A matter of opinion

Is expert opinion produced outside the court process admissible? Chris Pamplin reports

Is expert opinion contained in third party documents (produced by entirely independent persons, extraneous to the proceedings and the parties) admissible as evidence in civil cases where the maker of the document is not to be called, indeed, may not even be clearly identified?

Air crash investigations

In *Rogers v Hoyle* [2013] EWHC 1409 (QB); [2013] All ER (D) 21 (Sep), an application was made to exclude from evidence a report produced by the Air Accident Investigation Branch of the Department for Transport (AAIB). The case involved a claim by executors of a Mr Rogers, who had been killed when a Tiger Moth aircraft in which he was a passenger, crashed in Dorset. The claimant alleged that the accident was caused by the negligence of the defendant, Mr Hoyle, who was the pilot of the aircraft.

The purpose of air accident investigations is the prevention of accidents and not to apportion blame or liability. The crash had been investigated by the AAIB in the course of carrying out its statutory and regulatory duties.

At the date the claim was issued, the report had not been concluded and so no reference was made to it. However, by the time of the reply to the defence, the report was available and the claimant placed reliance on matters within the report and made extensive reference to it.

In response to the claimant's statement of intention to rely on the report, the defendant sought a declaration that the report was inadmissible.

Hitherto, the use of AAIB air accident reports had been fairly commonplace in proceedings of this sort. It appears that there are no reported cases involving challenges to the admissibility of such evidence, and this was the first time the question had come before the High Court. In this case, the defendant submitted that the report consisted of inadmissible opinion evidence and that this extended to all "findings of fact" contained in the report, since findings of fact are statements of opinion. He also cited the rule in *Hollington v Hewthorn* [1943] KB 587, [1943] 2 All ER 35 as authority for the assertion that the findings of another court, coroner, wreck inquiry, disciplinary tribunal, or similar body, had all previously been ruled inadmissible by the courts.

Dealing with the application, Leggatt J considered the relevance and content of the report, the extent to which the report contained statements of fact and statements of opinion, and the basis on which those statements had been made. As well as factual evidence, the report contained evidence of the opinions of experts on technical matters, which included aeronautical engineering, wreckage analysis, meteorology, pathology, analysis of flight data, and the piloting of aircraft. The opinions of such experts were incorporated in the report. In some parts the experts were identified (although not by name), and in others they were not. However, he found that the report contained: "A wealth of relevant and potentially important evidence which bears directly or indirectly on the issues in this action, including the central issue of whether Mr Rogers' death was caused by negligence on the part of Mr Hoyle."

He recognised that some of the evidence could be obtained from direct and alternative sources, and some of it could not.

> *"A judge hearing an aviation case was unlikely to have any relevant knowledge of piloting or aeronautical engineering"*

Unnamed expertise still valuable

Of more concern was the fact that none of the statements of fact or opinion contained in the report were attributed to any named individual, and that the report was based on an exercise in evaluating and discarding evidence that was not disclosed. Neither did the report make a disclosure of any unused material. In the judge's view, however, these were all matters that went to the question of what weight should be given to the contents of the report, not to admissibility.

On any view, said the judge, the factual evidence in the report was admissible as the evidence was relevant; the fact that it was hearsay was not a ground for its exclusion. The opinion evidence was also, in principle, admissible in so far as the opinions stated were those of qualified experts on subjects involving special expertise.

Turning to the defendant's objections to the report's conclusions about the causes of the accident, the judge held that it was correct that if these findings involved inferences drawn from facts, then they fell into the category of opinion evidence.

The opinions expressed, however, were not those of a lay person. The AAIB was a body with very considerable expertise in determining the circumstances and causes of such accidents, and that gave the findings in the report a special value as the opinions of experts who were, moreover, entirely independent of the parties to the litigation.

Rejecting the defendant's argument in relation to the rule in *Hollington*, the judge agreed with the claimant's assertion that the rule was formulated in relation to judicial findings and could not properly be applied to the AAIB report. What characterises a judicial finding for these purposes is that it is an opinion of a court or other tribunal whose responsibility is to reach conclusions based solely on the evidence before it. There was a material distinction to be made between this and a finding made, as in this case, by an air accident investigator. A judge hearing an aviation case was unlikely to have any relevant knowledge of piloting or aeronautical engineering. There was, in this regard, a significant difference between judicial findings, which must be based on the evidence adduced by the parties, and the opinions of an expert who is entitled, and indeed expected, to reach conclusions by applying previously acquired knowledge.

Having concluded that the report was, in principle, admissible, the judge went on to deal with the status of the evidence. He did not agree with the claimant's contention that the court had no discretion to exclude it.

He agreed that the report did not fall within Civil Procedure Rule (CPR) Pt 35, which gave the court the power and duty to restrict expert evidence that would otherwise be admissible to that which was reasonably required to resolve the proceedings. The term "expert" in Pt 35 is restricted by r 35.2 to "an expert who has been instructed to give or prepare evidence for the purpose of court proceedings". Thus, although the AAIB report included expert evidence in a general sense, it could not be expert evidence regulated by Pt 35, because it had not been prepared for this purpose. It followed that the claimant did not require the court's permission under r 35.4 to adduce it. The judge pointed out, however, that the court had a wider discretion under CPR Pt 32, which gave the court express powers to control the evidence it will receive. In particular, under 32.1: "1) the court may control the evidence by giving directions as to—a) the issues on which it requires evidence; b) the nature of the evidence which it requires to decide those issues; and c) the way in which the evidence is to be placed before the court. 2) The court may use its power under this rule to exclude evidence that would otherwise be admissible."

The objections raised by the defendant, which included the facts that: (i) the individual experts in the report were not named; (ii) there was no statement of truth; and (iii) there was a failure to disclose unused material, were all considerations the trial judge could take into account when assessing the weight that should be given to statements contained therein. However, in the judge's view, they came nowhere near to providing a sufficient reason for excluding the report from evidence.

> *"It is possible to adduce third-party expert evidence in a form not governed by CPR Pt 35 & in circumstances where the author of the evidence will not be called & indeed, may not even be named or identified clearly"*

Published research

In *Interflora Inc v Marks and Spencer plc* [2013] EWHC 936 (Ch); [2013] 2 All ER 663, the court came to a similar conclusion in relation to an application to exclude from evidence academic articles of a broadly scientific nature. These included, for example, articles by an eminent academic at the College of Information Sciences and Technology at Pennsylvania State University. The primary objection raised by the defendant was that the statements contained in the documents constituted expert evidence. Accordingly, such statements were only admissible, so it was argued, in accordance with CPR Pt 35. The defendant argued, in the alternative, that, even if the articles were technically admissible, the court should exercise its discretion to exclude them.

Considering the application, Arnold J came to conclusions broadly the same as those made by the judge in *Hoyle*. He, too, made similar findings in relation to the application of Pt 35 which, he said, controlled the giving of evidence by experts as defined in r 35.2. It did not control the admission of other types of evidence that may be described as expert evidence.

If he was to exclude the academic articles on the ground that their makers were not experts as defined by r 35.2 and were not to be called as expert witnesses, this would have startling consequences. He took as an example the common situation where an expert witness produces a report under Pt 35. If exhibits to that report rely upon articles published in the scientific literature by others, but no expert report is produced from those other individuals, the consequence of the defendant's argument would be that the expert's report itself would be admissible (because it was properly adduced before the court pursuant to the machinery in Pt 35) but the material exhibited to it would not. In Arnold J's view, that could not be right and he declined to exclude the evidence.

The judge did have two concerns, however. First, is it fair that a party could be permitted to rely upon a selection of the academic literature in circumstances where he did not know what a wider search of the academic literature might throw up and whether there was academic literature that could be produced in rebuttal? Second, he thought that the court "should be astute to an attempt by parties...to turn the court itself into its own expert". The judge said he felt some "discomfort at the proposition that scientific literature can be put before courts without the benefit of an expert's report to put the literature into context and without the opportunity for an expert to be cross-examined upon the contents of such literature".

Conclusion

Both cases show that it is possible to adduce third-party expert evidence in a form not governed by CPR Pt 35 and in circumstances where the author of the evidence will not be called, and, indeed, may not even be named or identified clearly. Both judgments highlight the inherent problems posed by this approach, however, and make it clear that the court has wide discretion to evaluate the merits of such evidence on a case-by-case basis and to use its powers under Pt 32 to control or exclude it, as it sees fit. NLJ

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