

Who should bear the cost of experts' mistakes?

Is a Crown expert witness part of the team or independent?

Chris Pamplin looks at the costs implications



IN BRIEF

▶ The CPS does not bear costs liability for the errors of its experts, Sharp LJ held in *R v Aylesbury Crown Court*.

When considering orders for costs against one or other of the parties, it is reasonable for the court to take into consideration the conduct of the parties and any failures or omissions made by them. It might seem reasonable that this extends to the activities of all persons involved on the party's behalf, including expert witnesses. In this respect, then, one might think that expert witnesses are indivisible from the 'legal team'.

This was the view taken by the Crown Court sitting at Aylesbury, whose cost order against the Crown Prosecution Service (CPS) was the subject of an application by the Director of Public Prosecutions (DPP) for judicial review. The DPP's application was made following an order that the CPS pay the defendant's costs following the collapse of a trial where the prosecution's expert witness was found to have made a fundamental error in a case involving alleged possession of indecent images of children. One month after the defendant's not guilty plea, the CPS offered no evidence and the court acknowledged the man was of good character.

The defence team sought costs from the CPS on the basis those costs were attributable to an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings (Prosecution of Offences Act 1985 (POA 1985), s 19; Costs in Criminal Cases (General) Regulations 1986 (SI 1986/1335) (the Regulations)).

The Crown Court judge attributed no blame to the CPS but held that the Crown is indivisible in terms of the parties it relies upon. Consequently, he allowed the application for the defence costs, stating 'equality of arms is a very important point', although he said he did so with a heavy heart.

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Judicial review

In *R v Aylesbury Crown Court* [2017] EWHC 2987 (Admin), the DPP contended that the Crown Court judge made an error and acted without jurisdiction since the expert witness was an independent third party. Furthermore, the judge had not identified any unnecessary or improper act or omission sufficient to make the order under s 19. The error was—to put it at its highest—a negligent mistake, which fell far short of impropriety.

The defence countered that, in the absence of binding authority on the point, the judge was entitled to regard the expert as 'part of the Crown' for the purposes of the costs

application. In the alternative, an improper act or omission was committed by the CPS itself: the finding of only one accessible image among the 123 recovered from the computer was anomalous, and this anomaly should have provoked an inquiry of its expert by the CPS.

The decision

Lady Justice Sharp acknowledged that the Crown Court only has jurisdiction to order costs if those costs have been incurred as a result of the improper or unnecessary act or omission by or on behalf of that party. She identified the material words as being 'on behalf of'. She further recognised that it was common to refer to an expert instructed by the CPS as giving evidence 'on their behalf'. However, she was satisfied that the relationship between the CPS and the expert was a contractual one and not one of agency. The CPS was, therefore, no more responsible for the acts or omissions of an expert than it would be responsible for the actions or statements of a witness of fact.

Experts, she said, are not to be regarded as part of the Crown. She contrasted and distinguished the role of the police and the role of experts.

The CPS and the police were two arms of the Crown and could, therefore, be regarded as indivisible. This is not true of expert witnesses and it would be antithetical to the duty of an expert if that were to be the case. She was in no doubt that the wording of the Criminal Procedure Rules firmly established that expert witnesses are independent third parties, whose principal duty is owed to the Court, not to those instructing them.

She then had to deal with the suggestion that the CPS should have recognised the possibility of an error and questioned the expert more closely; in not doing so, it had been guilty of misconduct, thus justifying the cost order. Sharp LJ held that the error in this case was not one that should have been obvious to the CPS.

In some respects it is not difficult to see why the Crown Court judge made the order he did. Although he had power under s 19B of POA 1985 to make a third-party costs order against the expert, such an order would require serious misconduct, the threshold of which is very high. It is, perhaps, unsurprising that a judge should, therefore, seek some alternative mechanism to enable an innocent party's costs to be met by public funds. The judicial review has, however, made clear that this is not a proper exercise of the judge's powers under s 19. The CPS does not generally bear costs responsibility for the errors or failings of its experts. **NLJ**

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