Your Witness

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Statement of Truth in civil cases

A recent update to the Civil Procedure Rules (CPR) has made a change to the Practice Direction to Part 22. It requires all documents that need to be verified by a statement of truth to contain a changed wording **to include a warning that proceedings for contempt of court may be brought against those who give a statement of truth without an honest belief in its truth**. The question arises, then, **does this change the statement of truth that expert witness should use in their reports?**

Rule 22.1(1) states that the documents that must be verified by a statement of truth are:

a) a statement of case
b) a response complying with an order under rule 18.1 to provide further information
c) a witness statement
d) an acknowledgement of service in a claim begun by way of the Part 8 procedure
e) a certificate stating the reasons for bringing a possession claim or a landlord and tenant claim in the High Court in accordance with rules 55.3(2) and 56.2(2)
f) a certificate of service, and
g) any other document where a rule or practice direction so requires.

However, expert reports are governed by Part 35. The requirements for written reports are contained in CPR 35.10 and CPR PD35 paras 3.1, 3.2 and 3.3, and the guidance at paragraphs 48–60. The guidance stipulates that the report must be verified by a statement of truth in the following form (see CPR PD35 para 3.3):

> *'I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.'*

The guidance states that this wording cannot be modified. Consequently, we do not believe that the reference to 'witness statement' or 'other document' in PD22 can be intended to change the requirements of PD35 unless it specifically says so. We lodged a question on the matter with the Civil Procedure Rules Committee in May. However, given the current pandemic we anticipate it taking a while to receive a response. With no reply to date, we were not wrong!

Types of bias

Starting on page 6 we look at what expert witnesses can do to mitigate against the human tendency to colour our decisions based on unconscious bias. But what types of cognitive effect come under the general banner of unconscious bias?

Context bias: Surrounding detail matters. For example, if two grey squares are shown side by side, one with a light background and one with a dark background, the brain sees the square with the lighter background as being 'brighter'. Focusing on a male face will make a subsequently viewed androgynous face appear more definitely female.

Cueing bias: A person exposed to a cueing stimulus is more likely to answer a non-specific question in a particular way. For example, if a subject is given a word relating to, say, mammals and is then asked to fill the gaps in random letters to make a new word, their answer is more likely to relate to mammals than not.

Confirmation bias: Individuals will have a tendency to search for and interpret information that confirms their prior beliefs. In doing so, they may fail to weigh information that does not support their prior belief and tend to embrace that which does, no matter how tenuous. It can sometimes come into play when a second expert verifies an original expert's conclusions, perhaps aware of the initial opinion, or knowing the first expert is more experienced. The verification can thus be biased by the initial examination.

Stereotype bias: The bias of human language includes the description of positive or negative behaviour of in-group and out-of-group members. So strangers tend to use abstract descriptive words, describing violence and brutality, whereas those to whom the fighters are known are likely to use specific, more moderate language to describe the event.

Anchoring bias: Such bias illustrates a tendency to stick to conclusions drawn from the first piece of knowledge to be received and a failure to attach sufficient weight to later knowledge that may contradict it. It shares similarities with the 'status-quo bias', where a subject is reluctant to change views or previously held beliefs.

Added to these, we must also include such natural human tendencies as the desire to please others, conformity, self-fulfilling prophecies and plain old wishful thinking!

It should be stressed that we all have a tendency to these forms of unconscious bias. It is simply the way our brains work. And it is precisely this ability – to interpret information and draw conclusions from our previous experience, preconceptions and daily stimuli – that marks us out from mere machines and computers. However, expert witnesses must try to mitigate their effects on their opinions.

Chris Pamplin

Inside

Issue 101

Experts and the fiduciary duty

Balancing the overriding duty to the court with duties to the instructor

Expert witnesses, like everyone else, are subject to the common law of contract and tort and will owe a duty of care to those who instruct them. However, the extent of that duty is qualified as set out, for example, by para 4.1 of *The Protocol for the Instruction of Experts to give Evidence in Civil Claims*:

> '*Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code of ethics. However, when they are instructed to give or prepare evidence for the purpose of civil proceedings in England and Wales they have an overriding duty to help the court on matters within their expertise (Civil Procedure Rule 35.3). This duty overrides any obligation to the person instructing or paying them. Experts must not serve the exclusive interest of those who retain them.*'

But is the expert's paramount duty and their independent role inconsistent with a fiduciary duty of loyalty to the instructor? (*A fiduciary duty exists where a person is required to put another person's interests before their own. It arises from a relationship of trust and confidence.*)

A conflict of interest?

This was one of the issues to be resolved by the court in *A -v- B*[1]. The claimant in the case was the developer of a petrochemical plant, and B was a group of companies ('Group B').

In 2012, the developer engaged a third party in connection with its development. And in 2013, the developer entered into two contracts with a contractor for the construction of facilities connected with the development. Disputes arose between the contractor and the developer surrounding alleged delays. The contractor commenced International Chamber of Commerce (ICC) arbitration proceedings against the developer in England (Arb 1).

The developer approached one of the companies in Group B with a view to engaging it to provide expert services in connection with Arb 1, and it signed a confidentiality agreement. Having fallen out with the contractor, the developer then fell out with the third party, which commenced its own ICC arbitration against the developer (Arb 2).

In October 2019, the third party asked Group B to provide expert services in connection with Arb 2. The developer believed that, given the existing agreement it had with Group B, if the third party instructed Group B it would create a conflict of interest. Group B denied that there was a conflict of interest. The developer obtained an interim injunction to prevent Group B from acting in Arb 2 and sought to make the interim injunction permanent, giving rise to *A -v- B*.

The application was heard by Mrs Justice O'Farrell. The defendant argued that expert witnesses did not owe a fiduciary duty of loyalty to their clients because it would be inconsistent with their independent role. The judge acknowledged that, in principle, an expert could be compelled to give expert evidence in arbitration or legal proceedings by a party, even in circumstances where that expert had provided an opinion to another party (c.f. *Harmony Shipping*[2]). Furthermore, following the ruling in *Jones -v- Kaney*[3], expert witnesses had a paramount duty to the court or tribunal, which might require the expert witness to act in a way that did not advance the client's case. However, as a matter of general principle, the circumstances in which an expert witness is retained to provide litigation or arbitration support services could give rise to a relationship of trust and confidence with the instructing party.

In effect, then, in common with counsel and solicitors, **independent expert witnesses owe duties to the court that might not align with the interests of those who instruct them**. However, the paramount duty owed to the court is not inconsistent with an additional duty of loyalty to the instructor.

The judge quoted the words of Lord Phillips in *Kaney* when he said that:

> '*... the terms of the expert's appointment will encompass that paramount duty to the court. Therefore, there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court.*'

The first defendant in this case had been engaged to provide expert services for the claimant in connection with Arb A. It had been instructed to provide an independent expert report and to comply with relevant duties. However, it was also engaged to provide extensive advice and support for the claimant throughout the arbitration proceedings. In those circumstances, a clear relationship of trust and confidence arose, such as to give rise to a fiduciary duty of loyalty.

Limits of the fiduciary duty of loyalty

Having established that a fiduciary duty of loyalty arose, it was not limited to the individual concerned, but also to the firm and possibly to the wider group (see *Marks & Spencer plc*[4]). That was the case here: the parent company had a common financial interest in the defendants, which were managed and marketed as one global firm and had a common approach to conflict management and resolution. Accordingly, O'Farrell J was satisfied that any duty of loyalty was not limited to the first defendant but was owed by the whole of the defendant group.

The judge stressed that the fiduciary obligation of loyalty was not satisfied simply by putting in place measures to preserve confidentiality and privilege. **A fiduciary, said the judge, must not place himself in a position where his duty and his interest may conflict**. In this case, the overlap between the two arbitrations had plainly created a conflict of interest for the defendants, and the judge ruled accordingly that the claimant should be entitled to a continuation of the interim injunction pending a trial of the matter.

References

[1] *A -v- B* [2020] *EWHC* 809 (*TCC*).

[2] *Harmony Shipping Co SA -v- Saudi Europe Line Ltd* [1979] 1 *WLR* 1380.

[3] *Jones -v- Kaney* [2011] *UKSC* 13.

[4] *Marks & Spencer plc -v- Freshfields Bruckhaus Deringer* [2004] *EWCA Civ* 741.

Expert role limited in sentencing

In criminal proceedings, it will be for the judge to sentence an offender in accordance with sentencing guidelines. Sometimes this can involve the judge in making a subjective assessment that comes very close to a medical judgment. To what extent do sentencing guidelines allow this without expert assistance?

This question arose in early 2020 when a number of cases were referred to the Court of Appeal. *R -v- Chall (Joginder)*[1] and four other cases all concerned appeals against sentence. The five unconnected cases were listed together because they raised a common issue as to the approach a sentencing judge should take when assessing whether a victim of crime has suffered severe psychological harm.

Should expert evidence assist sentencing?

All the appellants had been convicted of sexual or violent offences. A number of the definitive guidelines published by the Sentencing Council directed sentencers to consider whether victims had suffered severe psychological harm. The starting point for any consideration of these questions is section 143(1) of the Criminal Justice Act 2003, which emphasises that the combination of culpability and harm underpins the structure of the sentencing guidelines.

The five cases before the Court of Appeal raised questions regarding whether the sentencing court had to obtain expert evidence before making a finding of severe psychological harm. If not, on what evidence could it act?

Counsel for the appellants submitted that, in the absence of expert evidence, a court should not place an offence into a higher category on the basis of a finding of severe psychological harm. She submitted that consideration should be given to obtaining a clinical assessment of the psychological state of a victim whenever there is scope for argument as to the degree of psychological harm. She further submitted that the court should be able to identify exactly what harm has been caused, e.g. a diagnosis of post-traumatic stress disorder, and not rely on the mere assertion of the victim. It was also argued that, in the absence of expert evidence, a judge has no benchmark against which to assess whether psychological harm is severe.

Counsel for the Crown argued that there was no such requirement and that it was entirely appropriate for judges to use their forensic experience to make the necessary judgment.

A judicial, not a medical, assessment

Considering the submissions, Holroyde LJ noted that when a sentencing guideline directs a sentencer to assess whether the victim has suffered severe psychological harm, or to make any other assessment of the degree of psychological harm, a judge is not being called upon to make a medical judgment. The judge is, rather, making a judicial assessment of the factual impact of the offence upon the victim.

Accordingly, any suggestion that, in doing so, a judge is making an expert assessment without having the necessary expertise is, he said, misconceived. The judge is not seeking to make a medical decision as to where the victim sits in the range of clinical assessments of psychological harm, but rather is making a factual assessment as to whether the victim has suffered psychological harm and, if so, whether it is severe.

Holroyde LJ acknowledged that the assessment of whether the level of psychological harm can properly be regarded as severe may be a difficult one and that a judge would need to approach the assessment with appropriate care. The judge should not reach such an assessment unless satisfied that it is correct. Nevertheless, this should be an assessment that the judge alone must make, even if there is expert evidence.

This is, said the Court of Appeal, the sort of assessment judges are accustomed to making. An analogy was drawn with the assessment a judge has to make when considering under the Criminal Justice Act 2003 whether an offender is dangerous. In that context, the judge may have to assess whether there is a significant risk of serious psychological injury being caused by the offender committing further specified offences.

Conscious that the questions before the Court of Appeal were of potentially wide-ranging significance in other similar cases, Holroyde LJ took the opportunity to lay down some guidance in relation to the use of expert evidence in sentencing. He recognised that judicial assessment may in some cases be assisted by expert evidence from a psychologist or psychiatrist. However, the judge may make such an assessment, and will usually be able to make such an assessment, without needing to obtain expert evidence.

Reasons for judgment can be appealed

The Court recognised that there might be concerns regarding the making of subjective assessments by judges. Judges are, however, required to give reasons for their assessment in their decision. Consequently, if it is thought that the assessment was not supported by the evidence, it could be raised on appeal. Holroyde LJ was satisfied that it should be possible to make a proper assessment of the extent of psychological harm on the basis of factual evidence. An important factor in this might be the victim's demeanour when giving evidence. However, he considered that the most relevant evidence would usually take the form of the victim's personal statement. In many cases, he felt it would be entirely appropriate for the judge to make his assessment on that basis.

Holroyde LJ acknowledged that there may be circumstances in which a judge considers that a formal medical diagnosis is required. In such cases it is permissible for the matter to be raised with counsel and steps taken to obtain the necessary expert evidence. He considered, however, that this would only be necessary in rare instances.

Judges deemed competent to make finding of severe psychological harm

References

[1] *R -v- Chall (Joginder)* [2019] *EWCA Crim* 865.

Covert recording – Part 2: How the Fa

Covert recording more common in family court cases

We noted in issue 100 that evidence in the form of a recording can be very useful and probative. But its increasing employment, the ease by which covert recordings can be made and the near trivial ability to make 'deep fakes' give rise to a number of ethical questions. We focused last time on how the civil courts have dealt with covert recordings. This time we consider the Family Court's approach.

Being covert often damns the recorder

In *M -v- F (Covert Recording of Children)*[1], the court considered the use of covert recording in a child custody case. The proceedings were to decide whether a child of upper primary school age should continue to live with her father and his new partner or live with her mother. Relations had become strained and the local authority had appointed a guardian. The father and his partner wished to know what the child was saying at meetings with her social worker, a family support worker and the guardian. They sewed button-sized recording devices into the child's school uniform on the days when a meeting was due to take place. The device recorded everything that the child did that day, including conversations with her friends, her teachers and her mother. They made recordings in that way for approximately 18 months. The father transcribed those conversations he felt were relevant and sought to adduce them in the family proceedings. These transcripts related to 16 conversations. Although they were only a very small part of the recorded material he had obtained, they ran to over 100 pages.

The father's application to admit the transcribed recordings was not opposed by the mother, but Counsel on behalf of the daughter drew attention to the court's powers under the Family Procedure Rules to control the evidence it receives. Furthermore, Counsel highlighted the court's responsibility to discourage other parents from acting in the same way as a matter of public policy. She conceded, however, that the manner in which the recordings were made was directly relevant to an assessment of the parenting offered by the father and his partner.

Covert recording often says more about the recorder than the recorded

Finding in favour of the mother, Jackson J gave a stark warning against the use of covert recording in child cases. He said that it would almost always be wrong for a recording device to be placed on a child for the purpose of gathering evidence in family proceedings. He found that the recordings put forward by the father were selective and were not professionally transcribed. The issue increased the length and cost of the hearing, but did not produce a single piece of useful information. The recordings had further damaged relationships between the adults in the child's life and had created a secret that could affect the child's relationship with her father and stepmother when she came to understand what had happened. The child was unaware of the recordings and would be distressed if she were to discover that her father had covertly recorded her conversations.

Tellingly, Jackson J appears to have taken the view that the act of recording said more about the father than the subjects, or content, of the recordings. The recordings, he said, showed the father's inability to trust professionals. The recording programme was a prominent indicator that the father and his partner could not meet the child's emotional needs as main carers. Anyone who was considering doing something similar should first think carefully about the consequences. Experience suggested that **covert recording normally said more about the recorder than the recorded**. The case, said Jackson, was:

> *'... a striking example of the acute difficulties that can be caused by adults recording children for the purposes of litigation… By the final day, even the father appeared to be beginning to understand the difficulties that he had created not just for his case but for his child.'*

... and can even be intimidatory

In *Re C (A Child)*[2], the court went further and described a father's covert recording of his child as amounting to a form of intimidation. In that case, the father had recorded handover meetings between the parties and the child so as to further his own case in custody proceedings. In attempting to display the mother as violent and abusive, he succeeded only in demonstrating to the court his own provocative and abusive behaviour.

The judge commented that, in resorting to such covert behaviour, the father had failed to understand that his frequent recording and photographing of the child had been emotionally abusive of her. He considered the matter from the child's point of view and concluded that, as she grew up, she would know, if she did not know already, that her father was '*looking all the time for the means to criticise*' the mother.

... yet is sometimes vital

There are, of course, circumstances when the use of covert recordings is of the greatest assistance to the court and provides valuable evidence that could not have been obtained by any other means. An example of this is provided by *Medway Council -v- A (Learning Disability; Foster Placement)*[3]. In that case, allegations of verbal and racial abuse made by a fostered mother against her foster carer had not been believed by the local authority. The mother made covert recordings of the incidents complained of against herself and her baby. These were played in court and the court relied on the recordings in making findings against the foster carer.

Need for court guidance recognised

The President of the Family Division has acknowledged that there is a need for proper guidance as to how courts should approach the

mily Court handles the issue

use of covert recordings in family proceedings. In *Re B (A Child) (Covert Recording)*[4], a father appealed against the decision of a circuit judge sitting in the Family Court concerning the weight attributable to covert video recordings made by him in support of his case in private law proceedings concerning his daughter.

The father had alleged that the child's mother had pursued a deliberate course of action designed to alienate the child from the father. Over a prolonged period, the father had made covert recordings which he said supported his assertions. The judge in the lower court had made findings in relation to that evidence which did not uphold the father's case. In the course of a very lengthy judgment, which dealt with the substantive issues, the judge also set out to provide guidance as to how family courts should approach the use of covert recordings. The father appealed on the ground that the judge had been biased against him. He also sought an order that the judgment should not be published.

Considering the appeal at a directions hearing, the appeal court held that the father had no prospect of establishing bias and that the circuit judge's approach to the covert recordings was within the law. However, the appeal court was concerned that he had given the guidance with neither the approval nor endorsement of the President of the Family Division, and without any wider input. The case came before the appeal court on that basis.

The President of the Family Division, Sir James Munby, said that the use of covert recordings in family proceedings was a pressing issue. He recognised that their use had become an issue of greater significance with the ready availability and decreasing costs of modern recording equipment, and with the widespread distrust in many quarters of the competence and integrity of the family justice system and the experts and professionals working within it. He acknowledged that the covert recording of children, other family members and professionals all raised myriad issues. There were questions around lawfulness, best practice and admissibility. Evidential and practice issues also arose. There was little authority on the topic, and no adequate guidance.

However, while some guidance would no doubt have been useful, the approach outlined by the circuit judge had not been in accordance with the law. Sir James held that the circuit judge had embarked on a process that he should never have undertaken and produced a judgment that was open to serious challenge. Although there were parts with which the instant court would not quibble, it was not the function of a circuit judge sitting in the Family Court to provide such guidance. Aspects of his judgment caused very serious concerns. For example, he had made sweeping statements, expressed in unsubtle terms, that were potentially misleading. He had also pronounced on matters that required a much more detailed analysis. Furthermore, he had considered matters that he had not needed to address in order to decide the case fairly and justly. What's more, he had not had the benefit of sustained, professional and adversarial argument.

Any designated family judge can issue local guidance about local practice and procedure so long as it is intended purely for local use and is compatible with the law, general practice and any nationally applicable guideline. However, if guidance is to be issued for general use, it should only be formulated and disseminated either by:

a) the President issuing a Practice Direction
b) the Family Justice Council issuing guidance endorsed by the President
c) the President commissioning guidance from an expert and issuing it with his imprimatur
d) the President, or another Family Division judge having the President's permission and approval, issuing a 'guidance judgment'.

Consequently, the President ordered that the circuit judge's decision, including his attempt at providing guidelines, should never be made available publicly.

Recognising a pressing need for some properly formulated and approved guidance, he did, however, invite the Family Justice Council to consider the issue of covert recording from a multi-disciplinary viewpoint. The Council should take account of the various documents annexed to the judge's judgment and other materials, including interesting discussions to be found on the blogosphere.

We understand that a consultation process closed in February this year. At the time of writing, though, no formal guidance has been released.

Pending any guidance that may emerge, the Children and Family Court Advisory and Support Service (CAFCASS) Operating Framework states that professionals should have nothing to fear from covert recording, but should expect that everything they say or write has the potential to become public knowledge. The CAFCASS guidance stipulates that where a professional subsequently becomes aware that they have been recorded without their knowledge, they should tell the court. If covertly recorded evidence later comes to light then professionals should be given the opportunity to listen to the recording or read the transcript before it is admitted in evidence.

Conclusion

The CAFCASS guidance has strong resonance for expert witnesses. **Experts should assume that everything they say or write has the potential to become public knowledge, and they should resist any thought about engaging in covert recording.** If you discover that covert recordings have been made by others, inform the court immediately.

Official court guidance due soon

References

[1] *M -v- F (Covert Recording of Children)* [2016] *EWFC* 29.

[2] *Re C (A Child)* [2015] *EWCA Civ* 1096.

[3] *Medway Council -v- A (Learning Disability; Foster Placement)* [2015] *EWFC* B66.

[4] *Re B (A Child) (Covert Recording)* [2017] *EWCA Civ* 1579.

Coping with unconscious bias

Unconscious and contextual bias affect us all

The concepts of unconscious and contextual bias are not new, yet few people seem to be aware of their own susceptibility. Of course, the justice system relies on the giving of expert evidence being as objective, unbiased and impartial as possible, and the same has to be said of the judicial evaluation of such evidence. However, recent studies suggest that many experts and lawyers have not recognised how contextual bias and cognitive processes may distort and undermine the probative value of expert evidence.

For most people, the presence of unconscious bias is not a matter for undue concern. While in common usage, 'bias' carries negative connotations, in many cases bias may operate as a good thing that helps to protect us. Indeed, bias is what keeps us from getting into cars with strangers. For expert witnesses, juries and judges, however, such forms of unwilling bias can have far-reaching and unwanted consequences.

To help the trier of fact discover the truth, experts must be impartial. But because forensic and scientific evidence is likely to be highly specialised and often complex, it can be difficult for laymen, judges and juries to understand. It is desirable, then, that such expert evidence be based on a correct interpretation of the science. However, experts, like everyone else, are prone to unconscious bias.

The well-established theory of categorisation extends as much to expertise as to any other area of human endeavour. The theory identifies that **one of the reasons experts are experts is that the experience they have gained in their field has given them a large number of exemplars**, i.e. they have seen similar situations before and understood what was going on. Consequently, experts respond to new information by reference to its similarity to previously encountered situations. Such categorisation develops without conscious effort, but surely influences performance and expectation in almost every task we undertake.

Judges, lawyers and experts are no exception

In matters of pure science based on established and peer-reviewed techniques, the scope for bias may be reduced. But in some forensic sciences, where human judgment plays a major role, the risk will be greater. For example, in pattern analysis fields, the determination of a match – or not – will rest ultimately with the examiner's judgment and is largely subjective. It will remain so notwithstanding attempts to develop procedures that aim to introduce objective methods of analysis. Cognitive psychology will, therefore, play a significant role in such fields of forensic science and will provide the potential for bias and thus error.

Subjective science – pattern analysis

Pattern analysis fields include fingerprint identification, tyre and footwear impressions, bloodstain pattern analysis, tool mark impressions and handwriting analysis, to name a few. The literature has focused mainly on fingerprint identification, so we will use that as a proxy for all pattern analysis forensics.

Recent cases of fingerprint identification error have focused renewed attention on its reliability. Underpinning the approach is the assumption that no two fingerprints are identical. The friction ridge patterns on the fingers form before birth. Apart from the artifacts caused by significant skin damage, they remain unchanged though life. Fingerprint analysis employs a methodology incorporating analysis, comparison, evaluation and verification (ACE-V). First, an analysis is performed on the latent print, observing the papillary ridge detail, the patterns formed, ridge endings, the shape of the ridge edges and pore positions. This assessment is then repeated on the comparison prints. The features between the latent print and the comparison print are compared, and then evaluated. The final step is verification, where a peer-review process checks the procedure, results and objectivity. This methodology, or a variation of it, is shared by several pattern analysis fields.

It will be apparent from the above that fingerprint identification and pattern forensic analysis is largely a human decision-making process. As with other decision-making processes, contextual bias can come into play. Indeed in some cases, other evidence comes to light, such as DNA, that shows the fingerprint analysis was incorrect. The negative influence of extraneous information on the reliability of pattern forensic analysis can then be studied.

Snowball bias

Another problem that forensic evidence may suffer from is what's called the 'snowball effect'. The result can be the contamination and corruption of other lines of evidence. For example, eyewitnesses who have given a tentative positive identification of a suspect are much more likely to impute greater certainty to their belief when they are informed of any forensic evidence that appears to support it. Thus, even where the forensic evidence is shown on appeal to be flawed, the judge may consider that there is sufficient additional evidence to render a conviction safe, without grasping that the additional evidence may be tainted by the same contextual bias.

Notwithstanding an expert witness's overriding duty to the court, the role taken by the expert will tend to affect how they identify themselves within the adversarial judicial system. Whether instructed by the prosecution or defence, there is a basic human drive to want to belong. Expert witnesses should try to resist it! Despite best efforts, though, subconscious bias may be introduced, with experts modulating their decisions towards 'their side' where some ambiguity exists.

Research, both here and in America, has suggested that **a significant proportion of all scientific and forensic evidence is exposed to the risk of unconscious bias**. In the majority of cases, it would be difficult or impossible to measure the corrupting effect this might have had. Few doubt that many forensic scientists and most lawyers, judges and jurors are oblivious to the dangers of unconscious bias. But for the most part, adversarial justice systems, such as those in the UK, America and Australia, have concerned themselves with the conscious bias some experts have exhibited.

Adversarial bias in the form of a partisan expert is an issue the courts have been very willing to address. Successive reforms have gone a long way towards eradication of the expert as a 'hired gun'. However, the courts have shown less alacrity in addressing the question of unconscious bias.

It may be that it is simply in the 'too hard' basket. While well-founded analysis is the bridge between scientific conclusions and the truth, it is not an easy task to devise a legal standard (as opposed to a scientific standard) to determine whether the analyses made by the experts are well founded and free from unconscious bias. Such safeguards as exist tend to focus on procedural conformities and standards, and the management of scientific laboratories and the forensic tests they conduct. Some recognition of the dangers and effects were recognised in the Forensic Science Regulator's report FSR-G-217 *Cognitive Bias Effects Relevant to Forensic Science Examinations*, published on 30 October 2015.

Scottish Fingerprint Inquiry

In Scotland, Sir Anthony Campbell undertook an inquiry into the controversy emerging out of the mis-attribution of a latent fingerprint to PC Shirley McKie. Lord Campbell conducted a comprehensive review of current practice and proposed many reforms. The final report (published in December 2011) placed conspicuous emphasis on the need to attend to contextual bias. Sir Anthony's recommendations included that the Scottish Police Services Authority should:

- review its procedures to reduce the risk of contextual bias
- ensure that examiners are trained to be conscious of the risk of contextual bias, and
- consider the minimum information needed for fingerprint examiners to carry out their work, and that only such information should be provided to examiners and should be recorded carefully.

Curiously, although the courts are sensitive to the damaging consequences of bias in a justice context, judges and experts alike have seemed to develop the idea that they are particularly resistant to it. There is a belief in some that, through their scientific or legal training, experience and professional inclination, experts and judges are somehow immune to the natural bias present in the cognitive processes of the ordinary citizen – the oft-cited 'man on the Clapham omnibus'. However, such exceptionalism is misconceived. Experts and judges are equally susceptible to the same biases that influence ordinary human cognition. They are difficult to mitigate, even with training, experience and effort. Of course, if one starts from a point of ignorance about the existence of such bias, mitigation is nigh on impossible.

Pattern analysis forensics are particularly susceptible to bias

Research carried out by Goldin and Rouse in 2000 revealed an example of unconscious bias in persons who believed themselves to be immune through their training and expertise. A study was undertaken into musical auditions conducted by the New York Philharmonic Orchestra. Musicians aspiring to membership of the orchestra were subjected to a contested audition by a panel of eminent and experienced musicians, conductors and composers. Over time, it became apparent that the majority of successful candidates were white males. The panellists firmly believed that the only factors influencing their decisions were the candidate's raw talent, excellence in music and the vitality of the orchestra. The possibility existed that white males were predominately superior in the field of music, but there was also the suggestion that unconscious bias was at work. When the orchestra switched to blind auditions, the number of successful female and ethnic minority group candidates increased substantially. Eventually the point was reached where the numbers of these previously underrepresented groups had increased to reflect the general social demographic. This suggested that, despite the honestly held belief of the panellists, the prior selections had been biased in a manner that was not correlated directly with ability.

This example is now cited in judicial training in England and Wales. I**t is important that judges and experts alike should recognise the existence of bias and resist the temptation to believe that their training makes them somehow immune.**

Acknowledging the bias is the first step

Expert witnesses must first accept that contextual bias affects them. They should then put in place measures designed to mitigate it, including:

- **avoid irrelevant information** as it may taint their opinions
- **employ objectively reliable methods** which are more likely to reveal unconscious bias
- **use reasoned analysis**, and
- **provide their findings in comprehensive reports**, which include a precise description of personal background and expert activity.

Experts must also follow sector standards of forensic science regarding objective technical requirements, laboratory management and other factors. The basis for any opinion should be explained clearly and be open to reasonable examination and review.

Acknowledge the bias and put in mitigation measures

Services for registered experts

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

Your Witness – FREE

First published in 1995 and now at 100 issues, *Your Witness* was the first newsletter dedicated to expert witnesses. All quarterly issues are freely available to members.

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 72). All are available and searchable on-line. Topics covered include expert evidence, terms and conditions, getting paid, training, etc.

E-wire – FREE

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