective therapist' to more (but not exclusively) 'subjective adviser'
- does not involve the mental health care professional acting as an expert witness
- does not ask the mental health care professional to openly question the work of another
- would not be appropriate where the mental health care professional has acted for both parties as a counsellor, mediator or therapist because of the conflict of interest
- would include child psychiatrists and child psychologists who have been instructed by one of the parents because, whilst this joint legal-psychological approach is directed at the parent, it is eminently child centric
- would not be available to publicly funded clients, where the current resource levels impede even effective legal representation
- could, in time, be 'institutionalised' by those associations representing mental health care professionals.

This approach has generated considerable interest and support amongst the mental health care community. They can see an opportunity to both change the system for the better and expand their practice.

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About the author

Richard Gregorian was a commercial law partner in a leading London firm of solicitors. Involvement in his own international matrimonial litigation made it clear to him that the application of family law could benefit from an understanding of both human decision-making and behaviour and commercial law standards of client service. He used a joint legal-psychological approach in his own case to great effect with the assistance of Mr Gavin Emerson. He now practises full time in family law using this approach in all disputes involving children. Clients (including the very many parents he speaks to on a second opinion, pro bono basis), mental health care professionals and politicians have all confirmed the good sense in adopting such an approach which works within all aspects of the present system.

Expressing shades of opinion

There have always been dangers inherent in the admission of expert opinion evidence into court. However, generally these have been thought to be outweighed by the usefulness of expert opinion in cases where it would otherwise be difficult for the court to reach a decision based on the evidence. But given the often pivotal role of expert evidence, should an expert be permitted to provide the court with some indication of his own assessment of the certainty to be attributed to his opinion? This was one of the questions the Court of Appeal considered in *Atkins & Atkins -v- R*[1].

Is it permissible for an expert to opine on the strength of his opinion?

How to express levels of certainty

The defendants in the case were appealing against convictions for murder, two aggravated burglaries and other offences. Expert facial mapping evidence had been given at trial based on images obtained from a CCTV camera outside one of the homes of the victims. The expert had described the procedures by which the images were obtained and had explained the techniques employed in examining the footage. In evidence before the jury, the expert identified nine factors that could affect reliability. These included the quality of the photographs, the possibility that two different people may be indistinguishable on film and that there exists no database of facial characteristics. The expert also dealt with the particular quality of the CCTV photograph of the offender, which was significantly limited by short duration, some distortion at one edge, shadows and the sudden change from dark to light when a door was opened.

The expert went on to express his conclusions by reference to a range of expressions set out in a table. These ranged from 'lends no support' (with a score of 0), to 'lends powerful support' (with a score of 5). The expert said that in the present case he would place the proposition that the man on the camera was the defendant at somewhere between 3 and 4 (i.e. between 'lends support' and 'lends strong support').

Although the witness's expertise in his field was not challenged, the court was asked to rule that the evidence, expressed in this form, was inadmissible. The argument was that giving expressions of the level of support in the form of an ascending scale carried the risk of bestowing upon evidence, which is purely subjective, a spurious objective scientific authority. The defence said that this could mislead the jury by suggesting that there was an arithmetical scale or statistical basis for the strength of the comparison. Furthermore, said the defence, although the expert made it clear that he could not, by his techniques, identify the defendant as the man in the photograph, the use of his expression 'lends some to strong support' came perilously close to identification, and was likely to be over-valued by the jury.

The Court of Appeal said:

'We accept that there can be proper anxiety about new areas of expertise. Courts need to be scrupulous to ensure that evidence proffered as expert, for any party, is indeed based upon specialised experience, knowledge or study. Mere self-certification, without demonstration of study, method and expertise, is by itself not sufficient. It sometimes happens that such anxieties are reinforced when experts overstate their case... . But the remedy is not to prevent all experts, good and bad, from expressing any informed opinion at all as to the import of their findings. The three principal remedies are (i) to have such evidence examined and, if appropriate, criticised by an expert of equal experience and skill, (ii) to subject the evidence to rigorous testing in the witness box and (iii) to ensure careful judicial exposition to the jury of the difference between factual examination/ comparison or arithmetical measure on the one hand and, on the other, a subjective, but informed, judgment of the significance of the findings.'

The Court of Appeal took the view that the trial judge in this case had dealt properly with the expert evidence. In his summing up to the jury, he had set out the extent and limitations of the expert evidence and made it clear that the expert's opinion was incapable of constituting positive identification, although it could potentially have positively excluded the defendant. Furthermore, the evidence was not based upon any database that could give a statistical foundation for the expert's expression of opinion and was therefore informed by experience and was entirely subjective. The trial judge also told the jury that the decision whether to accept the expert evidence was for it alone.

Judicial guidance needed to make clear the subjective expression of significance

The Court of Appeal thought that the judge's guidance to the jury had been proper and sufficient.

Judge must make expert's subjective opinions crystal clear to jury

In dismissing the appeal, it was held that the expert was entitled to give evidence of his conclusions as to the significance of his findings and to use expressions such as 'lends powerful support'. But it should be made clear that this was no more than an expression of subjective opinion. It was observed, however, that in some instances it may help the jury for the judge to explain that the forms of expression are 'labels' applied by the expert to his opinion of the significance of his findings. Indeed, different experts may not attach the same label to the same degree of comparability.

The Court of Appeal also thought it preferable that the expressions should not be allocated numbers; to do so might run the risk of leading the jury to think that they represent an established, measurable scale. They are merely expressions of subjective opinion, and this must be made *crystal clear* to the jury charged with evaluating them.

Reference

[1] *Atkins & Atkins -v- R* [2009] *EWCA Crim* 1876.

Court of Appeal on LCN DNA

LCN technique back in the dock

We have reported in previous issues on the emerging forensic science of Low Copy Number (LCN) DNA profiling (see *Your Witness* 51, March 2008). This is a technique for analysing minute quantities of DNA and it has been developed by the Forensic Science Service (FSS) from 1999 onwards. It has been adduced, with sometimes controversial outcomes, in a number of cases in UK courts, although its use in many foreign jurisdictions is severely limited.

During 2007, following a recommendation of an earlier review of the LCN process, the Forensic Science Regulator, Andrew Rennison, asked Professor Brian Caddy to lead an independent review of the standards of science employed in the analysis of all Low Template DNA, including the LCN process. But even before this review had been completed, the whole question of LCN profiling was once again thrown to the fore by the case of *R -v- Sean Hoey*[1].

In *R -v- Sean Hoey* the defendant was charged with offences of murder, conspiracy to murder and other offences in relation to the Omagh Bombing which had occurred on 15 August 1998. The case against Hoey was based substantially on DNA evidence using the LCN process. Much evidence was given in the course of the trial regarding the reliability or otherwise of the LCN process to obtain data of sufficient evidential quality. The judgment of Weir J contained a summary of the criticism of the technique, led by Dr Daniel Krane, a professor at Wright State University, Dayton, Ohio and Professor Allan Jamieson, a Director of the Forensic Institute, Scotland. He concluded that the present state of the validation of the science and methodology associated with the LCN process was such that its reliability as an evidential tool was doubtful.

However, following his review, Professor Caddy reported in April 2008 that the processes were valid for amounts of DNA less than 200 picograms (1 picogram = 1 trillionth of a gram), subject to some caveats. He recommended that the Regulator should develop a consensus on standards for the interpretation of such profiles and monitor implementation of these standards. The limitations, he said, had to be made clear.

Court of Appeal gives guidance on admissibility

The Forensic Science Regulator broadly accepted the conclusions of the Caddy Report in his response dated 7 May 2008. However, as he believed that a single set of caveats was unlikely to be effective, he asked a specialist group to consider whether the issues that had to be considered by an expert should be identified and, where appropriate, included in a report. He also made clear that he did not consider validation a necessary pre-condition for the admission of scientific evidence, provided the obligations under Rule 33.3(1) of the Criminal Procedure Rules (CrimPR) were followed.

LCN in the dock again

In *R -v- Reed & Reed and R -v- Garmson*[2], the question of the reliability of LCN DNA came before the Court of Appeal once again.

In the first case, *Reed*, two defendants had been convicted of murder. The prosecution evidence included and relied upon LCN profiling on two pieces of plastic (which the Crown contended were parts of two separate knife handles) that had been found near the victim's body. One such piece had revealed cellular material that matched the DNA profile of one defendant, and the other piece revealed cellular material that matched the DNA profile of the other defendant and the victim. The match probabilities were such that it was accepted to be their DNA.

Although there had been no dispute that the DNA profiles on the pieces of plastic matched the DNA profiles of the defendants, a significant challenge was made concerning the value of that evidence. The evidence for the Crown given by an officer of the FSS was that the recovered profiles had been obtained using the LCN process. They were not from blood or other identifiable biological material, but simply cellular material that had been transferred onto the pieces of plastic.

In the second case, *Garmson*, the defendant was convicted of various offences of kidnapping, rape and sexual assault. The incidents had occurred in April 2005 and March 2006. It was the incident in April 2005 that raised the issue of DNA evidence and was the subject of the appeal, although the later incident was adjudged material as it constituted similar factual evidence.

The DNA evidence relating to the 2005 series of offences was found on three items belonging to the victim and also on a lip swab of the victim. These had all been analysed using the LCN process, and the Crown relied on two of these findings.

Prior to the hearing of the appeal in these cases, the Court of Appeal directed the parties to provide it with a guide to the basic science of DNA profiling and, in particular, Low Template DNA profiling using the LCN process. The document was duly submitted by the Crown. A summary of this report is contained in the court's judgment and is a useful précis of processes on which the current science is based. Save for one part, the report was not disputed by the parties. Therefore it forms a clear statement of that part of the expert evidence not in issue.

Guidance on admissibility of expert evidence

The judgment of the Court of Appeal was lengthy. It emphasised the distinction between the admissibility of expert evidence and how that evidence should be assessed by the judge or jury. Before going on to deal with the specific issues raised by LCN profiling, the court first clarified the general questions of admissibility.

Expert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable for it to be put before the jury (cf. the Law Commission work, *Your Witness* 56). The Court accepted, however, that there is no enhanced test for the admissibility of such evidence. If the reliability of the scientific basis for the evidence is challenged, the court will consider whether there is a sufficiently reliable scientific basis for that evidence to be admitted. However, if satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted, then it will leave the opposing views to be tested in the trial.

Reference was made to the decision of the Supreme Court of South Australia in *Bonython*[3]. It was held that the subject matter of the evidence must be part of '*a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience*'. However, there is no closed category where evidence cannot be placed before a jury. As was observed by Steyn LJ in *R -v- Clarke*[4], '*it would be wrong to deny to the law of evidence the advances to be gained from new techniques and new advances in science*'.

Even if the scientific basis is sufficiently reliable, the evidence is not admissible unless it is within the scope of evidence that an expert can properly give. In *Atkins*[5] (see page 3), the court had to consider the extent to which an expert could express a view on the significance of what he had observed without there being a statistical basis for comparison purposes. Hughes LJ, in giving the judgment of the court and after emphasising that the jury had to be told that the opinion was not based on a statistical database, said: '*An expert who spends years studying this kind of comparison can properly form a judgment as to the significance of what he has found in any particular case. It is a judgment based on his experience. A jury is entitled to be informed of his assessment. The alternative, of simply leaving the jury to make up its own mind about the similarities and dissimilarities, with no assistance at all about their significance, would be to give the jury raw material with no means of evaluating it. It would be as likely to result in over-valuation of the evidence as under-valuation. It would be more, not less, likely to result in an unsafe conclusion than providing the jury with the expert's opinion, properly debated through cross-examination and, if not shared by another expert, countered by contrary evidence.*'

Unless admissibility is challenged, the judge will admit the evidence. This is the only pragmatic way in which it is possible to conduct trials, as sufficient safeguards are provided by Part 3 and Part 33 of the CrimPR. However, if an objection to admissibility is made, then it is for the party proffering the evidence to prove its admissibility.

No more challenges on the LCN technique

It should be said that the issue of the reliability of the analysis of Low Template DNA using the LCN process did not arise directly in the appeals. In *Reed*, the argument was that there was a possibility of contamination or secondary transfer of DNA to the knife handles, whereas in *Garmson* it was argued that the expert had erred in calculating the match probabilities and the judge had failed properly to direct the jury as to the limitations of the DNA evidence and, in particular, the LCN process. However, there was a considerable measure of agreement as to the circumstances in which a challenge could properly be made about the use of Low Template DNA evidence. The Court of Appeal summed up the consensus, which illustrates the current state of scientific development, as follows:

- Low Template DNA can be used to obtain profiles capable of reliable interpretation if the quantity of DNA that can be analysed is above the stochastic threshold – that is to say where the profile is unlikely to suffer from stochastic effects that prevent proper interpretation of the alleles.
- There is no agreement among scientists as to the precise line where the stochastic threshold should be drawn, but it is between 100 and 200 picograms.
- Above that range, the LCN process used by the FSS can produce electrophoretograms that are capable of reliable interpretation.

The appeal judges acknowledged that there may be differences between the experts in terms of their interpretation of the data. However, in the absence of any new scientific evidence, a challenge to the validity of the method of analysing Low Template DNA by the LCN process should no longer be permitted at trials where the quantity of DNA analysed is above the stochastic threshold of 100–200 picograms.

The Court was told that it is now the practice of the FSS to quantify the amount of DNA available before testing. So there is unlikely to be any future difficulties in establishing whether the quantity used falls within the accepted limits. The Court accepted that profiles obtained from samples within the 100–200 picograms range could still be the subject of a challenge, but then expert evidence must be given as to whether, in the particular case, a reliable interpretation could be made.

Conclusion

In dealing with what remains a difficult area in the developing science of LCN profiling, the Court of Appeal welcomed the new Forensic Science Advisory Council and the appointment of a Forensic Science Regulator. The Court hoped that these bodies would be able to provide assistance to the court in its assessment of whether the profiling evidence was sufficiently reliable for it to be admitted. The Court of Appeal stressed, however, that the ultimate decision on this would always lie with the court.

LCN is declared 'fit for purpose' – at DNA quantities above threshold

References

[1] *R -v- Sean Hoey* [2007] *NICC* 49.

[2] *R -v- Reed & Reed and R -v- Garmson* [2009] *EWCA Crim* 2698.

[3] *Bonython* (1984) *38 SAAR* 45.

[4] *R -v- Clarke* [1995] *2 Cr App R* 425.

[5] Atkins & Atkins -v- R [2009] *EWCA Crim* 1876.

Expert immunity under threat

Expert witness immunity is up before the Supreme Court

In recent years there has been a succession of cases in which an expert's immunity from suit has come under the spotlight, and there has been a gradual erosion of the established common law principle. The key case is that of *Stanton -v- Callaghan*[1], in which the appellant had sued their expert for negligence when, at a meeting of experts, he had revised his opinion so as to undermine the appellant's claim against their insurers for subsidence in their property. The Court of Appeal upheld the expert's claim to immunity from suit in respect of both the contents of his report and the joint statement.

Then 2 years later, in *Arthur J S Hall -v- Simons*[2], the House of Lords abolished an advocate's immunity (broadly equivalent) on the basis that it was not needed to ensure that an advocate would respect his overriding duty to the court. However, it upheld immunity from suit for 'witnesses' giving oral testimony, because that testimony should be given 'freely without being inhibited by the fear of being sued'. Like advocates, experts owe an overriding duty to assist the court. Consequently, the court left scope for an argument that, unlike witnesses of fact, experts do not require such immunity because they are already under a strict duty to the court.

Another 2 years on and in *Phillips & Others -v- Symes & Others*[3] the Court of Appeal applied similar principles to those considered in *Hall*. It asked whether 'expert witnesses need immunity from a costs application against them as a furtherance of the administration of justice'. The Court took the view that such a safeguard was not needed and allowed an expert witness to be joined as a respondent in an action for costs.

With no let up in the pressure, 2 years later the question of immunity was considered further in *General Medical Council -v- Meadow*[4]. The principle of immunity was upheld but with provisos. The Court reaffirmed that an expert should be immune from suit so that their evidence can be given 'freely and fearlessly'. The Court did hold, however, that such immunity did not extend to immunity from disciplinary proceedings. It found that: '*If the conduct or evidence of an expert witness at or in connection with a trial, whether civil or criminal, raises the question whether that expert is fit to practise in his particular field, the regulatory authorities or FPP should be entitled (and may be bound) to investigate the matter for the protection of the public.*'

Immunity leapt on once again

Each of these cases has chipped away at the principle of expert immunity. And in January 2010 Mr Justice Blake delivered a judgment in the High Court that may open the way to further erosion. In *Paul Wynne Jones -v- Sue Kaney*[5], Blake J considered whether a negligence claim against an expert witness should be struck out summarily on the basis of the *Stanton* decision. The background to the case was as follows.

The claimant had sought damages for personal injuries sustained in a traffic accident. There was disagreement as to whether he was suffering from post-traumatic stress disorder (PTSD) or whether the symptoms had been exaggerated. The claimant's solicitors instructed an expert to advise on the psychological aspects of the claim. In her initial report, the expert suggested that the claimant was, indeed, suffering from PTSD. However, the expert underwent something of a reversal of opinion when, following a telephone conference between experts, she signed a joint statement that effectively said she had found the claimant to be 'deceptive and deceitful' and that his psychological reaction to the accident did not amount to PTSD. The claimant's request to instruct another expert was denied by the court and the action was settled for considerably less than it might have done, but for the expert's signing of the joint statement in the terms that she did.

The claimant then commenced negligence proceedings against the expert, seeking damages. The expert entered no defence on the merits but instead pleaded immunity under the principle in *Stanton*. She applied for a summary judgment striking out the proceedings.

The claimant opposed the application to strike out on the grounds that *Stanton* was no longer binding law since the House of Lords decision in *Hall* undermined the reason for the policy of expert witness immunity. The claimant further argued that the decision in *Stanton* preceded the coming into force of the Human Rights Act 1998 in October 2000 and was contrary to Section 6 of that Act – the right to a fair trial. Finally, the claimant argued, in the alternative, that if *Stanton* remained an authority that was binding on courts up to and including the Court of Appeal, the court should grant a certificate to enable the Supreme Court to determine whether they would wish to grant leave to appeal to it in the present case.

Counsel for the expert responded by saying that, although the policy basis for the decision in *Stanton* may have narrowed, none of the factors relied upon by the claimant served to deprive it of the status of binding authority. The decision, he said, had never been criticised by the Court of Appeal or the House of Lords. Indeed, in the very case that the claimant relied upon, namely *Hall*, Lord Hoffmann had confirmed his assumption that the authority was correct.

Blake J held that *Stanton* was binding on both him and the Court of Appeal. Accordingly, he granted the claimant a 'leapfrog certificate', enabling the claimant to apply for permission to appeal the question directly to the Supreme Court. The decision of the Supreme Court is awaited, but perhaps the writing is on the wall for expert immunity. We will be keeping a close eye on developments for you.

References

[1] *Stanton -v- Callaghan* [1998] *EWCA Civ* 1176.

[2] *Arthur J S Hall -v- Simons* [2000] *UKHL* 38.

[3] *Phillips & Others -v- Symes & Others* [2004] *EWHC* 2330.

[4] *General Medical Council -v- Meadow* [2006] *EWCA Civ* 1390.

[5] *Paul Wynne Jones -v- Sue Kaney* [2010] *EWHC* 61 (QB).

Challenging determining officers

Allowances for expert witnesses giving evidence in criminal trials are paid out of central funds and are determined by an officer in accordance with guidance issued by the Ministry of Justice (MoJ). Note that *allowances* are dealt with quite separately from *legal costs* payable from central funds, and this gives rise to important differences in terms of how the determination can be challenged.

Part V of the Costs in Criminal Cases (General) Regulations 1986 provides that the court may make an allowance in respect of an expert witness (i) for attending to give expert evidence and (ii) for work in connection with its preparation of such an amount as it may consider reasonable having regard to the nature and difficulty of the case and the work necessarily involved.

There is no prescribed scale for the allowance for the remuneration of experts. So a 'Guide to Allowances under Part V of the Costs in Criminal Cases (General) Regulations 1986' was issued by the (then) Lord Chancellor's Department[1]. It was designed to assist determining officers 'by providing a point of reference on quantum for use when exercising their discretion in determining such claims'. The Guide contains rate bands based upon allowances made throughout England and Wales, and it was intended that the information on which these bands were based would be reviewed annually.

The guidance states that it provides neither a minimum nor a maximum limit, merely a guide to the levels of allowances in normal circumstances. It allows that it may be appropriate, having regard to the particular circumstances of the case, to depart from the guidance scales contained therein. However, it says that such occasions 'will arise exceptionally'.

In exercising their discretion, determining officers are to bear in mind that each case must be considered individually. They are to take into account all the relevant circumstances surrounding the claim, including such things as the work done, the status or experience of the person doing the work, and the availability of such persons in the locality concerned.

But the important question is: Does an expert who is dissatisfied with the determining officer's allowance have any recourse to appeal against the decision?

At first glance, one can be forgiven for thinking that the procedure for appeal as set out in Part III of the Regulations would apply. This allows for an applicant to ask the officer to make a redetermination, and, if still unhappy, to ask a costs judge to review the matter. Finally, if still dissatisfied, the matter can go to the High Court.

If allowances payable to expert witnesses were 'costs out of central funds', then these steps would be open for experts to pursue. But, unfortunately, when one turns to Part V of the Regulations, there are no corresponding procedures open to the dissatisfied expert. It appears that a costs judge has no jurisdiction to hear any appeal against the decision of a determining officer in relation to allowances payable to experts.

Guidance issued by HM Courts Service confirms that because expenses paid to witnesses are dealt with under Part V of the regulations, there is no formal appeal process against a determination. The guidance, published on its website[2], gives no authority for this statement, and neither does it clarify what is meant by 'formal appeal process'.

There is, perhaps, an analogy to be drawn between allowances for experts and costs awarded out of central funds to parties in the magistrates' courts. Neither party has the right to appeal to a costs judge. However, the Supreme Court Costs Office Guide makes specific mention of the ability of the latter to make an application for judicial review if dissatisfied with the award of costs. It is presumed that this right is also available to experts.

The difficulty the expert faces, apart from cost, is that the determination of the allowance is within the *discretion* of the determining officer. It is very difficult to appeal against the exercise of a discretion. Provided that the determining officer has, on the face of it, operated within the parameters of the Guide to Allowances, he is free to exercise his discretion as he sees fit. Even if he has not, it may still be difficult to challenge his decision because the Guide is merely intended to assist and is not mandatory. It is very unlikely, therefore, that the decision of the determining officer will be overturned by judicial review unless it can be demonstrated that he has operated so far outside the guidelines that he has been reckless or negligent in his assessment or manifestly unfair to the applicant.

For experts instructed by the defence, there seems no option beyond negotiating with the determining officer to have him exercise his discretion 'correctly'. So, any expert agreeing to take on defence work in criminal cases should understand the distinctly unsatisfactory nature of this element of the payment system. The expert should also be fully prepared to justify his fees by giving the determining officer sufficient evidence to enable him to exercise his discretion to exceed the guidelines!

For experts instructed by the prosecution, it is CPS policy to contact an expert witness in advance of the hearing to agree a fee. Unfortunately, this is not always possible. It is advisable, therefore, for experts to contact the relevant CPS office to seek agreement on fees for both attendance at court and any necessary preparation. If prior agreement has not been possible, experts should, when sending an invoice for their fees and expenses to the instructing CPS office, ensure that they fully set out the work conducted and any unusual or additional work is noted to justify the officer in exceeding the usual allowances.

We ask whether there is any redress for the expert...

... but find none!

[1] See *Guide to Allowances in Criminal Cases – LCD [March 2003]* at *www.jspubs.com/Experts/library/lib_eridx.cfm*

[2] *www.hmcourts-service.gov.uk/cms/4290.htm*

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