Your Witness

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

UK Register of Expert Witnesses Professional Indemnity Insurance

In light of the *Jones -v- Kaney* ruling, it is clear to me that adequate Professional Indemnity Insurance cover is now more or less essential for expert witnesses. Together with the litigious nature of today's society, the ruling seems very likely to see expert witnesses the subject of more claims – whether real or vexatious.

Working with Lockton Companies LLP, we have designed the ***UK Register of Expert Witnesses* Professional Indemnity Insurance scheme** (the 'Scheme'), underwritten by Amtrust Europe. It has been created specifically to offer insurance for the expert witness work you do. It can be taken out to provide additional cover if you already have insurance in place for your non-forensic work, or to offer new cover if your work is entirely forensic. Alternatively, if you wish to obtain cover for all your work, forensic and otherwise, this can be considered too. (*http://www.jspubs.com/experts/pii/parties.cfm* gives details about Lockton and Amtrust Europe.)

Having insurance means that the insurer will be able to manage any claims on your behalf, and in the worst case settle the claim should that become necessary. In other words, any claim against you no longer need deflect you from productive work nor keep you awake at night!

This scheme is exclusive to members of the *UK Register of Expert Witnesses* and provides cover from £500,000 upwards.

Policy coverage

We've worked hard with Lockton to ensure that the Scheme is tailored to the needs of expert witnesses. The key points of the insurance are that it:

- is written on an **Any One Claim basis**, which means that, should multiple claims arise, there will not be a cap on the amount of cover provided under the policy
- provides **full retroactive cover** so the uncertainty over exactly when the *Kaney* ruling removed expert witness immunity (and that may be as early as November 2005) need not trouble you because cover under the policy will go right back to your first piece of expert witness work, and
- includes **full defence costs**.

If you would like to know more about the policy coverage, you can read the policy document at *http://www.jspubs.com/experts/pii/policy.pdf* or talk to Lockton directly.

Cost

We want the Scheme to provide top-quality cover *and* highly competitive rates. To keep things simple, there is a streamlined application process to apply for cover up to £2,000,000 where your expert witness fee income is less than £100,000. In those circumstances, the costs would be as follows:

Limit of indemnity	Annual premium[1]
£500,000	£148.40
£1,000,000	£180.20
£2,000,000	£233.20

[1] *Including Insurance Premium Tax at 6%*

However, if you have a higher fee income, you can still seek to take cover under the Scheme. Instead of the streamlined application process, you will need to contact Lockton who will negotiate competitive cover terms specifically for you. Equally, if you wish to seek cover for all your work, not just your forensic work, you should speak with Lockton directly.

How to apply

If you are interested in joining the Scheme and have an expert witness fee income below £100,000, you can download the application form from *http://www.jspubs.com/experts/pii* or contact Lockton directly. However, if you have a fee income above £100,000, need a different amount of cover, or wish to cover non-forensic work, you can still take cover under the Scheme. Simply contact Lockton, who will negotiate competitive cover terms specifically for you.

How to contact Lockton

We have worked with Lockton to develop this Scheme, but we are not permitted to be involved in the highly regulated business of selling insurance (which is something for which we must be grateful!). So, when taking out cover under the Scheme, you must deal directly with Lockton. Visit *http://www.jspubs.com/experts/pii* and click on the *Talk to someone* link for full contact details.

I think we've managed to create a top-quality insurance product at very competitive rates. I hope you agree.

Chris Pamplin

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Expert witness survey 2011

Ninth survey since 1995

There was once again a good response to the questionnaire enclosed with our June 2011 issue of *Your Witness*. By the end of August, 420 forms had been submitted, accounting for some 18% of the readership. A big 'thank you' to all who took the trouble to complete them. Their data has contributed to the ninth survey of its kind in 16 years.

The experts

Of the 420 experts who returned questionnaires by the end of August, 193 were medical practitioners. Of the remaining 227 experts, 50 were engineers, 19 were in professions ancillary to medicine, 13 were accountants or bankers, 24 had scientific, veterinary or agricultural qualifications, 17 were surveyors or valuers and 21 were architects or building experts. The substantial 'others' category totalled 83.

Work status and workload

Of the respondents, 199 (47% of the total) work full time and 179 (43%) work part time. Only 9% describe themselves as retired. These figures show for the first time in our surveys fewer than half the respondents working full time, although the split has been fairly stable since 2003.

Overall, expert witness work accounts, on average, for 45% of their workload, a figure essentially unchanged since 2001. Clearly, these individuals are much involved in expert witness work but have an even more extensive commitment to their professions – which is, of course, exactly as it should be.

Experience and outlook

We also asked respondents to say for how long they had been doing expert witness work. From their answers it is apparent that they are a very experienced lot indeed. Of those who replied, 97.1% had been practising as expert witnesses for at least 5 years, and 89.0% had been undertaking this sort of work for more than 10 years. Just over half of the respondents (52%) saw expert witness work as an expanding part of their workload, despite the increasing pressures on expert witness work and the recent removal of expert witness immunity.

Their work

SJE instruction rate already dropping fast

Reports

In all nine of our surveys we have asked those taking part to estimate the number of expert reports they have written during the preceding 12 months. The averages for the last six surveys are given in Table 1. The three types of report are advisory reports not for the court, court reports prepared for one party only and single joint expert (SJE) reports.

Report type	2001	2003	2005	2007	2009	2011
Advisory	12	11	13	17	19	15
Single party	41	45	54	54	57	56
SJE	12	14	15	14	15	9

Table 1. Average number of full, advisory and SJE reports per expert over time.

Single joint experts

A dramatic rise in the number of SJE instructions between 1999 and 2001 (a jump from 3 to 12 instructions a year brought on by the Woolf reforms) then levelled off. Now, 65% of experts have been instructed as SJEs, and on average each expert receives nine such instructions in the year – but that is a drop from 15 in the 2009 survey.

Since the removal of expert witness immunity in January 2011, the role of the SJE has become even more fraught. Working for both parties in a dispute may well lead to a disgruntled instructing party, and that party can sue you! Indeed, we have heard from experts – even those who until now have been very supportive of the SJE approach – who say that they will no longer undertake such instructions. This is one metric we will watch closely.

Court appearances

Another change over the years has been the reduction in the number of civil cases that get to court. It is now altogether exceptional for experts to have to appear in court in 'fast track' cases, and it is becoming less and less likely in those on the 'multi-track'. In 1997 we recorded that the average frequency of court appearances was 5 times a year; some 4 years later this had dropped to 3.8; it now stands at 3.3. Of course, this survey does not separate civil cases from criminal and family cases (in which most will get to court), and so the number of civil cases reaching court will be much lower even than 3.3.

Variation by specialism

However, these averages hide a lot of variation by specialism (see Table 2). For example, the reporting rate for medics is much greater than in all other specialisms. Furthermore, SJE

Professional group (*n = number of respondents*)	Reports	Court appearances	Advisory reports	SJE instructions
Medicine (*n = 193*)	86.5	2.7	21.0	13.5
Paramedicine (*n = 19*)	49.7	1.9	9.1	5.1
Engineering (*n = 50*)	21.6	2.4	14.7	1.8
Accountancy (*n = 13*)	40.5	5.5	10.5	6.1
Science (*n = 24*)	28.5	10.3	16.4	2.0
Surveying (*n = 17*)	17.0	1.0	11.1	3.3
Building (*n = 21*)	11.4	0.3	5.5	1.3
Others (*n = 83*)	37.5	4.3	7.8	8.4
Aggregate averages	*55.8*	*3.3*	*15.3*	*8.8*

Table 2. Average number of reports, court appearances, advisory reports and SJE instructions by specialism (2011 data).

appointments are much more common in medical cases than in the other specialisms.

Numbers of court appearances are similar in all areas except the sciences, where we suggest that the use of forensic science in the criminal caseload pushes up the average.

Their fees

Which brings us to the detail everyone wants to know. How much are fellow experts charging for their expert witness services? This information is summarised in Table 3.

For each professional group the table gives average hourly rates for writing reports and full-day rates for attendance in court, with the 2009 data for ease of comparison. Given the small size of some of the groups, it would be unwise to read too much into the changes revealed by these pairs of figures.

In terms of annual income from their expert witness work, 32% of our respondents earn less than £20k per year, 29% earn between £20k and £50k per year and 15% earn over £50k per year.

Professional group (*n = number of respondents*)	Average rate (£)			
	Writing reports (per hour)		Court appearances (per day)	
	2011	2009	**2011**	2009
Medicine (*n = 193*)	201	192	1,197	1,252
Paramedicine (*n = 19*)	140	153	1,082	1,067
Engineering (*n = 50*)	136	118	1,137	836
Accountancy (*n = 13*)	236	192	1,619	1,246
Science (*n = 24*)	144	114	884	811
Surveying (*n = 17*)	155	162	926	1,140
Building (*n = 21*)	135	118	1,127	860
Others (*n = 83*)	132	120	899	760
Totals	*170*	160	*1,103*	1,069

Table 3. Average charging rates for report writing and court appearances by specialism (2009 and 2011).

Average fee rate increased by 6.25% since 2009 – that's less than inflation at 6.85%

Cancellation fees

The issue of fees that become due as a result of cancelled trials continues to be a source of friction between expert witnesses and those who instruct them. The average percentage of the normal fee experts charge is generally controlled by the amount of notice they receive of the cancellation. In this survey, the percentages are 5.5% if notice is given at least 28 days before the trial was due, 15.4% if 14 days, 32.8% if 7 days and 69.2% if just 1 day's notice is given.

The right to cancellation fees is one that has to arise from the contract between the expert and the lawyer, although the Ministry of Justice has made claiming them very difficult in publicly funded cases. This ought to act as yet another spur to all experts to put in place clear, written terms of engagement.

Speed of payment

In this survey, 87% of experts reported that the promptness with which invoices are paid had not deteriorated – but that really means matters couldn't get much worse! One measure of the problems experts have in securing prompt payment is the number of bills settled on time. In this survey, the number of experts reporting their bills were being paid on time *in even half of their cases* is only 47.5%. Clearly, the situation remains grim. On average, 33% of solicitors pay within 8 weeks, 22% pay between 9 and 12 weeks and 27% pay between 13 and 48 weeks.

Against this background, it is depressing to note that whilst 85% of experts say they stipulate terms, still fewer than 50% use a written form of contract. Without a solid contractual basis, experts are making their credit control much more complex than it need be. The *Civil Procedure Rules Experts Protocol* requires (at 7.2) that terms be agreed at the outset. Clearly, the hope we often express – that the imposition of this official obligation would help to persuade more experts to adopt written terms – is falling on deaf ears!

As every lawyer knows, setting out clear terms for any contract, at the outset, is essential if subsequent problems are to be avoided. The contract between expert and instructing lawyer should be no different.

As an expert listed in the *UK Register of Expert Witnesses* you have access to *Factsheet 15* dealing specifically with terms of engagement (all factsheets are freely available at *www.jspubs.com*), and our *Little Book* on *Expert Witness Fees*[1] makes creating a set of terms even easier. Or why not go to the *Terminator* section of our website to create personalised sets of terms based on the framework set out in our *Little Book*? So you have no excuse! Use our free member resources to set down a firm contractual base and better secure your position with your instructing solicitor.

The ultimate solution?

If all else fails, experts can sue for their fees – or at least threaten as much. Obviously this should be the option of last resort, if only because it is likely to lose the expert a client.

Of those who took part in our 1999 survey, 24% claimed to have sued for their fees on at least one occasion in the preceding 5 years. That figure had risen to 29% in the 2009, and in this survey it has jumped to 37%!

If you are considering suing for your fees, our *Little Book* on *Expert Witness Fees*[1] has a chapter dedicated to getting paid. But it is important to recognise that the basis for any such suit is in contract. If you have not built the instruction upon a firm contractual footing, winning in court may well be more tricky than it need be.

Chris Pamplin

All experts should have written terms of engagement

Reference

[1] Pamplin, C.F. [2011] *Expert Witness Fees.* 2nd Edition J S Publications ISBN 1-905926-11-4 Order line (01638) 561590

Confidential information

Does prior knowledge compromise independence?

An expert witness will often be instructed in a succession of cases that revolve around similar subject matter and may even involve the same party in multiple cases. Furthermore, in the course of preparing a report, an expert witness will normally have access to privileged or otherwise sensitive information. A question therefore arises as to the extent to which an expert witness's evidence in subsequent proceedings might be affected, or the claim to independence be compromised, by exposure to such information in earlier proceedings.

Until recently, there was a somewhat dubious authority (see *HRH Prince Jefri Bolkiah -v- KPMG*[1]) to suggest that experts were in the same position as solicitors: that they were disqualified from acting in contentious cases where they had acted previously for, or had received privileged communications from, the other party.

Difference between experts and advocates

However, there is, of course, a fundamental difference between solicitors and expert witnesses. Expert witnesses are not advocates and have a duty to help the court on the matters within their expertise. This duty overrides any obligation to the person from whom they have received instructions or by whom they are paid. Furthermore, Civil Procedure Rules Practice Direction 35.2(1) states that expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation, and similar requirements are contained in the Criminal and Family Procedure Rules. The role of an expert is very different from that of a solicitor, and any suggestion that an expert's freedom to act should be restricted in the same way is questionable.

The issues raised have recently come before the Court of Appeal. In *Meat Corporation of Namibia Ltd -v- Dawn Meats (UK) Ltd* [2], the High Court considered whether to disallow expert evidence on the basis of the claimant's allegations that the expert had seen privileged and confidential information and, consequently, was not independent.

The facts of the case were briefly these...

A claimant sought to engage an expert as a meat industry expert in an agency agreement dispute. When the claimant first contacted the expert in May 2010, the expert was waiting to hear from the defendant with a view to an engagement for them as a consultant. She explained that she would not be able to act as the claimant's expert if she agreed to that role with the defendant. However, she later agreed to consider the request and, at the end of May, received some confidential information from the claimant by e-mail. It was common ground that the e-mail was covered by litigation privilege.

In another e-mail sent by the claimant to the expert, the claimant referred to settlement offers and tactics, based on legal advice given to it. The claimant alleged that in June 2010, the expert agreed to act as the claimant's expert and, thereafter, further details about the case were divulged. The claimant then alleged that the expert changed her mind, claiming diary conflicts and a possible conflict of interest with other activities. The conflict of interest was a reference to the consultancy role for the defendant, with the defendant sponsoring the expert to be a member of an industry association. However, the expert confirmed that she would not divulge any of the communications she had received about the case.

Both parties instructed other experts but, subsequently, the defendant decided to instruct the first expert. This was notwithstanding the defendant's knowledge that she had previously been approached by the claimant and had declined to act for them. When the appointment was challenged by the claimant, the defendant's solicitors acknowledged that communications between the expert and the claimants should remain confidential and should not be divulged to the defendant or the court. The expert offered an undertaking to the court on this basis. The claimant also alleged that, in previously acting as consultant for the defendant, the expert's independence was questionable. Accordingly, the two grounds for challenging the appointment were that:

- privileged and confidential information made it untenable for the expert to act as an expert witness for the defendant, and
- the expert lacked the degree of independence necessary for an expert witness.

In Harmony

The Court of Appeal considered the ruling in *Bolkiah* and contrasted this with the court's decision in *Harmony Shipping Co SA -v- Saudi Europe Line Ltd* [3]. In *Harmony* (see *Is there property in a witness?* in *Your Witness* 30, December 2002), a handwriting expert had accepted brief instructions to comment on a document. However, not realising that he had already advised on the document, he then gave advice to the other side. He declined to act for either party, but the second party subpoenaed him to give evidence. The Court of Appeal refused to set aside the subpoena, applying the principle that there is no property in a witness, whether an expert or a witness of fact. On the risk of disclosure of privileged information, the court noted many of the communications between the solicitor and expert witness would be protected by legal professional privilege. While there is a tension between the principle of no property in a witness and the receipt of privileged information, the court concluded that the principle still applied.

The Court of Appeal acknowledged that the *Harmony* case was not completely aligned with the facts and issues in *Bolkiah*, but that it did demonstrate that an expert was not

References

[1] *HRH Prince Jefri Bolkiah -v- KPMG* [1998] *EWCA Civ* 1563.

[2] *Meat Corporation of Namibia Ltd -v- Dawn Meats (UK) Ltd* [2011] *EWHC 474 (Ch).*

[3] *Harmony Shipping Co SA -v- Saudi Europe Line Ltd* [1979] 1 WLR 1380.

[4] *Toth -v- Jarman* [2006] *EWCA Civ* 1028.

automatically disqualified just because he had acted for both sides.

Mann J took the view that the main thrust in *Harmony* was contrary to the *Bolkiah* principles, so far as these concerned expert witnesses. He concluded that *Bolkiah* did not apply merely because privileged information had been given to the expert witness. Mann J further distinguished the issues in *Bolkiah* on the basis that, in that case, KPMG had, in effect, acted like solicitors and were actually engaged to provide services and obtain information in that context. The information they obtained was likely to be very damaging to the claimant, and the accountants were in the same position as solicitors concerning that information. Accordingly, the House of Lords was not protecting the court–expert witness relationship but was rather protecting a quasi-solicitor–client relationship and the disclosure that went with it.

Independence must be decided on the facts

So far as the independence of an expert witness is concerned, the Court applied the principles of *Toth -v- Jarman*[4] (see *Dealing with biased experts* in *Your Witness* 53, September 2008). Given that the status of an employee did not automatically disqualify a person from acting as an expert witness, a consultant could not automatically be disqualified either. Whether an expert is disqualified for lack of independence will depend on all the facts of the case.

In dismissing the appeal, the Court was influenced by the fact that the expert had not actually been engaged by the claimant and that, insofar as she had received privileged or confidential information from them, she had given an undertaking not to reveal it. Mann J made it clear, however, that it was necessary to consider the facts of each case on its merits, and an expert should not be permitted to act where it was likely that the expert would be unable to avoid resorting to privileged information.

It is apparent from the decision in *Dawn Meats* that, despite the earlier decision in *Bolkiah*, expert witnesses are *not* to be treated in the same way as solicitors and are *not* automatically disqualified from acting merely because they have received privileged information. It appears, however, that an automatic disqualification may still be applied in circumstances where the expert witness has been engaged in a quasi-solicitor, investigative role.

The case also demonstrates that, where confidential or privileged information has been received, it may be sufficient for the expert witness to give an undertaking not to make use of or reveal that information. It seems likely that the Court would accept the efficacy of such an undertaking, save where it takes the view that the nature of the information is such that the expert witness would be unable to avoid the use or influence of that information.

Expert credibility

The recent appeal application by convicted murderer Kenneth Noye (*R -v- Kenneth Noye* [2011] *EWCA Crim* 650) has thrown up an interesting clarification of issues concerning the credibility of expert witnesses and its effect on the safety of convictions.

At Noye's original trial, expert opinion had been given by a pathologist, listed on the *Register of Home Office Forensic Pathologists*, regarding the degree of force used to deliver knife blows. This evidence, although challenged by two other experts at the trial, was a contributory, but not essential, factor in dismissing Noye's plea of self-defence.

Pathologist discredited

Since the date of the trial, however, there had been a number of successful appeals in cases where the same pathologist had given evidence and he had since resigned from the *Register of Home Office Forensic Pathologists*. Following a reference to the Court by the Criminal Cases Review Commission, Noye appealed against conviction on the ground that there was fresh evidence that significantly undermined the credibility and evidence of the Home Office pathologist. The Crown did not dispute that the pathologist had been discredited since the trial. The issue was whether Noye's conviction was safe in the light of that fact.

When the credibility of an expert witness is questioned...

On appeal

The Court of Appeal did not admit further evidence from another Home Office pathologist on which the appeal was based because this was not considered significant. The Court took the view that, although cases in which the pathologist had given evidence for the Crown had to be approached with great caution, the safety of a conviction would depend on a fact-specific conclusion based on all the issues in the case (see *R -v- O'Leary* [2006] *EWCA Crim* 3222 and *R -v- Ahmed (Mushtaq)* [2010] *EWCA Crim* 2899). Upon consideration of the facts as revealed at trial, the court held that Noye's claim to have used measured force was difficult to comprehend. Once it had been established that he had deliberately stabbed his victim, rather than simply run away or taken other avoiding action, there was nothing in the pathologist's evidence to support the defendant's assertion that he had struck out in panic and in self-defence. Dismissing the appeal, the Court said that the expert's evidence did not impinge on the essential issues in the trial, and the diminution in his standing as an expert witness did not undermine the safety of the conviction.

... previous court decisions are not automatically unsafe

Conclusion

The simple fact that an expert has lost credibility since the date of a trial will not automatically render a conviction unsafe. The post-trial diminution in the credibility of an expert will not affect the safety of a conviction unless it had an impact on the essential issues in the trial.

Pre-action reports

The important distinction between expert advisor and expert witness

The Civil Procedure Rules (CPR) Pre-Action Protocol for Personal Injury Claims[1] states at paragraph 3.15 '*Before any party instructs an expert he should give the other party a list of the name(s) of one or more experts in the relevant speciality whom he considers are suitable to instruct.*' This is designed to give the other party the opportunity to object to any of the names. If there is no objection, there is a presumption against them instructing their own expert.

The question that arises is what effect this procedure has on whether a pre-action expert report should be disclosed when a party chooses not to rely on it and seeks leave to rely on the evidence of another expert in the field.

In the early years of CPR, Brook LJ in *Carlson -v- Townsend*[2] said that the aim of the CPR protocol was not to deprive a claimant of the opportunity to obtain confidential pre-action advice about the viability of his claim (which he would be at liberty to discard undisclosed if he did not agree with it), and that the court should not act to override privilege in such documents.

To some commentators, this position was eroded by the subsequent case of *Beck -v- Ministry of Defence*[3]. This case concerned a party that wanted to instruct an alternative expert mid-way through proceedings, after losing confidence in the first expert. The Court of Appeal said that in almost all cases, disclosure of an earlier expert's report should be required when allowing a party to instruct a fresh expert.

Are advisory reports secure?

The question arises, however, as to whether *Beck* relates only to **expert witness reports**, or if it also affects **expert advisor reports**. Was it really the Court's intention in *Beck* to override privilege in expert reports obtained pre-action for the purpose of advising the solicitor rather than providing opinion evidence to the court?

Helpfully, the case of *Jackson -v- Marley Davenport Ltd*[4] allowed the Court of Appeal to hold that when an expert adviser is subsequently instructed as an expert witness, his advising reports remain privileged, unless the privilege is expressly waived.

Did this mean that it was only unwanted expert *witness* reports that would face disclosure before leave to instruct another expert would be given, and expert *advisory* reports that would remain privileged? Not according to Bristol County Court.

In *Carruthers -v- MP Fireworks Ltd*[5] a judge sitting at Bristol in 2007 ordered the disclosure of a report by an expert who had advised the claimant prior to the issue of proceedings as a condition of allowing the claimant to rely on the report of a subsequent expert witness.

The issue has ever since remained somewhat ambiguous. But in a judgment given in February 2011, the Court of Appeal has given clarification. In *Edwards-Tubb -v- JD Wetherspoon plc*[6], the Court specifically considered whether a pre-action expert report should be disclosed when a party chooses not to rely on it and seeks leave to rely on the evidence of another expert in the same field.

In brief, the facts in *Edwards-Tubb* were that the claimant had been injured at work. Under the pre-action protocol, the claimant's solicitors gave notice prior to proceedings of three experts who they might instruct and invited objections within 21 days. No objections were received and the claimant duly instructed one of the experts, who provided a report shortly thereafter. This report was never disclosed to the defendant and was not relied on by the claimant.

After more than a year had elapsed, the claimant issued proceedings. Those proceedings were accompanied by the report of another expert who had not been one of those named in the original list. The defendant did not dispute liability, but there was a dispute as to the extent of the claimant's injury and thus on quantum. Relying on *Beck*, the defendants sought an order for disclosure of the earlier report as a condition of the permission the claimant needed under CPR 35.4 to rely on a new expert.

The claimant argued unsuccessfully that the Court's power to order disclosure was only appropriate to a change of expert after the issue of proceedings and did not apply to reports obtained pre-action. However, the trial judge agreed with the defence – that there was no distinction between the two – and ordered disclosure as a condition of granting leave. On appeal, the decision was reversed and the appeal judge held that the pre-action report should remain privileged. The defendant referred the question to the Court of Appeal.

CPR distinguishes advisor from witness

In allowing the appeal, Hughes LJ said that the CPR had created a distinction between experts who were instructed to advise a party privately and those who were not. CPR 35.2 referred to expert reports that were prepared 'for the purpose of proceedings'. The Court took the view that this was the only important difference and that there was otherwise no distinction to be made between a change of expert instructed pre-issue and a change of expert once proceedings had commenced.

Where a party had elected to take expert *advice* pre-protocol, at his own expense, Hughes LJ did not think that, save for the existence of some unusual factor, the Court should act to override privilege in that advice, as such an expert (instructed to write a report not for the court) was outside CPR 35.2. However, a formal duty to the court arose when an expert was instructed 'for the purpose of proceedings'.

The CPR gave rise to an expectation that parties would co-operate with one another pre-action and that there would be an equivalent level of openness and communication before as after

References

[1]See *http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/protocols/prot_pic.htm*

[2]*Carlson -v- Townsend* [2001] *EWCA Civ* 511.

[3]*Gary Beck -v- Ministry of Defence* [2003] *EWCA Civ* 1043.

[4]*Jackson -v- Marley Davenport Ltd* [2004] *EWCA Civ* 1225.

[5]*Andrew Carruthers -v- MP Fireworks Ltd & Another* [2007] *unreported*.

[6]*Edwards-Tubb -v- JD Wetherspoon plc* [2011] *EWCA Civ* 136.

issue of proceedings. One of the factors the pre-action protocols were designed to facilitate was the nomination and appointment of expert witnesses. Consequently, once a party had embarked on the pre-action protocol procedure of obtaining co-operation in selecting expert *witnesses*, there was no justification for not disclosing a report obtained from an expert who had been put forward by that party as suitable for the case and who had, in fact, reported. It was important for the court to exercise the control afforded by CPR 35.4 to maximise the information available to the court and to discourage 'expert shopping'.

Hughes LJ pointed out in his judgment that the damaging effects of expert shopping, which the CPR was designed to avoid, were exactly the same whether or not it happened before pre-action or after commencement of proceedings. Although matters of disclosure would remain at the discretion of the Court, Hughes LJ said that, save in exceptional cases, it should be usual for the courts to order disclosure of an earlier report of an expert *witness* as a condition of giving leave to instruct a second expert.

Advisor or witness? Be clear which you are!

The important point here is the distinction between the expert instructed as an expert *advisor* and the expert instructed as an expert *witness*. In the former case, the expert is instructed outside of CPR, as one of the litigation 'team', and the resulting report is likely to be very different from the sort of report that would result from an instruction to work as an expert *witness*. As an advisor, the expert will be helping his team to understand the strengths and weaknesses of the case, and will often assist in development of the litigation strategy. The expert has no overriding duty to the court, but is beholden only to those who instruct him. An expert instructed to prepare a report for the court is entirely different!

The decision of the Court of Appeal in *Edwards-Tubb* is a helpful reassertion of this important distinction. All reports prepared for use by the court, whether or not favourable and whenever commissioned, will be disclosable. To retain privilege in a report and to prevent any suggestion that it was obtained 'for the purpose of proceedings', it would be sensible to specifically instruct experts as expert advisers with clear instructions that they have not been appointed as court experts.

Using experts as advisors has always been an expensive option suited only to higher value cases. But with *Edwards-Tubb* to hand, and clear instructions, no party need fear ready disclosure of an expert advisor's report. But would this hold true if the expert advisor became the expert witness? That transition has ever been loaded with difficulty, and *Edwards-Tubb* does not change that!

Confidentiality

In *A County Council -v- (1) SB (2) MA (3) AA* [2010] *EWHC* 2528 *(Fam)* the President of the Family Division, Sir Nicholas Wall, gave important guidance regarding experts and confidential information in child cases.

The case concerned a 16 year old girl in ongoing child protection proceedings. She had been made the subject of an interim care order under the Forced Marriage (Civil Protection) Act 2007. An expert produced a report in which she concluded that the girl was not at immediate risk of forced marriage but she recommended that the order made under the 2007 Act should stay in place. The expert subsequently gave oral evidence, during which it emerged that the girl had given certain information which the expert had assured her would be kept confidential. This had not been referred to in the report and neither the information nor its source had been disclosed.

The undisclosed information was sensitive, dealing with allegations of domestic violence between the girl's parents, her mother's behaviour towards another man and intimations of criminal activity made by the family of the man who was to be the object of her forced marriage. Although the expert had given a promise of confidentiality, the information did, she acknowledged, have some influence on her in preparing her report and recommendations. She subsequently produced a second report that contained the information but which was disclosed only to the parties' legal advisers on the understanding that they would not disclose it to their clients. The court was required to determine whether to order disclosure of this second report and, for once, all the parties were in favour of disclosure – it was only the expert who resisted!

Sir Nicholas Wall said that experts in Children Act cases could not receive information in confidence from anybody. All relevant information normally had to be shared with the other parties and the court. Consequently, an expert's report would invariably be disclosed, whatever it said. The expert's duty was to be objective and wholly free from bias in favour of one party or the other. Experts had to be prepared for everything they did and said to be the subject of challenge. Confidentiality in the context of the instant case meant that the information contained in the papers filed with the court for the purposes of the proceedings was confidential to the court. It was not for the expert to decide whether information should be kept from disclosure to the parties. In cases where disclosure might pose a real threat of harm to the source of the information, experts could make a full disclosure to the court of the relevant material and then allow it to decide whether the article 6 rights of the parties required disclosure. The court stressed, however, that the threshold for non-disclosure in this context would be very high.

Information given 'in confidence' to an expert...

... must still be shared with the court!

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