

Your Witness

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Registration not accreditation

In this issue we report on Lord Faulks's determination to deliver a new accreditation scheme for expert witnesses in 'whiplash cases' (in fact that phrase encompasses most low-value personal injury claims resulting from road traffic accidents). This scheme should, he says, include peer review and auditing elements, which, he believes, will identify substandard reporting. Lord Faulks wants this new scheme to be funded entirely by 'the industry', and it all has to be delivered by December 2014.

The driver for this renewed interest in expert accreditation comes from the October 2013 Government response to its whiplash consultation (Cm 8738, October 2013). It states that:

'Of the options set by the Government for independent medical panels, the specific model preferred most [i.e. 38% of respondents] was for a system based around accreditation of experts as a significant step in improving standards of examinations and medical reporting of whiplash injury claims.'

Leaving to one side the unseemly haste, the spectre of expert witness accreditation has been with us before. Indeed, over a decade the Government poured more than £3.2 million of public money into the Council for the Registration of Forensic Practitioners (CRFP) in an abortive attempt to create such a system. This was followed by the Civil Justice Council convening a programme of work back in 2005 to look at accrediting expert witnesses, and the idea was rejected decisively.

Whiplash panels are unremarkable in themselves. The 'sausage machine' approach to a commoditised low-value PI industry has been with us for a few years, and it now has such a slim overlap with delivering justice that it should probably be removed from the legal system entirely!

However, the next tranche of rapid-fire reform promised by Lord Faulks – an entirely new system of accrediting experts – is, in my view, most unlikely to be fit for purpose. It will depend on the detail, of course, but if the primary aim is, as stated, to deal with the occasional rogue expert, then what's required is a registration not an accreditation scheme.

I've regularly pondered what exactly there is to accredit in an expert witness's ability to form an opinion and bear witness to it. There is, of course, scope to accredit expert witnesses as experts, but it should be undertaken, if at all, by the existing professional bodies, not a new quango.

That approach was tried through the CRFP with entirely predictable results.

Lost in the post?

Some disputes between expert witnesses and solicitors arise because letters are (apparently) lost in the post. Occasionally the issue resolves itself, but it can give rise to very real problems for the expert.

Consider the case of the solicitor who writes to the expert advising that a case has settled. The letter does not arrive, and the expert duly attends court to find no mention of the case. Or what about the supposed non-delivery of correspondence dealing with initial negotiations about the terms and conditions of the agreement between the parties? The expert writes to the solicitor, often following a telephone discussion as to the suitability of the expert, setting out his terms on, for example, payment. The letter is 'lost in the post' and the solicitor proceeds upon the basis that the terms set out in the opening letter are agreed.

The root cause of the problems that arise flow from the existence of the 200 year-old 'Postal Rule' in English contract law. It was established in 1818 at a time when the postal authorities did not lose thousands of letters a week, as they do today. This rule states that **where delivery to a postal authority is the agreed form of communication between the parties, acceptance of its contents is complete as soon as the letter is posted, even if the letter gets mislaid or lost and does not reach the addressee.**

So what steps should experts take to ensure that they do not find themselves unable to get paid because of the effect of this piece of antique law? The prudent expert might incorporate into any contract: *'For the avoidance of doubt, no correspondence addressed to me will be of legal effect until I acknowledge receipt of it.'*

Has the hot tub gone tepid?

The hot-tub process (also known as concurrent expert evidence) was brought into general civil court procedure in April 2013. Since then, we have heard very little about it. I would be interested to receive any feedback you may have about hot tubbing. Have you been involved in a case that used the process, or has it yet to come across your horizon? If you have been in the hot tub, how did it go? Were all the participants clear about what they were supposed to be doing, and did the judge/lawyers help or hinder the process? Overall, did it aid the court in reaching a just decision more quickly, more easily or more cheaply?

Chris Pamplin

Inside

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The right expert
LiP injustice

Issue 77

Backlash on whiplash

The UK has long been dubbed the whiplash capital of the world, and both the Ministry of Justice (MoJ) and the insurance industry have increased their efforts to quell the number of fraudulent claims that are proving a drain on the court system, insurers and those who pay a high price for their motor insurance.

So far as experts are concerned, the issues that have come under scrutiny include the level of fees charged for medical reports on soft tissue injuries and the quality and independence, or otherwise, of those experts commissioned to provide them. The independence of experts in this field has also been questioned in relation to the work carried out by medico-legal reporting organisations (MROs) and their occasionally overly close connections with the solicitors who instruct them.

Of course, in these frugal times, the MoJ is unlikely to miss an opportunity to make savings. As highlighted in the government's *'Whiplash Reform Response Paper'* published in October 2013, fees for medical examination and reporting are, once again, in the Government's sights as part of its continuing drive towards the reform of civil litigation funding and costs. According to the MoJ, the areas identified for further action are:

- (i) the need to fix fees for medical reports in whiplash claims
- (ii) discouraging offers to settle being made before appropriate medical reports have been obtained ('pre-medical offers')
- (iii) the imperative for independence in the commissioning of reports, and
- (iv) a process to permit only experts with appropriate accreditation to conduct medical reports.

Expert panels

Chris Grayling, Secretary of State for Justice, has said:

'... the Government wishes to press ahead with our consultation proposal to introduce independent medical panels, backed up by an accreditation scheme, to establish a new more robust system of medical reporting and scrutiny. This should mean that exaggerated and fraudulent whiplash claims are challenged whilst ensuring that the genuinely injured, backed up by good quality medical evidence, can get the help and compensation they deserve. We want to work with all sides, including insurers and claimants, to develop a comprehensive, effective and proportionate system of independent medical panels.'

Following the recommendations of an MoJ working party, the Minister of State for Justice, Lord Faulks, issued a consultation document on 2 May 2014 inviting responses to the proposals it contained by 28 May. The Government published its final proposals on 4 August and they will be implemented in the October 2014 update to the Civil Procedure Rules.

Although aimed principally at whiplash-type injuries, the changes concern all 'soft tissue injury' road traffic claims, which are defined as:

'... a claim brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury and includes claims where there is a minor psychological injury secondary in significance to the physical injury.'

The definition is drawn widely enough to encompass most types of claim likely to result from a collision of motor vehicles. The inclusion of 'minor psychological' injuries will prevent claimants from avoiding the provisions by including a claim for such an injury, although there is likely to be some technical ambiguity in deciding exactly what constitutes a 'minor' psychological injury.

Fixed fees

The costs of the majority of medical reports obtained in these cases (70% according to the Association of Medical Reporting Organisations; AMRO) are already fixed by the voluntary cross-industry MRO agreement. However, the Government and the cross-industry working groups agree that it is appropriate for fixed fees to be mandated and extended to all initial medical reports obtained in such cases that are said to be, by definition, relatively straightforward. If the initial examination reveals the need for a specialist report, this will be permitted (if necessary outside the fixed-fee regime), provided it is at reasonable cost – although, given the nature of these cases, it is expected that this situation will be rare.

The fee for the first report is fixed at £180 (except in exceptional circumstances where another type of report is justified). This represents a cut of about 10% – under the voluntary AMRO agreement currently in force, a GP report costs £200. An addendum report from a GP on medical records will remain at £50. In line with the intention to introduce accreditation for medical experts, the rules do not limit the type of expert permitted to provide the initial report.

It will be explicit that a secondary report (if justified) should be commissioned only on the recommendation of the expert completing the initial report. Fixed costs will apply where secondary reports are provided by orthopaedic consultants (£420), accident and emergency consultants (£360) or GPs/physiotherapists (£180). Secondary reports may be sourced from other experts, but the need and cost for such a report must be justified.

The Government considers that in introducing a new system of fixed costs, an appropriate level of sanction for non-compliance is required. Under the amended RTA Pre-Action Protocol, if the first medical report is obtained outside the fixed-costs scheme, the cost of that report will not be recoverable. For a claim that falls

Government puts a spotlight on whiplash

Creation of expert panels working to fixed fees

outside the RTA Protocol, the court may not give permission for an expert medical report unless it is a fixed-cost report.

Pre-medical offers

The draft rules sought to eliminate pre-medical offers by denying a defendant the right to invoke Part 36 until a valid report had been obtained and disclosed within the framework of the scheme. The MoJ is still of the view that these pre-medical offers should be prohibited. However, it recognises that this is a difficult issue and a new rule alone is insufficient to address the particular problem. The rules are being amended to strongly discourage this practice, and the MoJ intends to continue to work with the industry on further ways to tackle the issue effectively.

The RTA Pre-Action Protocol discourages pre-medical report offers being accepted. This stance is underlined in the rules, which provide that the acceptance of a defendant's offer to settle before the defendant receives the fixed-cost medical report will carry no costs consequences until after the report has been received.

Expert independence

In March 2014 the Secretary of State for Justice, Chris Grayling, pledged to make provisions to ensure that the new medical panels remain independent. This statement was in response to concerns that MROs could form alternative business structures (ABSs) with personal injury law firms. Mr Grayling stated that the principles of medical panels are 'not at odds' with support for ABSs, but acknowledged that safeguards must be implemented.

The consultation document stated the aim that there should be no financial link, direct or indirect, between the party commissioning the medical report and the medical advisor or intermediary organisation through which the report is provided, other than for payment of the examination or report. It was proposed that, as a preliminary measure, a prohibition should be introduced on either party having a financial interest in an intermediary through which a medical report is obtained. However, through the consultation the MoJ wanted to explore the issue of independence further to ensure that reciprocal arrangements cannot be established between different commissioning firms to subvert this prohibition. Amongst the suggested solutions are requirements that:

- (i) the claimant and defendant representatives may only commission a specified proportion of medical reports via any given intermediary, or
- (ii) representatives be required to commission reports on a rota basis from a variety of intermediaries.

Unsurprisingly, this has not gone down well with lawyers who have a financial interest in MROs. It was reported that two PI firms are seeking support for a legal challenge to the MoJ's

plans. The two Manchester-based firms are said to be contacting other claimant PI lawyers to assess interest in pooling resources to instruct counsel with a view to contesting the proposal, arguing it would be an unreasonable restraint of trade. A spokesman for one of the firms said that independence issues were already addressed by the solicitors' code of conduct and the Civil Procedure Rules, and that claimant solicitors would be 'the last people trying to undermine the experts' independence'.

The MoJ has kicked this can of worms down the road a little. Lord Faulks tells us that the MoJ remains committed to ensuring this independence, and it intends to take the aim forward as part of the second tranche of reforms. The MoJ will consider the best way to do this in tandem with developing proposals for the accreditation system for medical experts.

Other provisions affecting experts

At present, only the claimant's version of events is provided to the medical examiner. However, the consultation document proposed that in a limited number of cases it may also be helpful for the medical examiner to have access to the defendant's account to make an informed diagnosis and/or prognosis. Some experts have expressed concern that this places them in the role of sole arbiter of the facts before the court has even considered the question of causation, and this is a cause for some disquiet.

Nonetheless, the MoJ has now decided that in appropriate claims, and only where liability is admitted, the defendant will be permitted to send his account of events to the claimant.

Next steps

These changes will take effect in October 2014. Meanwhile, the MoJ tells us that it will work with industry experts to support the development of a new system through which medical reports will be obtained using random allocation. Linked to this will be a new accreditation (and re-accreditation) scheme for experts, which will include a peer review and auditing element to identify substandard reporting. Accredited experts who do not meet appropriate standards will face sanctions such as the removal of, or restrictions applied to, their accreditation.

It is the MoJ's strong view that this scheme must be owned and established by the industry. There are financial implications in terms of setting up and running such a scheme, and the MoJ is asking those operating in the PI sector to provide a suitable initial funding solution to cover start-up costs. However, it is expected that the scheme will become self-funding through accreditation and re-accreditation fees.

It seems to us that a system of random allocation of accredited experts working to fixed fees rather does away with the need for MROs. We will watch with interest to see what the MoJ proposes – as, we suspect, will the MROs!

Changes embed existing practice in RTA claims sector

Hastily created accreditation scheme coming soon?

Consequences of choosing the wrong

In *Your Witness* 70 we reported on the case of *DataCard Corporation -v- Eagle Technologies Ltd*¹, a patent case in which the High Court considered the differing qualifications of the expert witnesses and the skilled teams involved. As a result, it set out principles for weighing these qualifications.

The leading case considered by the court in *DataCard* was *Mölnlycke AB -v- Procter & Gamble Ltd*². In that case, the Court of Appeal had held that in assessing whether an invention was obvious, the primary evidence would be that of properly qualified expert witnesses. In general, a properly qualified expert was said to be one who was working in the relevant field at the relevant time.

One of the difficulties here is in deciding what exactly constitutes 'the relevant field' and 'the relevant time'. Flowing from that, there is also the question of what should happen if, during the course of proceedings, there is some fundamental shift in what constitutes the relevant field or time.

The case of *DataCard* involved the validity of two patents related to different aspects of the printing of plastic cards, such as credit cards. The claimant's expert witness was, on the face of it, eminently suitable. He had considerable experience in the field of card printers but not, it transpired, at the relevant time. The defendant's expert witness, on the other hand, had no involvement with card printers but did have some experience at the relevant time with other types of printer and with solutions for application in printer systems.

Citing *Rockwater Ltd -v- Technip France SA*³, the Court said that it was not helpful to approximate real people to the notional skilled person. Instead, the question to be determined was whether the expert's reasoning and ability were sufficient to teach the court. In reaching this decision it was relevant to consider the extent to which the expert's qualifications (as opposed to their degree of inventiveness) approximated to those of the skilled person. If one expert witness was working in the field at the relevant time, and particularly if he considered at that time the problem to which the patent was addressed, then his evidence was likely to carry more weight than that of another expert who was not working in the field at the relevant time, even if he was, on the face of it, more qualified.

Since *DataCard*, there have been a number of cases before the courts that have considered this question of relevancy. One such case examined what should happen if there was a change in what constituted the relevant field (or a party's understanding of what constituted the relevant field) between the directions stage and trial.

The morning after

In *Generics (UK) Ltd -v- Richter Gedeon Vegyeszeti Gyar*⁴, a case concerning the validity of a patent

relating to the dosage regime of a 'morning after pill', standard form directions were given, providing for each party to call one expert witness. The names of the experts were to be supplied to the other party on or before 12 weeks before the trial date; then, on or before 8 weeks before the trial date, there was to be service of the reports on each party; and then, on or before 5 weeks before the trial date, there was to be service of any report from such expert witnesses in reply.

Unfortunately, the parties did not confer between themselves – which would have been desirable – as to the discipline of the expert evidence to be called. The claimant assumed that the relevant expert evidence would be in the field of clinicians experienced in administering the morning after pill. However, on the relevant date for nomination of expert names, the expert nominated by the defendant was an expert health statistician.

At that point, the claimant did not understand the nature of the evidence that it was proposed the defendant's expert would be giving. However, instead of seeking clarification of the position being adopted by the defendant, and the topic on which it was proposed he would give evidence, the claimant waited to see the expert's report so that he could take a view as to what to do in the light of it. When the claimant party read the report it became clear that one of the key areas for the defence was to be a contention that what the claimant proposed to rely upon as prior art would, for medical statistical reasons, not properly have been so regarded.

Once the claimant party appreciated the nature of the defence argument, it promptly sought advice from a medical statistician. It subsequently served a reply report on the footing that it would seek permission from the court to rely upon that report in reply to the evidence on medical statistics. The defendant opposed the application on the ground that the claimant would gain an unfair procedural advantage if it was permitted to put in the reply. The defendant also contended that the court should adopt a particularly stringent approach to the enforcement of the directions actually made, following on from the *Mitchell*⁵ case in the Court of Appeal.

Mr Justice Sales directed himself primarily by reference to the overriding objective in Civil Procedure Rule 1.1: to enable the court to deal with cases justly and at proportionate cost. In dealing with a case justly, it is desirable to secure, so far as is practicable, that the parties are on an equal footing. He considered that it would be disproportionate and unduly harsh to impose, in effect, a sanction on the claimant for failing to clarify the nature of the defence expert evidence at an earlier stage. The medical statistics issues were the topic which, in substance, had been selected by the defendant as the primary ground

*Definition of
'relevant expertise'
is not always
obvious*

*Being on an equal
footing includes
matching experts
across the parties*

of battle. Consequently, in his view, the just course was to permit the claimant party to adduce this evidence. The simple fact was that the parties proved to be at odds as to the nature of the expert evidence which should have been adduced under the order for directions. The judge could see no fault attaching to either party in that regard. But once the difference in view was identified, and the nature of the defence case became clear, it was right that the judge should make the order as sought so that the case could proceed on what he regarded as the appropriate and just basis.

What's relevant?

In another recent case, the Court looked again at the difficulties posed when there is some ambiguity about the precise nature of 'the relevant field'.

In *Environmental Defence Systems Ltd -v- Synergy Health plc*⁶ a challenge was made to the validity of a patent for barrage units used for flood defences. The method of the invention was to make water-absorbent pads and arrange them within a porous sack to form the barrage unit. The court was required to determine inventive step as a preliminary issue.

The difficulty in this case was that the method of manufacture of the pads was similar to that used in the manufacture of incontinence pads and nappies. The defendant asserted that it had been performing the totality of the claimed invention prior to the grant of the claimant's patent. The defendant also claimed a right under the Patents Act 1977 s.64 to continue an act performed before the priority date, and asserted that the patent was invalid. The Court was required to determine whether there was an inventive step in using the method of manufacture of the absorbent pads in the manufacture of a barrage unit.

The Court directed that each party could call one expert witness, but the direction did not state the technical subject matter to be addressed by the experts. The claimant adduced evidence from an expert in personal hygiene products, while the defendant employed an expert in flood risk management.

The Court held that the starting point for identifying a person skilled in the art was *Catnic Components Ltd -v- Hill & Smith Ltd*⁷, where it was stated that a person skilled in the art was likely to have a practical interest in the subject matter of the invention, and practical knowledge and experience of the kind of work in which the invention was intended to be used. On the face of it, this supported the claimant's choice of expert. However, while the characteristics of the skilled person in relation to insufficiency would be those identified in *Catnic*, that might not be true of the skilled person through whose eyes inventive step was to be assessed.

The Court pronounced that a party seeking to invalidate a patent should state clearly in the pleading the technical field nominated for the skilled person so far as inventive step was concerned, including an explicit statement of the skilled person's background. It was also necessary to state the argument on inventive step. In response, the patentee should set out the counter arguments concerning inventive step and address the common general knowledge of the skilled person drawn from the technical field selected by the defendant. By the time of a case management conference it should be clear how many experts are needed and in which disciplines. In this case, the parties had failed to address the field from which the skilled person should be drawn in respect of inventive step.

The Court, finding in favour of the defendant, held that it was likely that by the start of the relevant period the skilled person would have been aware that barrage units could be made by filling a bag with absorbent polymer. The skilled person was assumed to already know how to make absorbent pads, which would be an obvious choice as a filler. There was nothing to suggest that fibrous material would be regarded as undesirable as a filler in a barrage unit. Further, it would have appeared to the skilled person that the absorbent pads would be worth trying as fillers for a barrage unit, with a reasonable expectation of success. It followed that there was no inventive step in the patent, nor was there inventive step arranging the pads in the bag.

Making his judgment, Judge Hacon commented that it was his impression that both sides thought that details of the skilled person, including the technical field from which he came, were best left to be argued at trial. This, he said, was not something that should have been deferred until that relatively late stage. The practical consequence of the way the proceedings had progressed was that the defendant was not pinned down to a nominated skilled person until he served his expert evidence.

Conclusion

Both cases demonstrate the necessity not only to select the right expert witness but also to identify precisely, at an early stage, the 'relevant field' in which the expert evidence is to be adduced. In the face of increasing limitations on the use of expert witnesses (and particularly the possibility that the parties will be reduced to relying on the evidence of one expert only), it is important to get this right. If it should transpire, at some point later in the proceedings, that the wrong expert might have been instructed, then it would be appropriate for a party to apply to the court to make an adjustment to the directions. While leave may or may not be granted, it would be preferable to simply leaving the point to be argued out at trial.

Need for specific expertise must be identified early

References

- ¹ *DataCard Corporation -v- Eagle Technologies Ltd* [2011] EWHC 244 (Pat).
- ² *Mölnlycke AB -v- Procter & Gamble Ltd* [1994] RPC 49.
- ³ *Rockwater Ltd -v- Technip France SA (formerly Coflexip SA)* [2004] EWCA Civ 381.
- ⁴ *Generics (UK) Ltd (trading as Mylan) -v- Richter Gedeon Vegyeszeti Gyar* [2014] EWHC 1114 (Pat).
- ⁵ *Mitchell MP -v- News Group Newspapers* [2013] EWCA Civ 1537.
- ⁶ *Environmental Defence Systems Ltd -v- Synergy Health plc* [2014] EWHC 1306 (IPEC).
- ⁷ *Catnic Components Ltd -v- Hill & Smith Ltd (No.1)* [1981] FSR 60.

Paying LiP service to justice

In *Your Witness* 71 (March 2013) we considered the likely consequence of further cuts to the civil legal aid budget: there will be growing numbers of cases involving litigants in person (LiPs). We now have the Lord Chief Justice, when giving evidence to MPs, confirming that the cuts have ‘undoubtedly’ caused a significant increase in the number of LiPs in court.

Appearing before the Commons Justice Select Committee in April 2014, Sir John Thomas said that the number of people representing themselves in family courts has risen in the past year. Pressed by MPs on the effects of the legal aid cuts, Sir John conceded that there is now more pressure on the court system.

‘There is no doubt that [the Legal Aid Sentencing and Punishment of Offenders Act] is having an effect on the bottom rung of civil work... The issue is particularly acute in family cases. If two people who have had a breakdown in their relationship are required to be adversarial parties, our system does not work very well. Most district judges are moving to swearing the parties in and conducting the case in a more inquisitorial manner.’

He added:

‘All my colleagues who do cases with litigants in person say it significantly added to the time [the case takes]. The saving you get by not having lawyers has to be counter-balanced by the increase you have to have in court time.’

Meanwhile, NAPO (a trade union and professional association whose members work in probation and family courts) has reported family court figures showing that before the legal aid cuts came in (April 2013), 18% of cases began with neither party represented and 82% of cases began with one or both parties having legal representation. By December 2013, the position was that only 4% of cases had both parties represented and in 42% of cases both parties were LiPs.

One measure of the impact of this on access to justice comes from a retiring Court of Appeal judge.

Warding off injustice

Recently the *New Law Journal* ran a piece about Lord Justice Alan Ward’s retirement. Anyone who encountered Sir Alan before his retirement after 18 years in the Court of Appeal was unlikely to have come away untouched by his distinctive wit. His line in humorous anecdotes is legend. How about the time he leant over the bench and told a LiP to ‘get a life’? For offering that sage advice he was reprimanded by the judicial powers that be, despite the fact that many lawyers who have experienced such a LiP in action would actually agree with him!

Another LiP (associated with the Fathers for Justice campaign group) once appeared before him in full Darth Vader costume. Ward LJ politely asked him to remove his helmet and

lightsaber, and proceeded to refer to him as ‘Lord Vader’ throughout the hearing!

Tricky case

One can therefore imagine Ward LJ’s heart sinking when confronted by a case conducted by LiPs on both sides¹. He began his judgment with the following:

‘[1] This judgment will make depressing reading. It concerns a dispute between two intelligent and not unsuccessful businessmen who, after years of successful collaboration, have fallen out with each other and this and other litigation has ensued with a vengeance. Being without or having run out of funds to pay for legal representation, they have become resolute litigators and they litigated in person. Some unlucky judge had to cope with the problems that inevitably arise in the management of a case like this. Here the short straw was drawn by His Honour Judge Anthony Thornton QC. He struggled manfully, patiently, politely, carefully and conscientiously. Many may not have done so...’

‘[2] What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person. Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micromanage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved. Judge Thornton did a brilliant job in that regard yet, as this case shows, that can be disproportionately time-consuming. It may be saving the Legal Services Commission, which no longer offers legal aid for this kind of litigation, but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-represented litigants, this problem is not going to go away. We may have to accept that we live in austere times, but as I come to the end of 18 years’ service in this court, I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid.’

‘[3] My second concern is that the case shows it is not possible to shift intransigent parties off the trial track onto the parallel track of mediation... Judge Thornton attempted valiantly and persistently, time after time, to persuade these parties to put themselves in the hands of a skilled mediator, but they refused. What, if anything, can be done about that? You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the

*Legal aid cuts
prompt expected
explosion in LiPs*

*Ward LJ speaks
his mind on the
problem with LiPs*

litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable. But none of that provides the real answer.'

Wise words

James Wilson, Managing Editor of the *New Law Journal*, finds these to be wise words. He believes that Ward LJ's remarks are obviously correct for at least five reasons:

- (i) it is generally necessary for LiPs to be assisted with court procedure
- (ii) few LiPs have the skill of distilling relevant from irrelevant issues
- (iii) even highly educated LiPs are generally quite out of their depth in discussing any relevant authorities, statutes or points of principle, which therefore have to be explained at least to some extent (and even then the full significance is often not grasped)
- (iv) it is the duty of the other side's barrister to draw all relevant authorities to the court's attention and to identify arguable points the litigant might have missed, and this usually takes longer as the judge will want to be

Warding off stuffiness

Ward LJ was well known for making the process of the law less stuffy. Here are some of his best lines (drawn from *www.legalcheek.com*):

- This case involves a number of – and here I must not fall into Dr Spooner's error – warring bankers.
- I prefer the instincts of the youthful Mr Justice Stanley Burnton before he became corrupted by the arid atmosphere of this court. It goes to prove what every good old-fashioned county court judge knows: the higher you go, the less the essential oxygen of common sense is available to you.
- The appellant is a lap dancer. I would not, of course, begin to know exactly what that involves. One can guess at it, but could not faithfully describe it. The Judge tantalisingly tells us, at paragraph 21 of his judgment, that the purpose is 'to tease but not to satisfy'. By about the end of 2002, or early in 2003, the appellant seems to have begun to tease the respondent. He, being a rich businessman, sought, no doubt, to enliven his lonely evenings in London by seeking entertainment at the Spearmint Rhino club in Tottenham Court Road where the appellant was then employed. Having been tempted, he managed to obtain her telephone number and invited her to dinner. It was not exactly the traditional boy meets girl, 'Let's have dinner, darling' kind of invitation. It was an invitation which she accepted, but entirely on the basis that she would be there as his escort and, as his escort, she would provide the services of companionship and amusement, but for a consideration. That consideration

satisfied that duty has been discharged (it may also add to the – often unrecoverable – costs of the other side), and

- (v) judgments often take longer because the judges feel obliged to include more detail, with little homilies explaining points of law that would not ordinarily be necessary.

As many experts who have had dealings with LiPs will know, we can add to that list the problems arising when the litigant works with the expert direct. Gone is the professional filter the lawyer would normally provide. In such circumstances, significant care must be taken by the expert to ensure that the LiP grasps the important consequences of the expert's overriding duty to the court and the significance of the expert's duty to independence.

James Wilson sees a fundamental point being addressed by Ward LJ, namely justice being done – and being seen to be done. For a long time it was said that litigation could be afforded by the very rich or the very poor. With many of the latter group now denied legal aid, we end up paraphrasing that old cliché – justice, like the Ritz, is open to all.

would amount, according to the judgment, to perhaps about £700 or £800 a night for the pleasure of her company at dinner. But the arrangement was made on a number of occasions and, as they went on, the relationship changed and at some time early in 2003 it is common ground that the services included sexual services, for which even more money was paid as a consideration. Whether or not rule 2 of the Spearmint Rhino club had been breached, requiring that you could get no satisfaction, we do not know and fortunately do not have to decide.

- This is another of that hideous form of litigation called the boundary dispute, a form of litigation which is best not pursued. Just how much is this stupid piece of land worth? What you are arguing over is a few rhododendron bushes. If you live in St Georges Hill, you've got money to throw away, presumably. But why throw it away like this? You're all potty. Disputes of this kind are a most hateful form of litigation; go away and sort it out.
- The letter written by the wife's solicitors asking him to remove his belongings is lacking in sensitivity, lacking feeling, lacking in any humanity. This is a totally broken man, an honourable man, and to rub his nose in it like this is not dignified. He ought to be given a reasonable chance to clear a lifetime of belongings. I hope a little milk of human kindness may still run in the veins of those who have won everything for someone who has lost everything. (*This judgement led The Mirror to label Ward 'Decree Nicey'!*)

Experts need to adapt to LiP instruction

References

¹ *Wright -v- Michael Wright Supplies Ltd* [2013] EWCA Civ 234.

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