Your Witness

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Joint statement

A recent call to the *Register* Helpline raised a query about joint statements following a meeting of experts under the provisions of the Civil Procedure Rules (CPR) 35.12.

The expert concerned had met with his opposite number and they agreed the content of a joint statement. However, between that meeting and the agreed statement being sent over for signature, the expert was given new evidence that caused him to alter his opinion.

The expert now saw that the previously drafted statement did not reflect his opinion and suggested a modified version. His opposite number rejected the request and insisted that the original statement had to be signed. What should the expert do?

There is some helpful guidance contained in the Civil Justice Council's *Guidance for the Instruction of Experts in Civil Claims* (2014):

> *14. Experts should inform those instructing them without delay of any change in their opinions on any material matter and the reasons for this...*

and

> *64. It may become necessary for experts to amend their reports:*
>
> *(a) as a result of an exchange of questions and answers;*
>
> *(b) following agreements reached at meetings between experts; or*
>
> *(c) where further evidence or documentation is disclosed.*

and

> *66. Where experts change their opinion following a meeting of experts, a signed and dated note to that effect is generally sufficient. Where experts significantly alter their opinion, as a result of new evidence or for any other reason, they must inform those who instruct them and amend their reports explaining the reasons. Those instructing experts should inform other parties as soon as possible of any change of opinion.*

Based on this guidance, it seems to me that it would not be proper to sign the previous joint statement – it no longer reflects the expert's opinion and would simply confuse matters. But further, the purpose of the joint statement is to set out those issues on which the experts agree and those on which they disagree, with a summary of their reasons for disagreeing. Trying to use the joint statement to deal with the new evidence the expert has seen, and its effect on his opinion, is stretching it too far.

In accordance with paragraph 66, for a change of opinion significant enough to disrupt the previously agreed (but not signed off) joint statement, the expert should write an addendum to his expert report. With that done, it may be necessary to consider whether a further meeting of experts was required.

Of course, if the experts had already signed off the joint statement before the new evidence came to light, the addendum to the expert's report could detail those areas of the earlier statement that were now superseded. It is the view of many experts that, where a face-to-face meeting takes place, getting the joint statement signed off at the meeting is best practice. Where that isn't possible, wise experts are quick to take on the responsibility of drafting the statement and getting it signed.

Survey 2015

What is it that expert witnesses most want to know about their colleagues? Well, how much they charge comes close to the top of the list! It is also the question we are most frequently asked by experts new to litigation work.

In my mind, there is no more useful way to satisfy this demand for information than to conduct regular surveys among our readers and to publish the results in *Your Witness*. I make no apology, then, for enclosing with this issue a questionnaire on your work as an expert witness, your terms, conditions and charging rates, and the trends in your volume of work. This is the eleventh survey we have run, and the resulting analysis of trends over two decades is a valuable resource.

I would be grateful if you can find time to complete the short questionnaire, anonymously if you prefer, and to return it to me in the next few days. Alternatively, you can complete the survey on line. Simply point your web browser to *www.jspubs.com* and click on the Survey 2015 link. I will report back results in a future issue.

Meetings of unlike experts

We are currently investigating the problems that can arise when a court orders experts to hold a joint meeting under the provisions of CPR 35.12 (*Discussions between experts*) and the experts concerned are **of unlike discipline**. If you have experience of having attended such a meeting, or know of any cases where this has happened, I would like to hear from you.

I would also be interested to hear of your experiences if you have ever resisted an order to hold discussions on the basis that the other expert was not an expert in your field of expertise.

Chris Pamplin

Inside

Issue 80

June 2015

MedCo – sledgehammer or scalpel?

MedCo is the MoJ's solution for a problem created by the CPR...

MedCo is the on-line system created by the Civil Procedure Rules *Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (RTA)*. Its purpose is to prevent firms of solicitors and medical reporting organisations (MROs) from running cosy money-making collaborations by injecting random selection of expert witnesses into the high-volume low-value RTA sector.

The system went live on 6 April 2015. Medical experts, MROs and those who commission medical reports must register via the MedCo website[1] to be able to provide or commission fixed-price medico-legal reports in RTA claims covered by the pre-action protocol.

Getting registered

So-called 'national MROs' have to pay MedCo an annual subscription of £75,000, smaller MROs pay £15,000 and independent experts pay £150 to register. Furthermore, the national MROs will be required to pay a £100,000 bond to demonstrate their ability to meet their experts' fees.

It is clear that the fee for experts to register directly with MedCo is set at a level designed to encourage significant numbers to register as 'direct experts' – i.e. experts who will take instructions direct from lawyers, so avoiding an MRO.

'Search offer'

The Government's stated aim is to assure independence of the medical expert. The Ministry of Justice (MoJ) thinks the way to achieve this is for experts to be randomly allocated. Of course, in its decision making the MoJ has tried to ensure that achieving expert independence does not restrict any more than necessary access to justice or market competition. However, critics of the new system don't think the MOJ's 'search offer' achieves that aim.

Those seeking a medical expert from MedCo will receive a search offer that includes:

- the name of one high-volume national MRO and six other MROs, **or**
- seven direct medical experts.

A search can be made based on **either** the list of MROs or the list of direct experts, but not both. However, a direct expert search can be run only once; if none of the experts suit, a fall back to an MRO search is permitted. This offering is some way from the 'cab rank' system used by barristers. The MoJ has said it will review the search offer in 6 months. In the meantime, consider the following:

- There is nothing mentioned about the number of medical experts that will be offered for selection by an MRO.
- What would prevent claimant solicitors agreeing a list of pre-agreed experts with an MRO?
- What is to stop MROs coordinating such lists?
- Who'll be monitoring the interaction between the MRO and the solicitor?

... but there's a simpler and cheaper way to do it!

Breaking financial links

One reason that parasitical MROs have been so long lived is because many are owned by the solicitors using them, and such ownership is seldom clear. The MoJ is intent on stopping this.

When registering, claimant solicitors are obliged to complete a **user agreement** that includes a '**statement on direct financial links**'. These statements are used to ensure that experts and MROs with a financial link to the claimant solicitor are not returned in the search offer.

The statement on direct financial links calls upon solicitors to declare:

- ownership, directorship or shareholding in any MRO in the past year, and
- if they are part of an Alternative Business Structure (ABS), that they are not linked to an MRO, and
- that they do not employ or contract with any medico-legal expert who provides reports in the relevant class of soft tissue injury claims.

These obligations extend to the solicitor and any business partners, but (apparently in accordance with MoJ policy) they do not extend to husbands, wives or partners. A similar declaration has to be made by MROs and experts, who are also obliged to confirm any links to law firms, although there is no requirement for an expert to declare any directorship of a law firm, ABS or MRO.

Quality control?

All experts wishing to be instructed in soft tissue injury claims via MedCo must be accredited by January 2016. Doubtless MedCo's Accreditation Subcommittee is busy ensuring that an accreditation process is ready in time. With free choice of experts restricted, and reports fixed price, the quality control system is critical. After all, an expert who performs poorly will be under little competitive pressure when his name will be proposed as often as that of a top-notch expert.

It's also important that the MedCo rules are followed by all. Getting this right is the task of the Audit and Sanctions Subcommittee at MedCo.

Comment

Many have long seen MROs as adding nothing but cost and delay, so any action to control them should be welcomed. But it's hard to shake off the feeling that MedCo has much of the ring about it of the now defunct Council for the Registration of Forensic Practitioners. MedCo represents a complex, costly and easily bypassed approach to taming a market problem the CPR created.

As we've said before, Jackson LJ nearly solved the problem with a simple rule change, but he backed away at the last minute. His answer – and the correct and simple one in our view – is that the cost of the medical report should be a disbursement, whereas the MRO mark-up should be part of the solicitor's profit cost and so unrecoverable. One simple rule change would return us to a normal marketplace for expert reports without all the fuss that MedCo brings.

References

[1] *www.medco.org.uk*

Cross-examining experts

It can be argued that in an adversarial justice system, natural justice demands that each party should have a fair and equal opportunity to test the witness evidence. But how far should this requirement be allowed to override more practical matters imposed on a busy and expensive court system? The court can order the attendance of a witness, but what if a witness is prevented from attending for *bona fide* reasons?

When an expert falls ill

Mr Justice Foskett pondered these matters in a High Court application in *Robshaw*[1]. The Court considered an application to adjourn a clinical negligence trial based on the defendant's inability to cross-examine one of the claimant's expert witnesses who was ill. The somewhat sensitive circumstances in which the application was brought were briefly as follows:

The claimant in the case had sought to rely on the expert evidence of a consultant paediatric neurologist (Dr F). Since the commencement of proceedings, Dr F had developed a stress-related illness that prevented him from attending trial to give evidence. There were concerns that the nature of his illness might render him incapable of attending any court proceedings in the foreseeable future. Instead, it was proposed that Dr F's evidence be submitted in written form.

The defendant made an application for the trial to be adjourned on the ground that he would be seriously prejudiced if he was unable to cross-examine the expert.

Considering the application, Foskett J noted that a position had been reached where Dr F and the consultant paediatric neurologist instructed on behalf of the defendant had met and discussed matters. There was, he said, a very substantial document indicating the areas of agreement and disagreement. He further noted that whilst there had been a wide measure of consensus, a number of issues remained – life expectancy being one such area.

Acknowledging that the application was an unusual one, Foskett J seems to have concentrated on the extent to which the defendant might have been prejudiced by the inability to cross-examine the expert. He weighed this against the perceived disadvantage the claimant would also face.

Giving his judgment, he said that '*at the end of the day, experts do not determine the outcome of cases: the court does that on the basis of the totality of the evidence given. Plainly, the evidence of paediatric neurologists in a case of this nature is important and it helps to guide the court in the direction of the right result. However, I am wholly unable to see how it can be said that the Defendant is prejudiced by the inability to cross-examine [Dr F]. The Claimant's advisers have considered very carefully whether they themselves ought to seek a postponement of the trial in order to obtain a replacement… but have elected not to do so… it seems to me, the position taken by the Claimant's advisers is an entirely responsible one to adopt. What it does mean is that the Claimant goes into this trial without the ability to call a live witness experienced in paediatric neurology and it goes without saying that will doubtless present some forensic and logistical difficulties from the Claimant's side. But looking at the matter as objectively as I can, it places the Claimant in greater difficulty than the Defendant.*'

The judge pointed out that the defendant would have the advantage of being able to call as a live oral witness one of the most experienced consultant paediatric neurologists in the field. Consequently, weighing the balance of potential injustice, it did not seem to him that the balance weighed down against the defendant. That being so, he concluded that the defendant's application was without merit and that the trial could, in his view, proceed perfectly fairly.

When just saving time

This decision should be contrasted with that reached in *Homebase*[2] where the High Court allowed an appeal against a decision not to allow the cross-examination of expert witnesses at trial.

The judge at first instance sought to reduce the time estimate for trial from 3 to 2 days by removing the oral stage of expert evidence. On appeal, Knowles J upheld the reduction of the time for trial, but considered that it could be achieved by different means.

The evidence related to one of the key issues in the case on which the experts differed. Allowing cross-examination would therefore enable the court to assess the experts' comparative reliability. Knowles J held that, instead of removing the essential stage of expert cross-examination, the parties should be required to agree a specific and detailed timetable that would enable the trial to be completed within 2 days. This would permit the court to control the length of trial by imposing those arrangements as firm time limits.

The judge also proposed that time could be saved using the concurrent evidence procedure (hot-tubbing). Although the circumstances of this case differed substantially from those in *Robshaw*, it illustrates that, whilst the Court seeks to avoid delays and minimise the length of a trial, it acknowledges the continuing importance of oral expert evidence in some cases and the need for cross-examination.

The presumption that natural justice should allow all parties the ability to cross-examine an opponent's expert is not, then, an over-arching one. Furthermore, the courts are unlikely to adjourn or delay trials in situations where the disadvantage or difficulties are equal or comparable on both sides. However, whether the judge in *Robshaw* would have reached a similar decision on an application by the claimant for an adjournment to allow time for a fresh expert to be instructed is questionable, particularly if the application was made with the agreement of the defendant.

Cross-examining experts is not to be dropped lightly

References

[1] *Robshaw -v- United Lincolnshire Hospital NHS Trust* [2015] *EWHC* 247 (*QB*).

[2] *Homebase -v- ATS Rangasamy* [2015] *EWHC* 68 (*QB*) (23 January 2015).

Maths on trial – Part II

Trends in data can be misleading, or even hidden

In the previous issue of *Your Witness* we began looking at *Math on Trial*, an excellent book that catalogues the use – or perhaps that should be misuse – of mathematics in the courtroom. While the publication is well worth reading in its entirety, the purpose here is to summarise the ten common mathematical errors the authors distil from the legal casebook. Last time we looked at:

- multiplying non-independent probabilities
- making unjustified estimates
- getting something from nothing
- the value in re-running experiments, and
- the birthday problem.

As the authors say, '*despite their ubiquity… most of these fallacies are easy to spot*'.

Error 6: Simson's paradox

Simson's Paradox arises when a trend disappears (or reverses) when the groups showing the trend are combined. The classic legal case demonstrating the point is the University of California, Berkeley sex discrimination case. The two groups (male and female applicants to Berkeley) show a clear bias in favour of males. But when considering all applicants to given departments across Berkeley, the male bias vanishes.

The Berkeley admission figures for the autumn of 1973 showed that 8,442 men applied and 44% were admitted, whereas only 35% of the 4,321 women who applied were admitted. This difference was so large that it was unlikely to be down to chance. However, when you consider the individual departments, no department was significantly biased against women. In fact, most departments had a small but statistically significant bias in favour of women!

The resolution of this paradox is that women tended to apply to competitive departments with low rates of admission even among qualified applicants (such as the English Department), whereas men tended to apply to less-competitive departments with high rates of admission among the qualified applicants (such as in engineering and chemistry).

Simson's Paradox tells us that it can be easy to 'cut the data' to prove a particular point, but doing so will involve hiding some important factor or other. Look carefully!

Any model of the real world involves ignoring much of reality

Error 7: Incredible coincidence

The conviction of Lucia de Berk as a serial killer of children is an example of the error of analysing data with a preconceived idea of what that data will tell you.

In 2003 Lucia de Berk was sentenced to life imprisonment in the Netherlands for four murders and three attempted murders of patients in her care. In 2004, after an appeal, she was convicted of seven murders and three attempted murders. Her conviction was controversial, and in 2008 the case was reopened by the Supreme Court of the Netherlands. She was freed, her case was re-tried and she was exonerated in April 2010.

An inexpert statistical analysis was used to proclaim that the chance of a nurse working at the three hospitals involved being present at the scene of so many unexplained deaths and resuscitations was 1 in 342 million. However, the evidence gathering had been undertaken by hospital administrators once they suspected de Berk of being the killer.

Events were attributed to de Berk once suspicions began to fall on her that in reality could not have had anything to do with her. Once the failings in the source data were corrected, it was calculated that there was a chance of 1 in 25 that a nurse could experience a sequence of events of the same type as Lucia de Berk.

The lesson here is that retrospective thinking, and particularly attempting to retroactively determine probabilities for events that have already happened, is a very slippery slope.

Error 8: Underestimation

As humans we are used to dealing with small numbers, but very large numbers tend to confound us. We think on a human scale and appear to have difficulty using our 'common sense' to make intuitive predictions when large numbers are involved.

A fine example of this is the 'girdled Earth'. Without doing the maths, imagine a cable laid on the ground that runs around the entire equator of the Earth. Let's assume that it is 40,000km long. Now, imagine making the cable 1 metre longer. This longer cable must be raised a bit off the ground because it is a little bit longer, but how far off the ground does your intuition tell you it will be? Would you be able to get a sheet of paper under it?

The answer is 16 cm! That answer, to many, is an astonishing result, but the maths is simple and the answer indisputable.

This type of mathematical error enters the courtroom in fraud cases, like that of Charles Ponzi or Bernie Madoff, who promote schemes that can only work if they deliver exponential growth on investments. Such schemes cannot work. The lesson to take away is that human intuition, which is fragile at the best of times, is particularly weak when large numbers or compound growth is involved.

Error 9: Choosing the wrong model

Our penultimate error is provided by a battle over the will of Sylvia Howland. In an attempt to demonstrate that a signature on the second page of the will had been forged, it being thought too similar to the signature on the first page, the prosecution turned to a Harvard professor of mathematics.

He compared 42 examples of Sylvia Howland's signature, giving 861 individual comparisons. From the number of down strokes that coincided

on each comparison, he calculated that the chance of her producing two such similar signatures was vanishingly small.

But his model was too simplistic. It took no account of the possibility of her signature changing gradually over time, so two signatures made close together may be more similar than two signatures made years apart. Furthermore, it failed to account for the possibility that signatures made with the same pen at the same table in quick succession might be more similar than two signatures made in different settings.

Mathematical models always simplify the real world, and the simpler the model, the more danger there is of the model turning out nonsense. When such models end up in court, there is a real danger of injustice.

Error 10: The likelihood of unlikely events

The Dreyfus Affair was one of the most famous trials of the nineteenth century, but his conviction was based upon a misunderstanding that the likelihood of unlikely events is dependent on how many attempts are made. So this is error 7 applied to a set of unlikely events.

The scandal began in December 1894, with the treason conviction of Captain Alfred Dreyfus, a young French artillery officer of Alsatian and Jewish descent. Sentenced to life imprisonment for allegedly communicating in a letter French military secrets to the German Embassy in Paris, Dreyfus was imprisoned on Devil's Island in French Guiana. In 1906 Dreyfus was exonerated and reinstated as a major in the French Army.

A key piece of evidence used against Dreyfus was that the repeated placement of certain words in the letter with respect to feint lines in the paper was too unlikely to be coincidence, and so must reveal careful planning by the author to convey some hidden meaning. The 'expert' who conducted this piece of work was convinced there was a 1 in 400,000 chance of the pattern he saw being due to chance. But by failing to recognise that in focusing on the words he selected, he missed the placement of all the other words in the letter, his calculated chance was extremely wide of the mark. In fact, there was a 13 in 100 chance of what he saw in the letter happening by chance.

To explain this another way, should you be surprised if you see an archer get eight arrows in the bull's-eye? The answer lies in how many arrows he fired in total. If he fired 10 arrows and eight hit the mark, that is unusual. If the area around the target is littered with hundreds of fallen arrows, the feat is less surprising.

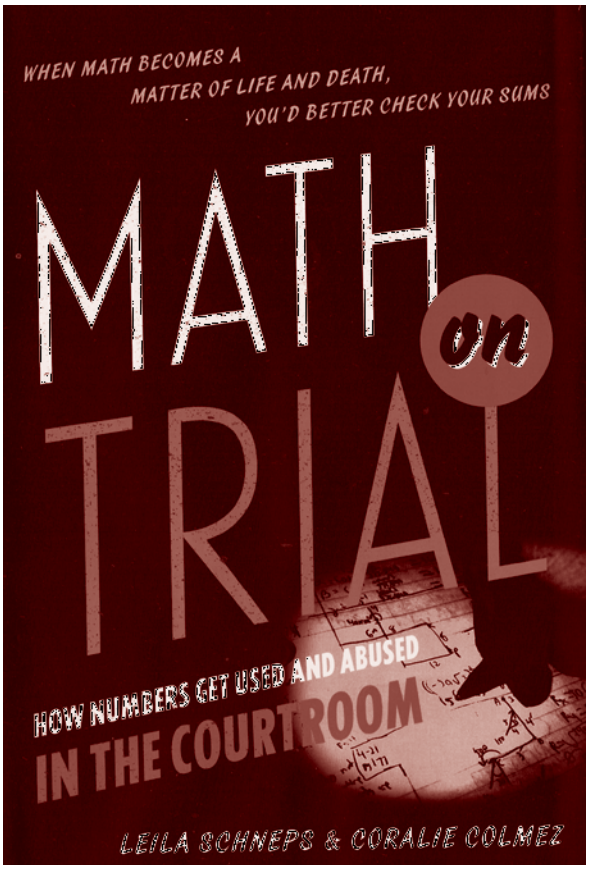
The Dreyfus Affair shows us that uncommon things will occur if you try often enough. It's why the lottery works – any individual ticket holder has vanishingly small odds of winning, but with millions of tickets sold each week it is unsurprising that week after week somebody does win with those vanishingly small odds.

Conclusion

The ten errors covered by the authors of *Math on Trial* are not the end of the story. There are other mathematical conundrums with which to contend. For example, in a recent Radio 4 discussion on the effect of free schools, we were told that, on average, when a free school opens it makes no difference to the educational standards in the local area. But, enthused one contributor, when you look just at those free schools that opened in areas where the educational standard was low, the standards in all the local schools rose. 'Ahh...' came back the other contributor, '... but when a free school opens in an area with schools that are performing very well, those schools tend to get worse.' What does this tell us about the impact of free schools? Probably very little! It should simply remind us of the principle of *regression to the mean*: on average, under-performing schools will tend to get better and over-performing schools will tend to get worse.

When mathematics is misused, whether by mistake or design, be it by politicians, the media or commercial operators, the audience will be confounded. If such misuse does little more than annoy us, it perhaps doesn't matter too much. But when these mathematical errors appear in trials, they can, at the extreme, be the difference between life and death.

When you are faced with mathematics in your expert witness practice, bear in mind these ten common errors. Of course, this short article can't do the errors full justice. For that you should get hold of a copy of *Math on Trial* and read it through.



Mathematical errors abound – but most are readily spotted

References

[1] *Math on Trial* [2013] Schneps, L & Colmez, C. Basic Books. ISBN 978-0-465-03292-1

Costs -v- fairness

In complex cases, the drive for cost saving plays second fiddle

The whole question of costs and proportionality is now enshrined in the overriding objectives of the Civil Procedure Rules (CPR). Yet cost is not the only determining factor, and the courts have acknowledged that sometimes the broader interests of justice will require the appointment of additional experts. In such circumstances there may be some overlap between the issues covered and a resulting increase in time and expense.

Combinations and permutations

Such was the finding of the court in *Various*[1]. These were complex professional liability proceedings involving 142 claimants against their former solicitors. The matter was unusual in that 91 of the claimants (group A) had commenced proceedings by instructing one firm of solicitors and the remaining 51 (group B) had instructed another firm.

The defendant was an Italian law firm that practised in England. Although the governing law was that of England and Wales, some of the documents involved (known as 'Mandates') were governed by Italian law and required expert evidence in relation to their meaning and effect.

The existence of these Mandates had become known to group A during the course of their proceedings. At a case management hearing they had sought leave to amend their particulars of claim to reflect alleged breaches of fiduciary duties arising under the terms of these Mandates. The Master had upheld objections by the defendants that this was a matter for Italian law and he refused leave to amend. So the group A claimants instead sought detailed preliminary expert opinion on the meaning and effect of the Mandates in Italian law.

At some later point the Court ordered that there be consolidation of the two sets of proceedings and that all 142 claims be heard together. At the first consolidated case management hearing the defendants applied to set aside default judgments that had been obtained by group B; for the purposes of that application the group B claimants and the defendants had served expert evidence on each other that included expert evidence by an Italian lawyer, Notary Valente. The case management orders made by the judge included that:

- all the actions were to be the subject of common case management and to be transferred to the Queen's Bench Division for further case management, and
- there should be a trial of generic issues which were to be agreed between the parties.

At a subsequent case management conference directions were given as to the expert evidence to be called. Group A was restricted to calling expert evidence only on those matters that had not already been covered in Notary Valente's report, despite the fact that the group A claimants had had no input into the instruction of Notary Valente.

At the Court of Appeal

Understandably, the group A claimants appealed against the order. They felt that the effect of the order was to require them to accept the group B expert report without the opportunity for their expert to comment on it or to cover the same issues; however, the group B expert was allowed to address issues arising out of group A's limited expert report, and the defendants' expert was allowed to respond to any evidence from either of the claimants' experts. The group A claimants further submitted that it would be unfair to prevent their expert from preparing a report on all the generic issues in the case.

Allowing the appeal, the Court of Appeal was in no doubt that this was one of those relatively rare cases when it was right for the Court to interfere with the case management decision of a lower court. It was observed that, ultimately, the Court has to do procedural justice. Giving his judgment, the Master of the Rolls said that the points made on behalf of the group A claimants were unanswerable. If this had been managed litigation from the outset then almost certainly the judge managing the case would have said that all the claimants were entitled to have only one expert dealing with Italian law. A compelling reason has to be given for granting permission to parties to rely upon more than one expert in relation to the same issue. There may be particularly complicated cases where such an exceptional course is justified, but nobody has suggested that the Italian law issues in this case fell into that exceptional category.

He went on to observe, however, that the unusual feature of this case was that it was not managed litigation from day 1. It was only when the two sets of proceedings came together that the combined litigation became managed. In such unusual circumstances it would be wholly wrong in principle for the group A claimants to be 'saddled' with the group B claimants' expert for the reasons they had given. The conclusion was reinforced by the fact that the group A expert did not agree with all of the group B expert's points. Consequently it was fundamentally unfair to the group A claimants to say to them that they were not permitted to instruct their own expert.

Conclusion

Although the Court of Appeal observed in closing that it was 'unfortunate' that its decision in this case would probably result in two experts giving evidence on Italian law on behalf of the two groups of claimants, there appears to have been very little reluctance shown when reaching the decision – all three appeal judges concurred. This is surely a reassuring example of natural justice and fairness to the parties triumphing over increasingly cost-conscious procedural dogma – may there be more of the same in the future!

References

[1] *Various -v- Various Defendants related to Giambrone* [2014] *EWCA Civ* 1562.

Switching sides?

In general terms there is 'no property in a witness', and a party is free, subject to the usual constraints and rules of court, to call such witnesses as it desires. This applies as much to the choice of expert witness as to any other type of witness. The issue can arise in cases where one party wishes to call the other side's expert witness to give evidence when, for one reason or another, the instructing party chooses not to adduce the expert's evidence.

A call to the *Register* Helpline concerned a situation in which an expert had been asked to report by an insurer on a claim the insurer declined. Its case file was then closed, but the expert was subsequently approached by the insured party to take instructions on a claim against the insurer. How then does the 'property' issue apply?

Professional conduct of solicitors

The solicitor's rules of professional conduct state that:

> *'A lawyer acting for one party must not question an opposing party's expert on matters properly protected by the doctrine of legal professional privilege, unless the privilege has been waived. Before contacting an opposing party's expert, the lawyer must notify the opposing party's counsel of the lawyer's intention to do so. When a lawyer contacts an opposing party's expert in accordance with the preceding Rules, the lawyer must, at the outset: (a) state clearly for whom the lawyer is acting, and that the lawyer is not acting for the party who has retained the expert, and (b) raise with the expert whether the lawyer is accepting responsibility for payment of any fee charged by the expert arising out of the lawyer's contact with the expert.'*

Such considerations would not apply where an expert is no longer instructed by the other party, but there remains an obvious potential difficulty in instructing an expert who has previously been instructed (but not ultimately used) by the other side: **Is the expert in possession of any privileged information?** If information had been communicated to the expert that attracted legal professional privilege, it would be very likely that the original instructing party would object to that expert being instructed subsequently by another party in relation to the same proceedings or in disputes concerning the same subject matter.

It seems likely that there would be an initial presumption that the party was free to instruct any suitably qualified expert. The sole issue for the court would be whether the expert was in possession of information that was privileged and, if so, whether it was practical to prepare a report or give evidence that made no use of that information.

If the nature of the dispute and the information supplied previously to the expert in confidence made it impossible to separate the two, or for the expert otherwise to act independently and impartially, then the court would probably uphold any objection made by the other side.

The courts would perhaps be somewhat wary of this kind of situation simply because of the potential it carries for unnecessary complications. It would be particularly so in cases where there was no shortage of experts suitably qualified in the same field. The court may be more tolerant if there was a genuine paucity of experts in a narrow field of expertise and the expert was one of a very few (or perhaps the only) who possessed the necessary level of expertise in that field.

We know of no case heard in the courts of England and Wales that tackles the specific circumstances raised by our expert. However, there was a similar case heard in the Hong Kong High Court in 2013.

The laws of Hong Kong are still based on English common law and are similar to those of countries that remain members of the British Commonwealth. Consequently, although not binding, the considerations applied by the Hong Kong court are likely to be similar to those that would be applied if the same case were to be heard in the English courts.

In the Hong Kong case (*Daimler AG (formerly known as Mercedes-Benz AG) -v- Leiduck, Herbert Heinz Horst & Anor*), a party had approached a firm of lawyers seeking expert opinion on some aspects of Russian law, particularly in relation to the registration of companies. That party subsequently decided not to use the firm as experts. However, a second party then approached the same firm with a request that it prepare a report, which they then sought to rely on in the proceedings. The first party made application to strike out the expert's report as being inadmissible.

Considering the application, the Hong Kong court applied a test similar to that outlined above. It held that there was no property in the witness and dismissed the application on the ground that it was not persuaded that:

- information for which the first party could claim privilege or confidence had been imparted to the expert, or
- the expert had disclosed or misused any privileged or confidential information of the first party in acting as the second party's expert witness.

Furthermore, there was nothing to suggest that the expert had taken a stance against the first party or compromised his impartiality and the duty he owed to the court. Consequently there was no proper ground on which to uphold an objection to his report or to prevent the second party from relying on it.

I would be interested to hear if you know of a case in which the expert has being involved, at separate times, on different sides of a particular matter.

The basic principle is nobody owns a witness

Be clear if there is any potential conflict of interest

Services for registered experts

Expert witnesses listed in the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

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Address
J S Publications
PO Box 505
Newmarket
Suffolk
CB8 7TF
UK

Telephone
+44 (0)1638 561590

Facsimile
+44 (0)1638 560924

e-mail
yw@jspubs.com

Web site
www.jspubs.com

Editor
Dr Chris Pamplin

Staff writer
Philip Owen