

Your Witness

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This issue marks the 10th anniversary of *Your Witness*. The past decade has seen many changes for experts – some good and some not so good.

Media attention

Perhaps the most significant development has been the rise in the public profile of the expert witness. In 1995, few outside the court system would have had much notion of the role of the expert witness. To the average man in the street, the work of the expert witness and the way in which the courts use expert evidence would have been shrouded in mystery. However, the role of the expert is now all too often headline news, and it's been the less positive side of the profession that has received the most media attention. Indeed, the cases of Sally Clark, Victoria Climbié, Alder Hey, Angela Cannings and others have been a depressing catalogue, serving only to highlight the deficiencies in the way the justice system currently deals with expert evidence.

There is little doubt, then, that the role of expert witness is becoming tougher. While it is not quite open season on experts, the current climate does call for a higher degree of resilience and professionalism than that which might have sufficed 10 years ago.

Accreditation

Calls for the wholesale accreditation of expert witnesses have been on and off the agenda throughout the decade. While our surveys indicate that only a small minority of experts favour a system of central accreditation, most experts agree that standards need to be maintained, if not raised.

In this issue, 4 pages are devoted to the subject. You'll see that we think there is a need for some change: from altering the way the courts handle expert evidence, to helping the professional bodies improve the public's perception of expert witnesses.

Procedural changes

The expert has also had to contend with sweeping changes in the civil court system. The Woolf Reforms, and the Civil Procedure Rules (CPR) that followed, have given the courts far greater control over the role of expert witnesses in civil cases.

Today, experts are subject to far stricter procedural rules than they were 10 years ago. Indeed, the nature and content of reports, the admissibility of evidence, and the duties and responsibilities of expert witnesses are all strictly regulated by the CPR, and their accompanying

practice directions and protocols. Furthermore, the decision as to whether expert evidence can be called at all rests no longer with the parties and their lawyers, but firmly with the judge.

Fewer court appearances

It's also far less common for experts to give oral evidence in the civil courts. In 1997 our survey of experts indicated that the average frequency of court appearances was 5 times a year. By 2003 this had fallen to only 2.6.

Farewell the hired gun

Over the same period we've also seen a distinct shift away from the adversarial nature of expert evidence and the 'hired gun' phenomenon. While a litigant might still retain a 'proprietary' interest in expert evidence, this has been tempered by the concepts of single joint experts, court-appointed experts and expert assessors.

A more 'professional' approach

Certainly, experts today are far more organised and professional than were their predecessors. In 1995 only 32% of experts used a written form of contract when accepting instructions. While this figure rose to 47% in 2001, it was rather depressing to report that 2 years later it had dropped back to 42%. Our latest expert witness survey accompanies this issue, and we'll report the results in the autumn.

Remuneration

Still one of the most popular topics in our post bag remains that of the expert's remuneration. Is it still profitable to be an expert?

Despite caps, cuts and economies, the loss of legal aid and meagre allowances in the magistrates courts, the last 10 years have shown a steady, if unspectacular, rise in the expert's average rate of remuneration. Whilst the rate for report writing has increased by less than the prevailing rate of inflation, the daily fee for court attendance has grown on average by 5–6% per annum.

Of one thing we can be reasonably certain: the next decade will bring further changes and developments in the role of the expert. There will, undoubtedly, be fresh 'scandals' with which to contend. There will be new attempts to remove the immunities and privileges experts currently enjoy. There will be further rules and practice directions to knot the expert's troubled brow. It is to be hoped, though, that there will also be changes for the better, and that some of the persisting problem areas will be resolved.

Chris Pamplin

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Accreditation or registration?

'Establishment' meets to discuss accreditation...

At the end of February, the Civil Justice Council (CJC), the body set up under the Civil Procedure Rules (CPR) to oversee the civil justice system in England and Wales, held a forum on the accreditation of expert witnesses. In preparation for this, all experts in the *Register* were invited to contribute their views through one of our on-line surveys (see Table 1). Using the 654 resulting contributions to build on work already completed for the recent Legal Services Commission (LSC) Consultation (see *Your Witness* 39), a discussion document was prepared with the intention of fostering debate amongst those attending the CJC Forum. What follows is:

- a summary of the analysis contained in that discussion document (point your browser to www.jspubs.com and follow the link to *CJC on Accreditation* to access the full discussion document)
- a report on the outcome of the CJC meeting
- a few ideas for change that might be considered by the courts and the professional bodies.

Analysis put before the CJC

Most of the discussions on accreditation of experts as expert *witnesses*, and the role of the Council for the Registration of Forensic Practitioners (CRFP), are predicated on two assumptions.

1. There is a current problem with the quality of expert evidence.
2. CRFP accreditation is capable of delivering quality assurance.

We believe, and over 80% of our expert contributors agree (see Table 1), that both assumptions are wrong.

No evidence of a problem

No evidence has been offered to support the view that there is currently a problem with the quality of expert evidence. In the civil arena, following the introduction of the CPR in April 1999, we have seen:

- expert evidence placed under the complete control of the court
- the adoption of a cards-on-the-table approach to litigation
- absolutely clear guidance for expert witnesses on their overriding duty to the court.

In the system of case management that existed pre-CPR, lawyers held sway and often used expert evidence as part of their case management strategy. All too often this strategy involved finding the most circuitous route to court, and misuse of expert evidence was just one tactic adopted. It was, perhaps, understandable, then, that the 'hired gun' was seen from time to time. Over 75% of our expert contributors support the view that the CPR have solved many of these problems.

Furthermore, the high-profile miscarriage of justice cases in the criminal courts, which have

been popularly ascribed to the failings of expert witnesses, have actually, according to the Court of Appeal (*R -v- Cannings* [2004] EWCA Crim 1), reflected a failing in the way the courts have handled conflicting scientific evidence. This is a view supported by 81% of our contributors.

In *Cannings*, the Court of Appeal recognised that it was the trial court's handling of scientific evidence, not the evidence itself, that was the problem. The judgment concluded:

'If the outcome of the trial depends exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed.'

The central tenet of the Court of Appeal decision is that where a court is presented with evidence that is solely, or mostly, opinion evidence, and where there is a strong divergence of opinion amongst the experts, the court should not feel confident to arrive at a verdict of guilt.

If this sensible advice had been followed in the Sally Clark case, the barrage of conflicting scientific evidence would have prevented her conviction. Likewise, in the *Cannings* case, the array of defence experts disagreeing with the views expressed by the Crown experts should, in the absence of corroborating evidence, have introduced sufficient doubt to lead the judge to direct the jury to acquit or to halt the trial, it being 'unsafe to proceed'.

The lesson of Barion Baluchi

It has been suggested that the case of Barion Baluchi supports calls for CRFP accreditation of expert witnesses (see *Your Witness* 39). We reject this because of the distinction between an expert witness who falls below some measure of quality and a criminal who impersonates an expert witness. It is no more appropriate for the CRFP, for example, to attempt pre-emptively to detect the criminal impersonation of an expert witness than it would be for the GMC to attempt pre-emptively to detect a murderer who happened to be a practising doctor.

How can any professional body be expected to prevent criminals from committing crimes? The GMC's revalidation scheme, recently put on hold because of severe criticism by the Shipman Inquiry, is incapable of preventing, or detecting, a future Shipman because revalidation was designed to test whether a doctor is fit to practice. That has nothing whatsoever to do with a doctor's propensity to commit murder.

Baluchi was ultimately caught by a vigilant lawyer.

Accreditation can't provide quality assurance

Even if there was a general problem with the quality of expert evidence, we reject the proposition that the CRFP accreditation scheme would be able to remedy the situation by delivering 'quality assured' experts (to quote the LSC Consultation Paper).

... and quickly sees dangers in its extension to the civil arena

Quality assurance for expert witnesses cannot, as implied by the LSC Consultation Paper, come from accreditation. It can only come from a system that looks carefully at each expert, in each case, from many angles. That is precisely the system we have in place already (the lawyers, the judge, the other experts), and probably the reason why no one has put forward evidence of a general problem with the quality of expert evidence. Perhaps this is the reason why 83% of our expert contributors agree that the current quality assurance system is the best way of ensuring competence amongst expert witnesses.

What is there to accredit, anyway?

Implicit in much of the debate on accreditation is the assumption that the skills of the expert witness, as opposed to those of the expert, are susceptible to accreditation. But what is there in a person's ability to form an opinion and bear witness to it that is susceptible to meaningful accreditation? The basic skills specific to report writing and the giving of evidence are not that onerous, and can be acquired through training, although experience is a better tutor.

A role for professional bodies

Insofar as an individual's competence as an expert might be in need of accreditation, this is a task best performed by the expert's professional body. Such bodies will generally already have the disciplinary powers in place to deal with an expert whose expertise is found to be below some defined standard.

One of our expert correspondents, who is an assessor for the CRFP and naturally supportive of its system of accreditation, raised the case of Michael Wilkey as an example of why accreditation by professional qualifying bodies was not acceptable. Yet far from damning the architects' professional qualifying body, the Wilkey case is a clear example of peer regulation that is working (see report in *Your Witness* 32).

Warning about scientific evidence and the nature of arrogance

There is a fundamental incompatibility between what science can offer and what the English legal system seeks. And that is 'certainty'. The courts want it; science cannot provide it.

For any hypothesis to be scientific, it must be capable of being proved wrong – if only the evidence proving it wrong could be found. This fundamental principle of science means it can never provide absolute certainty.

Much of the vitriol that has been poured on Professor Meadow flows from this incompatibility. He was a world-acclaimed authority, and by all accounts his mere presence in court had a way of winning over juries. What was more, the Court of Appeal noted that he had a certain arrogance. What is arrogance if not a species of self-belief? What do lawyers and the

courts crave? Certainty. Is it any wonder that Professor Meadow was called back time after time after time?

Conclusions from the CJC Forum

The CJC Forum brought together representatives from the judiciary, the LSC, claimant and defendant lawyers, professional bodies, expert witness bodies, the CRFP and a smattering of individual experts.

The *Society of Expert Witnesses* started discussions with a presentation that argued for any decision to change the status quo to be based on a firm evidential footing. Helpfully, the *Society* brought the Better Regulation Task Force's Principles of Better Regulation to the table. These provided a framework within which to measure the appropriateness of any proposed accreditation scheme that might emerge.

However, following discussions of the first morning, it became clear that the vast majority of those present saw no evidence of there being a problem with the current quality of expert evidence. Thus it was generally felt that any overarching system of accreditation was unnecessary.

Many delegates went further and expressed the view that introducing such a scheme might even promote the creation of a 'professional class' of expert witness whilst simultaneously reducing the supply of experts. This was a view supported by the respondents to our survey (see Table 1), who predicted that experts with other responsibilities and means of income would simply refuse to jump through, what they see as, an unnecessary accreditation hoop. This would leave behind just those experts for whom there was some reason (be it financial or otherwise) to jump through the hoop.

The handful of proponents of accreditation present at the meeting, faced with the rejection of accreditation on the basis of there being no evidence of a problem, adopted an intriguing stance. It went something like ... 'Just because there is no evidence of a problem doesn't mean we shouldn't put in place a system of accreditation just in case problems do arise in the future'. We weren't the only ones to find this a particularly bizarre proposal given the clear risks – and costs – associated with imposing accreditation on experts in the civil arena!

The consensus view was that any accreditation of expert witnesses – if deemed desirable – ought to be dealt with by existing professional bodies. It should be noted that those accreditation schemes currently in place (or under consideration) in professional bodies deal more with the *expert* than the *witness* side of the expert witness role.

In a generous display of openness, Alan Kershaw (Chief Executive of the CRFP) put forward his 12 principles of good accreditation (see panel overleaf) in the hope that other

Consideration of the current quality of expert evidence...

... should, itself, be evidence based

professional bodies choosing to implement accreditation would adopt them as a standard against which to measure their particular scheme. We would be very interested to have your views on the merits of these principles.

Action plan

So the immediate pressure for the introduction of a general accreditation scheme in the civil arena appears to have waned somewhat. But, ever vigilant to the dangers of such well meaning yet potentially damaging schemes, we think the time is right for two steps to be taken to put such dangers out of reach.

Take the expert out of the courtroom

Whilst calls for accreditation are easily made, the real answer to how to avoid miscarriages of justice arising from the inappropriate use of expert evidence lies in changes to court procedure. In the United States Supreme Court, *Daubert -v- Merrell Dow Pharmaceuticals Inc* (1992) 509 US 579 laid down a four-part test to be applied to all expert evidence that was scientific in nature (see *Your Witness* 37). As a result of *Daubert*, expert evidence in the US is more likely to come under closer scrutiny, and at an earlier stage, than in UK proceedings. The time has come for our courts to consider a similar move.

Registration, not accreditation

Based on all we have seen and heard, we are turning more towards registration of experts as

expert witnesses rather than the concept of accreditation. The difference between the two lies in the cost and proportionality of each approach.

Accreditation requires every expert to 'jump through the hoop' in the hope of catching the tiny proportion who are 'unsuitable'. This imposes a huge administrative and cost burden up front.

Registration, on the other hand, can be set up so that initial entry to the list is open to all who would apply, with no pre-conditions attached. This, of course, imposes very low upfront costs. Crucially, though, if one of these experts becomes subject to criticism for their expert witness work, then the registration body concerned (which must surely be the professional qualifying body, where such a body exists) can investigate the matter as one of professional competence.

Thus the existing professional bodies, with disciplinary powers already in place, can provide a point of reference to any complainant through a system that is both cheap to set up and proportionate. And the system can act against only those experts who are actually found wanting.

The *UK Register of Expert Witnesses* stands ready to work with other bodies to introduce such registration schemes. How do you think your own professional body would respond to such an idea? Do let us know.

The CRFP's 12 principles of a good accreditation scheme

- 1 The scheme should be as simple as is commensurate with providing a reliable indication of current competence in forensic or expert witness work, wherever possible avoiding duplication with other assessment and appraisal processes in which the practitioner may be participating.
- 2 It should be generous enough to allow entry to anyone shown to be practising safely and competently within the specialty; and rigorous enough to exclude those who are unable to demonstrate current competence.
- 3 It should define clearly the specialties and any sub-specialty groups it covers, so that users have a clear indication of what they can expect of the practitioners who are listed.
- 4 It should be based on a direct assessment of the current competence of individual practitioners.
- 5 It should include scrutiny of actual casework done recently by the practitioner, covering not only reports submitted in connection with judicial proceedings but sufficient supporting material to enable an assessor to scrutinise how the practitioner went about the task.
- 6 Applicants for accreditation should not select the casework to be scrutinised, nor should they choose their own assessor.
- 7 Assessors should themselves be competent and accredited in the specialty they are assessing.
- 8 Scrutiny of casework should be against specific criteria of competence agreed and published by the professional body running the scheme.
- 9 There should be a mechanism for appeal against a refusal to grant registration; and all applicants should receive feedback on what the assessment has shown.
- 10 Accredited practitioners should be required to subscribe to a common Code of Conduct setting out standards of professional conduct and ethics for forensic practitioners and expert witnesses.
- 11 Accreditation should be time-limited with a maximum of five years, with practitioners actively revalidated before a further period is granted.
- 12 The scheme should be subject to external verification by a body independent of the professions concerned.

What do you think of these principles? Are they a helpful contribution or vacuous nonsense? Give us your views by telephone (01638) 561590, by e-mail (editor@jspubs.com) or by post.

Pre-trial testing of expert evidence should be considered

Registration, not accreditation, is the proportionate approach

What to judge?

An *expert* is anyone with knowledge or experience of a particular discipline beyond that to be expected of a layman. An *expert witness* is an expert who is asked to form an opinion and bear witness to that opinion. By this definition, there are two distinct competencies that may be susceptible to accreditation: 1) an expert witness's expertise and 2) his or her ability to form and bear witness to an opinion.

Do you think competence with respect to expertise:	Yes	No	n/a
is determined by professional qualifications and relevant experience alone?	50.2%	46.5%	3.3%
also requires current membership of a self-regulating professional body?	65.3%	29.1%	5.6%
necessitates accreditation by the CRFP?	5.2%	87.0%	7.8%
necessitates accreditation by one or more of the three expert witness bodies?	20.4%	71.8%	7.8%
necessitates accreditation by some other body?	5.3%	86.9%	7.8%

Do you think competence in the skills of a witness should be determined by:	Yes	No	n/a
the individual expert?	34.6%	55.2%	10.2%
those who instruct the expert?	73.6%	20.9%	5.5%
demonstration of CPD relating to such skills (e.g. training, conferences, etc.)?	50.0%	41.1%	8.9%
checks carried out by a self-regulating professional body?	37.0%	52.8%	10.2%
accreditation by the CRFP?	7.3%	83.7%	9.0%
accreditation by one or more of the three expert witness bodies?	30.2%	60.8%	9.0%
accreditation by some other body?	4.9%	86.1%	9.0%

Need for accreditation in the civil courts

There has been much press coverage over the recent baby-death appeal cases. Such reporting might make some think that the quality of expert evidence is uniformly poor. It certainly seems to have had this effect at the LSC (which is proposing that all experts it pays for should be accredited by the CRFP). However, these cases are from the criminal arena, and the Court of Appeal found that the Court's handling of conflicting scientific evidence was largely to blame for the problems.

Based on your experience of the <i>civil arena</i> over the past 3 years, do you agree that:	Agree		Neutral		Disagree	
	LSC	CJC	LSC	CJC	LSC	CJC
there is no evidence of a general problem with the quality of expert evidence in the civil arena?	79.6%	65.2%	8.8%	21.3%	11.6%	13.5%
the effect of the CPR has been to solve many of the past problems that solicitor-based case management caused with expert evidence in civil cases?	75.6%	56.6%	14.9%	31.5%	9.5%	11.9%
the problems that have arisen in the criminal courts were the result of the way the courts handled conflicting scientific evidence?	80.8%	62.7%	15.0%	30.3%	4.2%	7.0%

LSC = LSC Consultation survey (n=190) CJC = CJC survey (n=654)

The LSC survey (see *Your Witness* 39) provided lots of background to the questions we posed. The CJC survey put the questions in isolation. We feel the larger neutral camp for the CJC survey reflects this, and that most of the neutral experts would tend to agree with the proposition once they had an appreciation of the issues.

Effect of making accreditation mandatory

In the Final Report of his Inquiry into the civil justice system Lord Woolf wrote:

'I do not recommend an exclusive system of accreditation. Such a system could exclude potentially competent experts who choose for good reason not to take it up. It might, in fact, narrow rather than widen the pool of available experts. It could foster an uncompetitive monopoly and might encourage the development of 'professional experts' who were out of touch with current practice in their field of expertise.'

How, as an expert, do you rate these arguments now?

For example, if accreditation of expertise was to become mandatory in the civil courts, whether through official dictat or just because it became common practice, would you:

	Yes		No		n/a	
welcome it as a means of raising standards?	30.9%	-18.6	63.1%	+22.0	6.0%	-3.4
be concerned by the potential narrowing of the pool of experts?	76.3%	+3.8	20.2%	-2.8	3.5%	-1.0
regard it as anti-competitive?	57.5%	+7.3	33.6%	-8.4	8.9%	+1.1
see it as a move towards creating 'professional experts'?	82.4%	+31.6	13.6%	-29.0	4.0%	-2.6
stop practising as an expert witness yourself?	18.2%	+7.6	71.1%	-10.8	10.7%	+3.2
Do you think that the conduct of civil litigation would benefit from the extension to it of the registration system currently offered by the CRFP for criminal litigation?	15.7%	-17.2	65.9%	+14.8	18.4%	+2.4

Figures in red show the change in per cent since we last posed the question in June 2001.

It is important to separate the expert from the witness

Data suggest the CRFP is losing the argument

Table 1 The results of the CJC survey conducted between 15 and 28 February 2005. n = 654

Declining quality of instructions

There's been a dramatic decline in the quality of instructions to experts in recent years. Tom Jones, of Thompsons Solicitors, London, has some theories about the reasons, and offers suggestions to both experts and lawyers on how they can make a difference.

A little background

Thompsons acts only for claimants in personal injury (PI) proceedings or for employees in employment disputes. We refuse to act for defendants, and have maintained this as a point of principle since 1921.

The vast majority of our instructions come from the trade union movement. Thompsons also takes some cases from other law firms, particularly high street law firms which dabble in PI. And we take cases from law firms who have had legal expenses insurance terms forced on them by the big insurers. We are now the UK's largest trade union personal injury and employment law firm. It is in that context, and from that background, that I tread (with both feet) into the expert arena.

Declining quality of instructions

Medical doctors are starting to complain of a decline in the quality of instructions they are receiving. And it's our experience that the doctors very often have good reason to be complaining! But why this reduction in quality? The reason appears to be a strong pressure to cut costs, leading to delegation of work from instructing solicitor to agency, and, within law firms, from solicitor to unqualified and poorly supervised staff.

Rise of the MRO

This cost reduction driver came with the introduction of the Civil Procedure Rules (CPR) and the new 'conditional fee agreement' funding regime. The notion was introduced that costs had to be *reasonable, necessary and proportionate*, making funding of disbursements an even bigger issue for solicitors. Whilst this has a logic, and ostensibly stopped silly costs claims, it does have a downside: the growth of the medical reporting agencies (MRO).

Not all MROs have the capacity, or indeed the will, to provide the benefits their introduction into the litigation process can promise. Too many are more interested in getting their cut (to be ungenerous towards them) or are unaware of what is required (to be more generous, but in which case they shouldn't be in the business).

It isn't good enough for a lawyer to simply ask an MRO to commission an expert report without explaining exactly what is required. Equally, it is unacceptable for an MRO to accept such an approach without checking with the solicitor what is actually required. All too often, each leaves the crafting of a proper set of instructions to the other. And the ultimate victim in this abrogation of duty is the client, who receives an

expert report that is at best delayed and at worst irrelevant. But the expert also suffers along the way.

How it ought to work

Whether or not an MRO is used, a solicitor should be capable of:

- delivering clear instructions to a doctor in the relevant discipline and at a suitable level of seniority
- ensuring that the doctor is instructed as to the obligations contained within the CPR
- checking that the report, as presented, is factually correct, sets out details of the accident in question, the injuries suffered, the treatment given, the findings on examination and a prognosis, together with comments, as appropriate, on the medical records, issues of attributability, etc.

If the solicitor is not capable of the above, then he or she should not be in the job.

Thompsons holds lists of experts we wouldn't use again, and experts should compile their own lists of solicitors they would not accept work from in the future.

In our experience, an MRO, properly instructed, can add value, provided the solicitor complies with the professional duties set out above.

What experts should do

Expert witnesses should always ensure that they are properly instructed. If they don't, they only have themselves to blame if relationships break down.

- Think of your reputation before you accept instructions from a solicitor who appears to have little or no experience of PI work.
- Do not accept work from a solicitor you suspect is attempting to handle PI claims on a shoestring.
- Don't be tempted to 'make the best of it'.
- If you receive instructions, from whatever source, which lack clarity, send them back and ask for proper instructions. You cannot comply with your obligations under the CPR if you don't.

As the CPR framework continues to settle down, the better instructing solicitors and MROs will survive; others will fall by the wayside. At Thompsons, for the sake of the claimant, we shall be the first to cheer their demise.

Tom Jones, Thompsons

So there you have it, straight from the horse's mouth, so to speak. The legal profession recognises that there are problems with the quality of instruction of expert witnesses. And the cause? The CPR. According to this lawyer, not all MROs are charlatans. And they do offer advantages for law firms, the most important of which is their credit arrangements. Ed.

Cost cutting leads to decline in quality of instruction

Blacklist the 'bad' lawyers and don't work for them again!

Court reports

Judicial discretion in appointment of experts

The judge's powers at a case management conference are wide and varied, but how far should the judge go in the exercise of discretion?

The decision as to whether directions should be given for expert evidence is, of course, one of the principal considerations at a case management conference. However, if the judge refuses to allow such evidence, what grounds are there for challenging the decision?

The extent of judicial discretion was considered recently by Lord Justice Thorpe in *Re B (Children)* (2005). The appellant was the father of three children. He sought to adduce expert evidence in relation to the mother's alcoholism. The mother had a history of alcohol abuse but had obtained a residence order in her favour following favourable reports as to her rehabilitation. There was a trial pending at which the court was due to consider whether the mother remained fit to care for the children and whether the residence order should be varied or removed.

The father claimed that the mother had not recovered from her addiction and made an application to adduce expert evidence to support this allegation. To counter suggestions that the appointment of an expert would be an unfair burden on the public purse, the father pointed out that the paramount consideration in cases involving minors was the welfare of the children. Nevertheless, the trial judge refused the application on the grounds that there was already, in his view, sufficient evidence before the court in relation to the mother's rehabilitation, and that the expense of instructing an expert could not be justified.

In considering the appeal, Thorpe LJ admitted that the father faced a difficult task in attempting to persuade the court that the judge had wrongly exercised his discretion. He pointed out that even if there had been no other evidence regarding the mother's fitness, the appellant would still have faced considerable hurdles. In refusing the application, the judge had only been setting the bounds of the trial he was then due to conduct. The Court of Appeal stated that such case management decisions attracted a particular latitude in the exercise of a judge's discretion, and it was only in rare cases that the court would interfere.

However unpalatable it might be to some, there is a stark financial reality to be considered. The trial judge, when exercising his discretion, was obliged to have regard for the anxieties of the father and, of course, the welfare of the children. The judge, said Thorpe LJ, should also give consideration to the *'strictures communicated to judges by the President of the Family Division with regard to the use of experts in family proceedings... Experts were commissioned too regularly, and the court should be more hesitant in the future about so doing, particularly having regard to the cost to the public purse'*.

The Court of Appeal accepted that there was already sufficient evidence adduced to support the contention that the mother had recovered and the children were safe in her care. In all the circumstances, the court would not interfere with the exercise of the trial judge's discretion.

So the message is clear: the exercise of the trial judge's discretion in relation to the appointment of experts will be extremely difficult to challenge, particularly in Family Division cases.

When a party decides not to rely on the evidence of an expert, does the same party need permission of the court to instruct and rely on the evidence of a second?

This very question was considered by the Court of Appeal in *Nicos Varnavas Hajigeorgiou -v- Vassos Michael Vasiliou* (2005) EWCA Civ 236. In the case (concerning assessment of damages), the trial judge had given a direction at a case management conference granting both parties 'permission, if so advised, to instruct one expert each in the specialism of restaurant valuation and profitability'.

Mr Hajigeorgiou, in anticipation of such an order, had already identified a suitable expert. Following the making of the order, the expert was instructed to undertake an inspection and prepare a report on Mr Vasiliou's restaurant premises. However, Mr Hajigeorgiou then decided that he did not wish to rely on the report prepared and so requested that a second expert be allowed access to the restaurant to prepare another. The judge decided that permission was needed to call the second expert. He granted such permission but only upon the condition that the first expert's report was disclosed to Mr Vasiliou.

Mr Hajigeorgiou objected on the grounds that, on a proper construction of the order, permission had been given to both parties to instruct a relevant expert. The order, he argued, did not merely give permission to instruct a particular expert. In reply, Mr Vasiliou argued that it was plainly intended by the order that Mr Hajigeorgiou be given permission to rely only on the evidence of his first expert and, in any event, the order did not envisage a succession of experts. It followed, said Mr Vasiliou, that once the order had been acted upon (by giving instructions to the first expert to inspect the property), a further permission would be required before a second or substitute expert could be instructed.

The Court of Appeal had two matters to consider:

1. What did the judge's order mean when it gave 'permission' to instruct an expert?
2. If a second expert is instructed, can the other side insist that the party discloses the first expert's report?

The Court of Appeal restated the relevant rule in CPR 35.4 (see Factsheet 35). There was a time when the objective of the leave granted was to

It will be hard to overturn a judge who says 'no' to the use of experts

Naming an expert on a court order has important consequences

Factsheet Update

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identify only the nature of the expertise for which permission was being given. However, the introduction of Rule 35.4(2)(b) recognises that, in many cases, constraints of time dictate that an expert will already have been identified in anticipation of directions (as was so in the present case). However, in this case, the order identified the expert only by field of expertise and not by name. The terms of the order, said the Court of Appeal, did not in themselves require permission to rely on the second expert's evidence. In any event, the court did not have the power to give permission for the 'instruction' of experts. CPR 35.4 did not refer to the 'instruction' of experts. Therefore the words in the order 'permission, if so advised, to instruct one expert' should be construed as meaning 'permission, if so advised, to call and put in evidence a report from one expert'. Since no specific expert had been named in the order, Mr Hajigeorgiou did not need the permission of the court to rely on the evidence of the second expert. The Court of Appeal did point out, however, that if the expert had been named in the order, the trial judge would have been correct in holding that permission would be needed to instruct a substitute.

There was, however, a sting in the tail. Referring to the decision of Simon Brown LJ in *Beck -v- Ministry of Defence* (2003) *The Times*, July 21, 2003, the court reaffirmed that 'it would only be in very rare cases that a fresh expert could be used without the first expert's report being available for disclosure to the other side'. To do otherwise would, of course, leave the way open for parties to indulge in shopping for experts. This was the view taken by the court in *Jackson -v- Marley Davenport Ltd*, which distinguished between reports prepared to assist solicitors by expert advisors and reports prepared pursuant to CPR 35.4. Whilst the former might be privileged, the latter could lose their privileged status if discarded in preference for a more favourable report. Consequently, Mr Vasiliou was entitled to see the report of the first expert.

In cases where the court gives an 'open' order (i.e. one that does not specifically name the expert), the parties can instruct whomsoever they choose, provided they are sufficiently expert in the specified field. They should do so with care. Whilst no permission is needed to instruct a second or even a third expert, the first reports will be vulnerable to disclosure.

Should the trial judge read and consider any literature referred to in an expert's report, and what happens if he does not?

This was the question for the Court of Appeal in *Carol Breeze (as personal representative of Leonard Breeze (deceased)) -v- Saeed Ahmad* (2005) EWCA Civ 223.

The case involved a claim by the widow of Mr Breeze, who had died of heart failure shortly

after he had visited his GP complaining of chest pains. The trial judge had found in favour of the claimant and had held that the GP had made a wrong diagnosis of musculoskeletal pain and had been in breach of his duty of care. Specifically on the issue of causation (whether referral to hospital and consequent surgical or other treatment would have saved the life of Mr Breeze), however, there was a difference of expert opinion.

Expert cardiologists had been instructed by both parties. The claimant's expert put forward the opinion that medical intervention would have prevented the patient's death. However, the defendant's expert thought that such treatment would probably not have saved the life of the deceased, although the risk of death might have been reduced by substantially less than 50%. To support his opinion, the defendant's expert witness referred to two pieces of medical literature. It is unfortunate that the existence of this literature only emerged during the course of trial.

It is here that the trial judge erred. Instead of calling for and reading the relevant parts of the cited literature, the judge allowed the defendant's expert to paraphrase its content in his evidence. The judge was effectively taking the evidence on trust, without subjecting it to any rigorous examination or, indeed, any examination at all. Moreover, the judge was clearly influenced by the fact that, whilst the defendant had cited such literature, the claimant had not produced any medical literature in support of his evidence. The judge found in favour of the defendant on the issue of causation. The claimant appealed.

Allowing the appeal, the Court of Appeal took the view that the judge's failure to call for and read the literature amounted to a serious procedural or other irregularity, such as to warrant an appeal under CPR 52.11(3)(b). The trial judge could have had no certainty that the literature referred to contained any evidence to support the defendant's case, or that the defendant's summary amounted to a fair and accurate assessment. The disclosure of medical or other literature is a matter that should be addressed pre-trial. Indeed, in clinical negligence cases, the standard form directions make specific provision for this and state that any literature should be disclosed at least 1 month before trial. The Court of Appeal has now made it clear, however, that the failure to disclose and produce supporting literature in advance of trial is likely to render such literature inadmissible. Furthermore, it will not be sufficient to merely refer to the content of that literature or to summarise it. Where the outcome of proceedings is likely to be influenced by such literature, it will be necessary for the text itself to be made available for scrutiny and for a proper evaluation and assessment of its weight.

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