Your Witness

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

Debate over experts' immunity

Our item in the last issue of *Your Witness* on the future prospects for experts' immunity has begun a lively debate. I am delighted to include in this issue another article on the topic by Stephen Stewart QC. He considers the matter in more detail than space allowed last time, and focuses particularly on the impact the Human Rights Act may have on experts' immunity.

An alternative viewpoint is expressed by Professor Geoffrey Beresford Hartwell. In his letter (on page 4), he takes us to task for questioning whether experts may now be held liable in negligence for what they do or say in court. However, there can be little doubt that there is a judicial hardening against the operation of blanket immunities grounded in public policy, and I think it only proper to bring this to your attention. This is not to say, of course, that claimants will succeed at trial – when suing expert witnesses they may well not. But in the light of recent cases, it seems much less likely that their claims will be struck out beforehand, which is generally what has happened hitherto.

I have chosen to publish these contributions because, despite being far apart on the spectrum of views, I see merit in both. This is an important matter for experts and I would be interested to hear your views on these items specifically, and on the issue in general.

The witness summons and experts

Since we covered the witness summons in June (*Your Witness 20*), there has been a further development (see page 5). This involves the attempted use of a witness summons to avoid paying an expert. It is an interesting case and I know you will be relieved to learn that the court set aside the summons. The new addition to our Factsheet Series focuses on the witness summons (see back page for further information).

Court system woes

In the Final Report of his Inquiry, Lord Woolf stressed that the courts needed an effective IT support system if they were to provide speedier access to justice. A couple of years later he was reported to be 'relieved' that the Civil Procedure Rules were being implemented in the absence of a fully integrated system, 'because you hear of reforms being let down by new technology'. Just how far his reforms are being let down by the Court Service's system is only now beginning to emerge.

Thus far, the only court in the country that is able to file all its documents electronically is Northampton County Court. The others are having to operate a paper system in tandem with the computerised one. The situation has become so dire at the London County Court that staff there are working weekends to keep up with the paperwork. Elsewhere, there are reports of case documents not being filed for weeks, of orders being issued after the dates to which they apply, and of hearing dates being vacated unnecessarily.

According to the ever-complacent Lord Chancellor's Department, courts are 'moving towards' electronic filing and providing services electronically by 2005. However, in October, Lord Justice Brook was telling a conference of litigation solicitors that the necessary infrastructure would not be in place fully until 2010, ten years after Lord Woolf had initially hoped. In the meantime, it looks as if the present situation can only get worse.

New *UK Register of Single Joint Experts*

You may have noticed that our stationery has changed. This move is part of our current development initiative which will lead to a number of new products.

The first of these new products is the recently launched *UK Register of Single Joint Experts*. Available on CD-ROM, this new sister product to the *UK Register of Expert Witnesses* is the first expert witness resource that caters specifically for single joint experts. As an expert listed in the *UK Register of Expert Witnesses* you are entitled to a **free** entry in the new resource, if you are willing to be instructed as an SJE.

Draft time

We have begun preparations for the new edition of the *UK Register of Expert Witnesses*. We will be sending you a draft of your entry for inclusion in the 14th edition in early January for you to check, sign and return. If you will be away during the first half of January you may wish to contact us beforehand so we can make arrangements to send your draft ahead of time.

Spell-binding!

The following 'truly' amazing submissions to district judges might raise a laugh at your Christmas party!

- The Pontiff was driving his Metro car accompanied by his wife and two children.
- The claimant seeks an order to inspect the defendant's locust.
- I can confirm that during the last month of our time together I committed adultery with an unmanned person.

Chris Pamplin

Inside

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Experts' immunity and the HRA

There have always been difficulties in defining the nature and extent of an expert's immunity from suit, but they are set to become even greater now that the Human Rights Act 1998 has come into force.

'Immunity exists for the benefit of the public'

The reasons for immunity

In common with others who provide a professional service, expert witnesses owe a duty to their clients to exercise reasonable skill and care. Failure to do so makes expert witnesses liable to be sued in negligence – unless, that is, they can claim immunity from action. It is important, then, to understand the reasons for this immunity and to appreciate its scope.

It is a well-established rule that witnesses are immune from liability for anything they may say in court. As Mr Justice Salmon explained in a case decided nearly 40 years ago[1]:

> 'this immunity exists for the benefit of the public, since the administration of justice would be greatly impeded if witnesses were to be in fear that any disgruntled and possibly impecunious persons against whom they gave evidence might subsequently involve them in costly litigation.'

As regards *expert* witnesses, it is a further concern of public policy that, in preparing or giving their evidence, experts owe a duty not just to the party engaging their services, but to the court itself. This latter duty (and consequential policy reason for immunity) is also well established in case law, though it has now been emphasised and reinforced by the Civil Procedure Rules:

> 'Rule 35.3
>
> (1) It is the duty of an expert to help the court on the matters within his expertise.
>
> (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.'

The extent of an expert's immunity

The immunity enjoyed by expert witnesses is not limited to what they do in court: it also covers proofs of evidence and reports prepared by experts for use at trial. Indeed, it has been held that, in criminal cases at any rate, the immunity must also cover statements made prior to the issue of a writ or commencement of prosecution, provided that the statement was made for the purpose of a **possible** action or prosecution, and at a time when a possible action or prosecution was being considered.

Extent of immunity differs in civil and criminal proceedings

In relation to ordinary civil proceedings, however, the courts have tended to take a more restrictive view of the immunity to which experts are entitled. Thus in the leading case of *Palmer -v- Durnford Ford*[2], the judge (Simon Tuckey QC) held that:

- immunity, being based on public policy, was to be conferred only where absolutely necessary
- experts were therefore *prima facie* immune only insofar as it was necessary to prevent them being inhibited from giving truthful and fair evidence in court
- the existence of liability for failure to give careful advice to a client should not normally so inhibit an expert
- the immunity only extended to evidence given in court and work that was preliminary to his giving such evidence
- thus, though the production or approval of a report for the purposes of disclosure would be immune, work done for the principal purpose of advising the client would not.

Note, too, that the judge also went on to say that difficulty in drawing the line precisely should not result in a plaintiff being denied all remedy against his expert.

The further question arises whether immunity extends to reports prepared in compliance with pre-action protocols. Annexed to the personal injury protocol is a draft letter of instruction which contains the statement:

> 'In order to comply with Court Rules we would be grateful if you would insert above your signature a statement that the contents are true to the best of your knowledge and belief.'

which implies that, despite the fact that proceedings will not have commenced, the preparation of the report is regarded as a preliminary to giving evidence in court. Since, however, the whole *raison d'être* of the protocol is to avoid proceedings and to encourage settlement, it is not at all clear that immunity could extend to such a report.

The Human Rights Act

The Human Rights Act 1998 incorporates into UK law the European Convention on Human Rights. Since 2 October 2000 our domestic courts have had to have regard for Convention rights – which necessarily entails taking into account the jurisprudence of the European Court of Human Rights in Strasbourg.

In relation to immunity from action for negligence, the European Court's decision in *Osman -v- UK* (1998)[3] is of particular significance. In that case the applicant complained about the State's failure to protect the lives of a father and son. The father was murdered and his son injured by the boy's teacher. As the police had been aware of the dangerous behaviour of the teacher, the son and his mother commenced a civil action against them for negligence. However, the case was struck out on the ground that no cause of action could lie against the police for negligence in the investigation of

crime, i.e. the police were immune. In Strasbourg, various violations of the Convention were alleged, but the one the European Court upheld was a violation of Article 6, namely that: 'In the determination of his civil rights and obligations..., everyone is entitled to a... hearing... by a... Tribunal.' In essence, the European Court decided that while the right of access to a court is not absolute, the Court must be satisfied that the limitations applied to that right do not restrict access such that the very essence of the right is impaired.

The European Court ruled that a limitation will not be compatible with Article 6 if it does not pursue a legitimate aim and if there is not reasonable proportionality between the means employed and the aim sought to be achieved. The aim of serving the interests of the community by not jeopardising the police to the constant risk of liability for their policy and operational decisions, whilst legitimate, cannot constitute an absolute bar to actions. On the contrary, that aim must be balanced against other public interest considerations, chief among which in the instant case were:

(a) the Court of Appeal's finding that, subject to immunity, the police owed the victims a duty of care, and

(b) the alleged failure of the police to protect the life of a child, which failure resulted from grave negligence.

Thus the European Court appears to have ruled out blanket immunity from suit, with the result that each case may have to be considered on its merits. The position is thus more fluid, and therefore less certain, than before.

Article 6 and experts' immunity

The public policy consideration that witnesses should not be in fear of future litigation may well be held by the courts to be a legitimate aim justifying immunity from suit. So, too, might one based on the expert's duty to the court. In individual cases, though, courts might choose to give greater weight to competing factors. If, for example, it is clear that an expert's negligence in giving evidence was grave and had nothing to do with his or her duty to the court, why should there be immunity? Advocates owe an analogous duty to the court, but they no longer enjoy immunity from action, even in criminal cases. Then again, courts might want to take into account the seriousness of the consequences of the expert's negligence – if, say, it had resulted in the loss of a very large case causing bankruptcy or denying a badly injured person proper levels of care.

These considerations apply with particular force to single joint experts. They owe the same duty to exercise reasonable skill and care as any other expert, but in their case it is a duty owed to both instructing parties. Furthermore, this is so whether the joint expert is instructed pre-action, i.e. pursuant to a protocol, or after proceedings have commenced.

Hitherto, the blanket nature of the immunity in English law has meant that there was no distinction to be drawn between joint experts and those appointed separately by the parties: they all enjoyed immunity in respect of evidence given in court and the work principally and proximally leading thereto. However, Article 6 may well impact on them differently. While many of the factors that compete with the public policy on which the immunity is based will be the same for both kinds of expert, it could be argued that the trust placed by the parties (and the court) in a joint expert, and the consequent power of what may in many cases be an unchallenged opinion, militate against immunity. Furthermore, to the extent that a joint expert's report is likely to be regarded by the parties as determinative of the issues with which it deals, it is much more advisory in nature and so is still less susceptible to immunity. This might be particularly the case where both parties voluntarily instruct a joint expert in accordance with a pre-action protocol.

What is even more problematical is the duty and immunity of the various contributors to a report prepared in accordance with paragraph 5 of the Practice Direction on Experts and Assessors. This provides that:

> 'Where the court has directed that the evidence on a particular issue is to be given by one expert only (Rule 35.7) but there are a number of disciplines relevant to that issue, a leading expert in the dominant discipline should be identified as the single expert. He should prepare the general part of the report and be responsible for annexing or incorporating the contents of any reports from experts in other disciplines.'

One can only hazard a guess, but mine is that:

(a) the leading expert's duties and immunities in respect of his own report are the same as if he were alone involved

(b) the leading expert's duty in respect of the reports of the other experts is restricted to exercising reasonable skill and care in gathering them and vetting the information they provide insofar as that lies within his expertise

(c) the experts in other disciplines owe a duty to the parties to exercise reasonable skill and care in providing their reports.

It follows that the immunity of the leading expert and the experts in other disciplines in relation to duties (b) and (c) must be in doubt, in that it is presumably not intended that evidence in respect of the matters dealt with in the other experts' reports will ever be given orally in court and / or be subject to challenge.

Stephen Stewart QC

The trust placed in an SJE may militate against immunity

Case references

[1] *Marrinan -v- Vibart* (1963) *1 QB*, 234.
[2] *Palmer -v- Durnford Ford* (1992) *1 QB*, 483. See also *Hughes -v- Lloyds Bank* (1998) *PIQR P98* and *Stanton -v- Callaghan* (2000) *1 QB*, 75.
[3] *Osman -v- UK* (1999) *EHRLR*, 228. cf. *Arthur J.S. Hall -v- Simons* (2000) *3 WLR*, 543.

Letters

Liability of experts in court

Professor Geoffrey Beresford Hartwell, Consulting Engineer & Chartered Arbitrator, Wallington writes:

Loss of immunity could lead to selling justice...

In *Your Witness 21* there are two propositions which appear, on their face, to be mutually contradictory. One of them is unexceptionable, the other a danger to justice.

In reporting *Anglo Group -v- Winther Brown*, you quote His Honour Judge Toulmin as saying 'The expert evidence presented to the Court should be, and be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of the litigation.' That is, as I recall, precisely what Lord Wilberforce said in *Whitehouse -v- Jordan* many years before.

Dealing with *Arthur J.S.Hall -v- Simons*, over the page, you ask the rhetorical question, 'But can experts now be held liable in negligence for their conduct in court or making a hash of the evidence they give from the witness box? That possibility, it seems, can no longer be dismissed out of hand.' That is the proposition with which I wish to take vigorous issue.

The law, of course, is what a court says it is, no more and no less. I would not presume, therefore, to say what the law may be. Nevertheless, it may be worth pointing out that, if the court wishes to have the evidence of an expert uninfluenced by the exigencies of litigation, it cannot at the same time impose a duty of care for the client's interests. That would be having the cake and eating it. If a duty of care is imposed, that is that. The expert's task will then be to discharge that duty of care, *ruat coelum*. If that is inconsistent with what otherwise would be the expert's duty to the court, so be it. Such a step would bring the English jurisdiction into line with the jurisdictions of the United States of America, where an observer might say that expertise is entirely a matter of partisan advocacy.

I may say that experts here have been divided for some time between those who see their task as the service of justice and those who see it as a duty to their client. This already creates a difficult tension in experts' meetings. To what extent is it legitimate for a neutrally minded expert to take steps to counter the views of one who is overtly partisan? Can one rely upon all courts to have the perspicacity of His Honour Judge Toulmin?

... to those who can buy the most articulate expert

In my own view, it would be most unfortunate if, as part of the trend to make professionals the insurers of last resort whenever there is a dispute or claim, the court were to impose a duty upon the expert witness to do his best to help his client win, because that is what the proposed duty of care would mean in practice. It would be yet another step in selling justice to those who are better able to fund it, by buying the most articulate experts, just as they buy the most articulate advocates.

Generally, professionals who act as expert witnesses do so in the hope that their skills and knowledge will help the court where the court is uninformed. I do not suggest that an expert should not take every care in carrying out his task, only that he should not be put in the position of giving his evidence *in terrorem*, any more than in hope of reward, because then it would be of no value to the court.

The Toulmin Principles

Mr Geoffrey H Lloyd, Chartered Insurance Practitioner, Cambridge writes:

I should like to offer some reaction to your piece about Judge Toulmin's views on experts. The paragraph to which I take exception is the second of the eight principles Judge Toulmin says an expert witness owes to the court. It reads: 'The expert's evidence should normally be confined to technical matters on which the court will be assisted by receiving an explanation, or to evidence of common practice. The expert witness should not give evidence as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.'

I have something to say about the first sentence, but the second is nothing short of extraordinary.

Either Judge Toulmin has had some very bad days with some very bad experts or he is over-sensitive. My understanding is that whereas witnesses of fact must refrain from expressing opinions, it is the right and obligation of expert witnesses to do just that. He or she is supposed to be an authority on a particular subject or discipline, and it is that expertise – which is better than anyone else in court is likely to have – that the court needs.

That said, an expert must not be arrogant, overbearing or over-dogmatic. A report littered with 'I would have done this' or 'I would have done that' is not likely to reflect a spirit of objectivity. However, a well drafted report is bound, by implication, to reflect what the expert regards as best practice; it follows that if the expert is a well respected authority in a particular field, then that is the way he or she would have behaved. Besides, as far as I am aware, there is nothing to stop Counsel asking in court what the expert would have done.

It is instructive to consider my own field of general insurance. Underwriting is both an art and a science, but probably rather more of the former. To help the court, I might reply that in certain circumstances I would have underwritten the risk on certain terms or not accepted the risk under any circumstances. That might be a very firm opinion. But, to be totally objective about the issue, I might have to add that there may be some underwriters who would take a more generous or more cautious line. In such circumstances, if I had the judge's confidence, he might feel it would be helpful to know, having

regard to the diversity of opinion of different underwriters, what I would have done. This is all in the realm of opinion and what I am there for. And the judge may reject my opinion anyway.

Judge Toulmin is concerned that I may usurp the role of the judge. How? What judge would allow it anyway? Surely he makes his own mind up on the evidence: such evidence being the established facts and the interpretation, opinions and arguments advance on both sides.

Lord Woolf is keen for greater expansion of the role of the single joint expert (SJE). A good SJE has to be extra careful about bias and partiality. The SJE will be privy to all the arguments on both sides, and I cannot see how the SJE can fail to avoid the moment when an opinion is required which is likely to be more favourable to one side than the other. I suppose this is bordering on a judgement in the legal sense. But how is this to be avoided if the expert is truly to assist the court and, in particular, the judge? The judge will, of course, make his own mind up.

John Lord writes:

Mr Lloyd raises some interesting points about the second of Judge Toulmin's principles, but I cannot help thinking that the problem he has with its first sentence is more apparent than real. It was, after all, the judge's first principle that roundly confirmed it to be the duty of an expert witness to provide 'objective unbiased opinion in relation to matters within his expertise'.

The key requirement here is that an expert's evidence should be objective. This is particularly important with regard to reports written for the court, given that in most cases nowadays experts do not give evidence from the witness box. For reports, the requirement is implicit in paragraph 1.2 of the Practice Direction supplementing CPR Part 35. It reads, in part, 'where there is a range of opinion on the matters dealt with in the report [an expert must] (i) summarise the range of opinion, and (ii) give reasons for his own opinion'. As Mr Lloyd himself points out, if the expert is a well-respected authority in the field, his own opinion is bound to reflect how he would have behaved in a similar situation. For an expert to state as much in his report would, however, detract from the required objectivity and might well lead to the report being discounted – or, as in the *Pride Valley Foods* case discussed in *Your Witness 21*, disregarded altogether.

I agree with Mr Lloyd that it is difficult to see how a properly instructed expert can, in Judge Toulmin's words, 'seek to usurp the role of the judge'. It is, however, an oft-expressed concern that the use of SJEs in cases which turn on technical evidence may result in the expert becoming the ultimate arbiter of the case – not because that role has been sought, but because it has been thrust upon the expert. That, though, is another issue.

Court report

Witness summons set aside

The long-running case of *Brown and another -v- Bennett and others* has at last come to an end, though not before there were some intriguing last-minute developments, one of which concerned an expert witness.

The claimants, Graham and Edwina Brown, were shareholders and directors in a company that went into liquidation 10 years ago. They alleged various kinds of wrongdoing by no fewer than 12 defendants – six of whom are also former directors of the company – and were claiming substantial damages. The issues raised by the case need not concern us here, but they were complicated, and the trial of the action was expected to last several weeks.

Until a very late stage the Browns had the benefit of legal aid, and this met the cost of the reports from their two expert witnesses, one of whom was Tracey Callaghan, an insolvency specialist with Baker Tilly. Then legal aid was withdrawn and the Browns told Ms Callaghan that they were no longer able to pay her fee for attending court to give evidence at the trial of their action. She responded that in that case she was not prepared to show up, whereupon the Browns made an *ex parte* application for her to be summonsed to do so.

In most circumstances a litigant applying for a witness summons does not require the prior permission of the court for the summons to be issued. Such permission is only needed if the trial is less that 7 days away or a witness's attendance is sought for a pre-trial hearing. Otherwise, issue of the summons is automatic. Subsequently, though, the court may, in the exercise of its discretion, set the summons aside – as was to happen in this instance.

At a hearing before Mr Justice Neuberger, counsel for Ms Callaghan successfully argued that when a litigant agreed to pay an expert witness a fee for giving evidence, he should not be allowed to resort to the procedural device of a witness summons to escape paying that fee. Were he to attempt this, the summons should be set aside, almost as a matter of course.

His Lordship agreed and duly released Ms Callaghan from observance of the summons, citing in support of his decision a passage from *Phipson on Evidence*, the standard textbook on the subject. As it happens, the Browns might not have needed Ms Callaghan's presence in court anyway, because during the hearing counsel for the defendants indicated that they were prepared to accept the evidence of her report as it stood.

Such considerations were, however, soon rendered immaterial, for a few days later the same judge accepted submissions on behalf of the defendants that the evidence so far disclosed revealed no adequate cause for action. He thereupon dismissed all the claims against them.

Experts must consider the range of opinion

Witness summons can't be used to escape paying the expert

Three conferences and a launch

A personal view of the 2000 expert witness conference season by Sophie Adams

I joined J S Publications in September charged with extending current products and researching new ideas. My rusty knowledge of law – an A-level in the subject taken 17 years ago – meant I had to get to grips quickly with the changes in civil procedure and their impact on expert witnesses.

In the cosiness of our Suffolk offices, I began my learning process: I read a variety of literature, surfed the internet, and spent hours frantically taking notes while listening to the hard facts about expert witnesses from Chris Pamplin. Enough of the office, it was time to go and meet some experts face to face!

My diary began to fill with dates for expert witness conferences. Within 2 months I was on my way to the Expert Witness Institute (EWI) Conference, the Society of Expert Witnesses (SEW) Autumn Conference, the Bond Solon Conference and the launch of the Council for the Registration of Forensic Practitioners (CRFP).

First encounters

On the day of the EWI Conference I met my first expert witness just outside Regents Park tube station: a forensic accountant from West Sussex who directed me to the Royal College of Physicians. The meeting started with a warm welcome from the Rt Hon Lord Mustill, President of the EWI, who introduced the theme of the day: 'Developments in Civil Litigation'. Although the audience comprised some 90 expert witnesses, this was a conference that very much delivered talks from members of the judiciary, solicitors and other legal professionals. In my novice capacity I found the keynote address a 'shock to the system'. The Rt Hon Lord Justice May, Deputy Head of Civil Justice, spoke about the early twentieth century American Judge Learned Hand and his views on expert evidence during that era. I was not the only member of the audience who had never heard of this 'influential' character!

Throughout the day, the single joint expert (SJE) and the impact of the Civil Procedure Rules were mentioned repeatedly, but the views of expert witnesses were represented by just one speaker.

However, despite being plunged in at the deep end, I came away feeling that the day had given me a key insight into the relationship between expert witnesses and the legal profession.

Practical matters at the SEW

Before the floods really started gathering momentum, I attended the SEW Conference in the impressive surroundings of York Racecourse. This was a 'hands-on' conference with the emphasis on practical workshops. With 120 delegates, the day offered valuable insights for both novice and veteran experts. Sessions ranged from how to write watertight terms of engagement, to maximising the returns from investment in PC hardware and software.

Morning workshops were followed by a well-deserved sit-down lunch: a welcome change from the stand-up balancing act involving plate, glass, napkin and fork at the other conferences!

I thought the open forum, the last feature of the day, was the most informative. The panel was made up of all speakers, including Professor Peter Hewitt and Michael Black QC. It was nice to see a panel made up not only of legal professionals, but also practising expert witnesses and representatives from marketing and computer consultancies. The thought-provoking questions coming from the floor illustrated that the day had indeed stirred up subjects for future debate.

This relaxed, but informed, conference gave me a valuable insight into many practical aspects of expert witness work – highlighting both successful practice and some potential pitfalls. Proceedings carried on long into the evening with a lavish sit-down (once again) meal at the impressive 17th-century manor house, Middlethorpe Hall.

Smooth operators

Among the 250 delegates who attended the Bond Solon Conference, I now began to see some familiar faces in the crowd. Although the conference included speakers from both the legal and expert witness communities, the precision time keeping of the organisers ensured there was plenty of opportunity for questions from the floor. I found this was by far the best way to absorb the different viewpoints represented at the conference.

It was interesting to hear the full details of the *Ikarian Reefer* case delivered by the Rt Hon Sir Murray Smith. I had heard of this case many times, and the way in which he recited events held everyone's attention.

It was difficult to choose which talk to attend in the parallel sessions of the afternoon. Out of all the speakers I had heard in the last 3 months, the one who really stuck in my mind was Kate Hill, a solicitor who helped me understand what the Human Rights Act would mean for experts involved in clinical negligence cases. I was sure I could hear a distinct 'encore' from one of the delegates!

I left this inspiring conference with plenty to think about.

No launch to the launch

Unfortunately the floods I missed in York finally caught up with me: the 6 a.m. non-existent train from Cambridge to Kings Cross on a blustery October morning ensured I was not to get to the launch of the CRFP.

I understand it went very well, though, and a week later I received my delegate pack and complimentary mouse mat!

Conference reports

Expert Witness Institute Conference

Date: Thursday 12 October
Venue: Royal College of Physicians, London
No. of delegates: 90 Cost: £150–£300

Entitled 'Developments in Civil Litigation', this EWI conference, like previous ones, drew the majority of its speakers from the legal world. In his keynote address, the Rt Hon Lord Justice May, Deputy Head of Civil Justice, encouraged experts to embrace the concept of the single joint expert (SJE), stressing that their use has cut the length and cost of court cases. He then gave a potted history of the changing role of the expert, concluding with the somewhat surprising finding that many similarities exist between the role of the expert in early twentieth century USA and that supported by the Civil Procedure Rules (CPR). He ended with his personal belief that the adversarial nature of old was outdated.

Developments in civil litigation

There followed short presentations by: Adrian Whitfield QC on privilege; Robin Oppenheim on the impact of the Human Rights Act on the expert's role; Colin Stutt from the Legal Services Commission on the new legal aid funding regime for civil litigation; and Norman Walker, a law costs draftsman, on the payment of experts.

Sir Roger Bell QC spoke about experts' discussions in clinical disputes, outlining the relevant draft guidelines. He said that while judges may have some experience in the field of expertise from previous cases, they were not experts in the field about which an expert gives evidence. Judges had to rely heavily on the experts' knowledge, their professional integrity in expressing unbiased, objective opinions, and their willingness to agree, wherever possible. Sir Roger saw the increased use of experts' discussions, carried out in good faith, as one of the most promising avenues towards achieving the court's overriding objective of dealing with cases justly. He said that all judges would appreciate the willingness of the experts to participate in discussions in a spirit of openness and co-operation.

Developments in the criminal process

Representatives from the Council for the Registration of Forensic Practitioners (CRFP) announced the official launch of their new organisation on 30 October. In promoting the CRFP, Professor Evelyn Ebsworth (Chairman) and Alan Kershaw (Chief Executive) said that the new body would meet 'the public desire for confidence' in the standards of forensic evidence; it will protect against the 'flaws in evidence of forensic experts'. They maintained that registration of the CRFP was 'not just a bureaucratic process, but an expression of a standard'. Somewhat controversially, the CRFP representatives spoke of establishing a sister organisation that would operate in the civil arena. In the question time that followed, a number of experts expressed their concerns about the aims and operation of the new body.

Unfortunately the day's programme overran and the final talk with the rather cryptic title 'Developments Internationally' had to give way to a dash for the 5.30 out of Liverpool Street.

SJEs help cut length and cost of court cases

Society of Expert Witnesses Conference

Date: 27 October 2000
Venue: County Stand, York Racecourse
No. of delegates: 120 Cost: £76–£120

The sixth Society conference focused on the issues involved in running an efficient business. Contributions considered the basics of setting up a business: choosing the right company structure; understanding business accounting; VAT and marketing. The Society also welcomed back Michael Black QC, a long-time critic of the expert provisions in the CPR, who has recently been appointed to the Rules Committee.

Meanwhile, a parallel track was considering practical issues that face many expert witnesses.

Terms of engagement

Richard Cory-Pearce identified the principal purpose of an expert's terms of engagement: to include the expert's requirements in the contract governing their appointment. The terms are intended to avoid argument, not to provide the basis of dispute; therefore clarity is essential.

In a novel twist, Mr Cory-Pearce brought to bear the wording of the *Guide to the Professional Code of Conduct of Solicitors*. The *Guide* defined an *undertaking* by a solicitor as any unequivocal declaration of intention given in the course of practice addressed to someone who reasonably places reliance on it. The *Guide* goes on to say that by failing to honour an undertaking, a solicitor is *prima facie* guilty of professional misconduct, and notes that professional conduct obligations can be more onerous than legal ones!

It was the speaker's contention that the acceptance of an expert's terms constituted such an 'unequivocal declaration of intention'. Accordingly, by separating the issue of non-payment from that of breach of undertaking, it should be possible to bypass the current 'defence' raised by the Law Society and the Office for the Supervision of Solicitors – that experts have the usual legal remedies to resolve issues of bad debt.

Treat non-payment and the breach of undertaking separately

Time and expense keeping

Frazer Imrie discussed why time and expense records are so important to the success of any expert witness practice. His session drew out the important features of a time-keeping system, namely that it should be: simple enough to support daily operation; sufficiently flexible to deal with many different tasks; convenient enough that it is likely to be operated; supportive of the accounting functions, and comprehensive, encompassing all chargeable activities.

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Open forum

The traditional endpiece of Society conferences is the open forum at which delegates can fire questions at the panel of speakers. The event proved to be as lively as ever.

A number of delegates raised issues that turned on their interpretation of their instructions. One example was of an expert who was asked to consider surveillance video evidence; he wanted to know if such evidence was admissible. The panel stressed that experts must take great care to avoid telling solicitors how to do their jobs. Experts should simply answer the questions asked: without conduct of the case, experts are not in a position to make such judgements.

The length of time, and therefore cost, to prepare SJE reports was discussed. The majority of experts felt that they took longer to complete than a traditional party report.

This led to a side debate about what experts should do when they believe the statements made by a witness to be false. The panel was clear that unless such a belief arose from the expert's technical expertise, these matters should not concern the expert. One contributor, with experience as an arbitrator and an expert witness, rounded off the debate by saying how much he enjoyed acting as an expert witness *because* he was free to lay down the 'facts' as presented without having to make judgements about which facts were true.

Bond Solon Expert Witness Conference

Date: Friday 10 November 2000
Venue: Church House, Westminster, London
No. of delegates: 250 Cost: £135.00

Poor weather and the well-documented rail difficulties kept some delegates away from the fifth Bond Solon Expert Witness Conference. But those who did get there were well rewarded by the day's agenda and range of speakers.

The participative nature of the conference and the regular soundings taken by the organisers ensured delegates felt involved.

SJE and CFA

The Rt Hon Sir Murray Stuart-Smith delivered the keynote address on the meaning of expert independence, the role of the SJE and the conditional fee arrangement (CFA). He was quite clear that the CFA brought with it a conflict of interest for both lawyers and experts. He observed that borderline or very difficult cases with an uncertain outcome – in other words, precisely those cases that should be brought to court for resolution – would simply not be taken on by lawyers under CFAs. Some experts said that they had been approached by solicitors to work on this principle, whilst others, rather worryingly, seemed to mistake this proposed arrangement for a deferred fee agreement.

Next, Grainne Barton, a medical negligence solicitor, looked at the changes brought about by Woolf. Questions from the floor were concerned largely with seeking directions from the court, which was a cause for concern with many experts. Ms Barton's experience in this area was largely, in her own words, 'negative'. Indeed, she recommended that experts channel any queries through the instructing solicitor, who may well, like herself, have a direct line to the court.

Other topics covered were the effect of the Human Rights Act, experts' meetings and how best to conduct these, and the role of the SJE.

Blame versus confession

One of the most interesting talks was delivered by Eric Watts (Consultant Haematologist) on the 'blame versus confession' culture. He put forward a thought-provoking theory on the contribution of a sequence of fairly minor individual mistakes to a fatality or disaster. After examining some of the reasons behind a blame-apportioning culture, Mr Watts contrasted this with the system used in aviation where the reporting of 'near misses' is actively encouraged.

Ali Malik QC then gave delegates an insight into the opportunities presented by arbitration and mediation, with some tips on how to approach such an instruction. He warned that the number of people qualified to act as mediator could very soon outstrip the number of cases available on which to mediate!

The afternoon began with a speech by Tony Cherry, Solicitor, who explained the history of the Code of Guidance for Experts. The delegates then divided into three groups according to their choice of specialist topic: Human Rights, The Cyber Expert and Clinical Negligence Update. Reports from delegates on each track suggested that the speakers had been well chosen and the sessions useful.

Accreditation of experts

The afternoon finished with the topic of accreditation of experts. Sir Louis Blom-Cooper, chairman of the EWI, presented the case 'for', arguing that the imposition of 'standards of excellence' can only benefit *bona fide* experts. He stated the EWI's support for the CRFP.

The 'against' case was put by Dr Peter Ellis, who maintained that a lawyer will not be convinced of an expert's professional competence simply because the expert has a certificate of registration. His opinion was that word of mouth recommendation counted for far more then membership of yet another 'club of card-carrying experts'. He also voiced a number of concerns regarding the practicalities of such accreditation.

The subject of accreditation caused the most emotive response of the day amongst delegates who were split in their opinion: approximately one-third were in favour of a general system of accreditation, while two-thirds were against, preferring to rely on training to raise standards.

More detailed conference reports can be read in our revised Factsheets 19, 20 and 40.

Factsheet Update

The following new factsheet will be available from 10 December 2000:

ID	Factsheet title
43	The witness summons

We have replaced the conference report factsheets (19, 20 and 40) with updated versions.

You can access factsheets through our web site, or by using our *Factsheet Viewer* software, which for £40.00 per annum provides quarterly updates and fast, flexible searching across all the factsheets. Call us on (01638) 561590 for details.

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