Your Witness

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Experts can't turn to the SRA for help

A recent Helpline enquiry on a late payment issue reminded me of the charming belief some expert witnesses still hold that the Solicitors Regulation Authority (SRA) will help them to bring into line scurrilous solicitors who simply refuse to pay their bills. Sadly, since July 1999 the regulatory body for solicitors in England and Wales has had no interest in fee disputes between lawyers and experts. The SRA views such matters as a commercial issue, not one of standards. It will, though, show some interest if the expert can obtain a County Court Judgment (CCJ) against the law firm. Also, if the dispute is about a solicitor's conduct, e.g. giving an undertaking and then failing to meet that undertaking, the SRA can sometimes be coaxed into action.

This is all a measure of just how far the SRA has drifted from its role to regulate lawyers as a 'body of professionals'. I well remember the days when the Law Society held its members to high professional standards. Indeed, not paying an expert was viewed as a serious professional matter.

Incidentally, that approach is, as I understand it, how the Law Society of Scotland still regulates its lawyers.

Contracts with MROs

The Helpline matter also touched on working for medical reporting agencies (MROs). As any long-time reader of *Your Witness* will know, I am firmly of the view that MROs add little but cost and confusion to the litigation process. Experts who agree to work with them (and I know plenty who find MROs so unsatisfactory that they no longer will work with them) should insist on **always having a direct line of communication with the instructing lawyer**.

In addition, some experts will only agree to work with an MRO on the basis that it is the **expert's terms of engagement that govern the relationship**.

However the expert manages the relationship, an expert contracting with an MRO is not in anything like as strong a position as one who contracts direct with the law firm.

Factsheet advice on getting paid

If you are having difficulties with getting paid by a law firm, you may want to read our Factsheet 51 *A Practical Guide to Securing Payment from Lawyers*. In this factsheet we examine ways in which the risk of late payment can be minimised, and look at the practical steps that can be taken for fee recovery in the worst cases. Visit:

https://www.jspubs.com/library

Solicitors as agent for fees

A second caller to our Helpline (who also hoped the SRA might help) was seeking advice about a law firm which was trying to persuade him that he should agree to terms that made the solicitor a mere agent for the solicitor's client when it came to the expert billing for his report. To paraphrase: *We emphasise that you are engaged by our clients and so in instructing you we are acting as agent for our client. Whilst you should address your invoices to us, when we bill our client we will include your fees as disbursements on our invoices and when we receive payment from our client your invoices will be paid.*

This kind of move, in my view likely designed to distance the law firm from direct responsibility for its experts' fees, is only too common. Sometimes it might make sense if the client is, for example, a large insurance firm. But with no contractual nexus between the expert and the law firm's client, it is not an arrangement that experts generally should willingly adopt.

I seriously doubt the SRA will see this approach as a matter for it. The SRA tends to take complaints from solicitors' clients only; contractor disputes are of little interest unless they result in a CCJ against a law firm. But, if you ever want to try your luck, there is a form available here:

https://www.sra.org.uk/consumers /problems

or you can call the SRA's helpline on 0370 606 2555. If you do find that the SRA shows some interest, please do let me know!

A matter of contract

Getting paid is a simple matter of contract, made much easier if you present it and get it signed in the first place! Your terms must:

- stipulate that **the firm is directly responsible for your fees**, and
- state explicitly that **your terms supersede any other agreements.**

The firm must give unambiguous agreement to your terms. Then any attempt to avoid direct responsibility for your fees is neutered. If a solicitor refuses to sign up to your terms on behalf of the firm, you will be in an informed position to decide whether you need to take the instruction at all and before much work has been completed. Implicit in this approach is my firm belief that **it is for expert witnesses to set up their own terms of engagement**, not for the law firm to seek to impose its terms on experts.

If the law firm is not to be deflected and insists on acting as a mere agent with regard to fees, experts could then consider 'cash on account' terms. How can you assess the financial risk with no knowledge of the client's financial stability?

Chris Pamplin

Expert witness survey 2021

Enclosed with our June 2021 issue of *Your Witness* was a survey questionnaire, the fourteenth of its kind over the past 30 years. By the end of July 2021, more than 200 forms had been returned. A big thank you to all who took the trouble to take part and contribute data.

On average, 59% of workload is expert witness-related

The experts

Of the 209 experts who responded by the end of July 2021, 94 were medical practitioners. Of the remaining experts, 34 were engineers, 15 were in professions ancillary to medicine, 9 were accountants or bankers, 11 had scientific, veterinary or agricultural qualifications, 8 were surveyors or valuers and 14 were architects or building experts. The 'others' category totalled 24 experts.

Work status and workload

Of the respondents, 49% undertake expert witness work full time, with 39% part time and 10% describing themselves as retired. Overall, expert witness work accounts for 59% of their workload. This figure was 37% in 2003 and rose to 45% in 2011. It is the fourth time over the past 30 years that this percentage has been over 50%.

It is clear, then, that those experts who responded are much involved in expert witness work but still have a strong commitment to their professions – exactly as it should be.

Experience and outlook

We also asked respondents to say for how long they have been undertaking expert witness work. From their answers it is apparent that they are a very experienced lot indeed. Of those who replied, 92% have been practising as expert witnesses for at least 5 years, and 84% have been undertaking this sort of work for more than 10 years. Ten years ago, well over half of the respondents (60%) saw expert witness work as an expanding part of their workload. With the increased regulatory pressures on expert witnesses, the removal of expert witness immunity, and now the impact of a pandemic, this optimism has fallen. We now see only half of respondents (49%) expecting expert witness work to be a growth area.

49% expect expert witness workload to increase

Nature of the work

The way the workload of these experts is partitioned between the various courts is little changed from 2013. Our respondents state that, on average, they perform 83% of their expert witness work in civil courts, 5% in family courts and 12% in criminal courts. Near 63% of these experts undertake civil work exclusively. This dominance of civil matters over the other courts is a long-standing feature of the make up of the *Register*'s membership.

When we asked about publicly funded work in 2013, 46% of our respondents undertook no publicly funded work. This percentage has been increasing ever since, now standing at 61%. Given the increasingly parsimonious pay rates for legal aid cases when compared with fee rates in the open marketplace, this should surprise no one. Of those who do accept publicly funded work, it averages just 27% of their workload, which is down on 2 years ago, continuing the long-term downwards trend. These **data show just how financially unattractive the Ministry of Justice is making publicly funded work** for expert witnesses.

When it comes to accepting instructions from litigants in person, 64% (56% in 2019) of our respondents do not agree to such instructions. Of those who are prepared to accept such instructions, the vast majority take just a handful of such cases each year. One of the difficulties that can arise with **litigants in person** is apparent in the **increase in the last 8 years in the percentage of experts who require payment on account in such cases** – from 38% to 63%.

Their work

Reports

In all of our surveys we have asked how many reports the experts have written during the preceding 12 months. The averages for the last six surveys are given in Table 1. The three types of report are advisory reports not for the court, court reports prepared for one party only and single joint expert (SJE) reports. When compared with previous surveys, it is hard to detect much of an impact of the pandemic on 2021 data.

Single joint experts

A dramatic rise in the number of SJE instructions between 1999 and 2001 (a jump from 3 to 12 instructions a year as a result of the Woolf reforms) then levelled off. Now, **55% of experts have been instructed as SJEs in the past 2 years** (it was 73% in 2011), and on average each expert receives five such instructions in the year – one-third of the average in our 2009 survey.

Since the removal of expert witness immunity in January 2011, the role of the SJE has become even more fraught. Working for both sides in a dispute may well lead to a disgruntled party, and either side (or both!) can sue the instructed expert! Indeed, we have heard from experts – even those who until now have been very supportive of the SJE approach – who say that they will no longer undertake such instructions. This is one metric we have been watching closely.

Court appearances

Another change over the years has been the reduction in the number of civil cases that reach court. It is now altogether exceptional for experts to have to appear in court in fast-track cases, and it is becoming less likely in the multi-track. In

Report type	2011	2013	2015	2017	2019	2021
Advisory	15	18	16	21	13	15
Single party	56	55	56	47	50	42
SJE	9	8	8	5	7	5

Table 1. Average number of full, advisory and SJE reports per expert over time.

1997 we found the average frequency of court appearances was five times a year; some 4 years later this had dropped to 3.8; it now stands at 1.2. It is, of course, likely that the near-complete closure of the court system during part of 2020 will have depressed this metric, but perhaps not as much as one might have predicted (of which more shortly).

Variation by specialism

However, these averages hide a lot of variation by specialism (see Table 2). For example, the reporting rate for medics is much greater than in all other specialisms. Furthermore, SJE appointments are much more common in medical cases than in the other specialisms.

Their fees

Which brings us to the detail everyone wants to know. How much are fellow experts charging for their expert witness services? See Table 3.

For each professional group, the table offers average hourly rates for writing reports and full-day rates for attendance in court, with the 2019 data for ease of comparison. Given the small size of some of the groups, it would be unwise to read too much into the changes revealed by these pairs of figures.

In terms of annual income from their expert witness work, 19% of our respondents earn less than £20k per year, 21% earn between £20k and £50k per year and 55% earn over £50k per year.

Cancellation fees

Fees due as a result of cancelled trials continue to be a source of friction. The average percentage of the normal fee experts charge is generally controlled by the amount of notice they receive of the cancellation. In this survey, 41 respondents charge on average 47% of their fee if notice is given at least 28 days before the trial is due, 84 respondents charge 56% with 14 days' notice, 126 charge 73% on 7 days' notice and 142 charge 99% if just 1 day's notice is given.

The **right to cancellation fees is one that has to arise from the contract** between the expert and the lawyer, although the Ministry of Justice has made claiming them very difficult in publicly funded cases. This ought to act as yet another spur to all experts to put in place clear, written terms of engagement.

Speed of payment

In this survey, **34% of experts report that the promptness with which invoices are paid has not deteriorated – but that means 66% of experts are finding payments are taking longer to secure!** One measure of the problems experts have in securing prompt payment is the number of bills settled on time. In this survey, the number of experts reporting their bills are being paid on time in even half of their cases is 57% (up from 49% in 2017). On average, 40% of solicitors pay within 8 weeks, 25% pay between 9 and 12 weeks and 28% pay between 13 and 48 weeks.

Against this background, while **93% of experts say they stipulate terms**, still **only 51% use a written form of contract**. **Without a solid contractual basis, experts are making their credit control much more complex than it need be**. All experts listed in the *UK Register of Expert Witnesses* have access to our *Terminator* service through our website (see page 8) to create personalised sets of terms, and our Little Book on *Expert Witness Fees*[1] has a chapter dedicated to terms.

Impact of COVID-19 on forensic practice

With the pandemic hitting just after our 2019 survey, we wanted to see how much impact it has had on our members' forensic practices. When asked if their forensic workload changed during the pandemic lockdowns, 29% reported no change while 34% reported an increase. Of those who reported a downturn, half saw less than one-third of their work fall away. The majority (67%) believe the downturn to be temporary.

During the pandemic, 79% of respondents used the likes of Zoom for remote meetings. Fewer than 10% found such meetings ineffective, while for the majority (73%) thought they were at least as effective as face-to-face meetings. Two-thirds of respondents feel remote meetings should continue post pandemic.

COVID pandemic did not close the forensic workplace

Professional group (*n = number of respondents*)	Reports	Court appearances	Advisory reports	SJE instructions
Medicine (*n = 94*)	72.7	1.2	20.6	7.2
Paramedicine (*n = 15*)	39.8	2.1	5.1	8.8
Engineering (*n = 34*)	16.0	1.0	12.4	3.7
Accountancy (*n = 9*)	10.0	0.8	6.0	2.6
Science (*n = 11*)	29.7	3.2	3.0	2.0
Surveying (*n = 8*)	14.9	0.1	10.0	3.5
Building (*n = 14*)	3.6	0.2	7.4	1.2
Others (*n = 24*)	9.9	1.0	17.8	2.4
Aggregate averages	42.1	1.2	15.0	5.2

Table 2. Average number of reports, trials, advisory reports and SJE instructions by specialism.

Professional group (*n = number of respondents*)	Average rate (£)			
	Writing reports (per hour)		Court appearances (per day)	
	2021	2019	2021	2019
Medicine (*n = 94*)	261	241	1,523	1,653
Paramedicine (*n = 15*)	187	161	1,065	1,098
Engineering (*n = 34*)	177	149	1,024	1,224
Accountancy (*n = 9*)	264	251	1,069	1,900
Science (*n = 11*)	135	141	916	993
Surveying (*n = 8*)	194	175	1,509	1,152
Building (*n = 14*)	177	180	1,180	1,602
Others (*n = 24*)	196	109	1,148	726
Aggregate averages	220	196	1,297	1,408

Table 3. Average charging rates for report writing and court appearances by specialism.

References

[1] *Pamplin, CF & White, SC* [2016] *Expert Witness Fees.* 3rd Edition J S Publications ISBN 1-905926-24-4 Order line 01638 561590

Addressing the unfairness often seen

Judicial criticism often gives expert witnesses no right of reply...

One of the more serious sanctions an expert criticised by the court might face is a complaint being made to their professional body. We have reported in the past on a number of cases, such as that of Professor Roy Meadow and Dr Waney Squier, where judicial criticism led to damaging proceedings before professional tribunals.

Unfairness of judicial criticism of experts

Given the often far-reaching effect of judicial criticism, it is, perhaps, surprising that experts subjected to it have little or no recourse to reply prior to a complaint being lodged. Their first opportunity to respond may come only once they face a duly constituted tribunal of their professional body. By that time, the damage may already have been done.

We recently reported (*Your Witness* 93) on the Upper Tribunal (Lands Chamber) decision in *Gardiner & Theobald*[1]. In that case, the Tribunal convened a hearing to give the expert witness an opportunity to make representations in response to its concerns about the accuracy of declarations made in his report. The Tribunal ruled that **where an expert might have failed to comply with his professional code of conduct or the Tribunal's procedural rules, the Tribunal could, exceptionally, hold a hearing to allow him to explain what had happened and to indicate what action would be taken to prevent any repeat**. If the expert report was found to contain declarations that were materially incorrect, or which appeared to be in breach of the expert's professional code of conduct, the Tribunal was likely to take that matter into account as to costs and refer it to the expert's professional body.

The Tribunal, in this case, made an analogy between the duties solicitors owe to the court and the duty owed by experts. Sir David Holgate referred to the decision in *Hamid*[2]: where the court was considering reporting a solicitor to the Law Society, the court should first issue the solicitor with a letter requiring him to show cause as to why they should not do so.

Sir David Holgate said experts owed the same '*duty of candour*' to the court as solicitors. Following the example set by the High Court in *Hamid*, the Upper Tribunal would, if necessary, require experts to provide written explanations for their behaviour. **The *Hamid* procedure and the issuing of a '*show cause*' letter provided an opportunity for the expert concerned to:**

- **propose an explanation for what occurred**
- **identify the lessons learnt, and**
- **give assurances about steps to be taken in the future to prevent similar issues arising.**

Sir David was of the opinion that a statement of this nature might satisfy the court in some cases without the need for a referral to a professional body.

... which makes such judicial criticism inherently unfair

EU rides to the rescue?

If an expert is criticised in a judgment and a referral is made, or the criticism in the judgment is otherwise disseminated, without the expert being given an opportunity to respond or offer evidence refuting such criticism, does the expert have any remedy?

Sadly, the answer to that question is probably no. However, a 2021 decision of the European Court of Human Rights (ECHR) is worth reading. In *SW -v- United Kingdom*[3], a social worker who had been criticised by the court made application under articles 8 and 13 of the European Convention on Human Rights.

[*Hang on, haven't we left the EU? After Brexit, the UK still participates in the ECHR through the Human Rights Act. While ECHR judgments no longer bind UK courts, they will still often be persuasive. Ed*]

The applicant in the case (the social worker) was a professional witness called to give evidence before the court. Between 2007 and 2014 her services were engaged through personnel agencies. In 2012, she began working with a local authority. The same year, she was called as a professional witness in child care proceedings concerning the alleged sexual abuse of a number of siblings. Before the proceedings ended, her agency assigned her to a different local authority.

The child care proceedings were complex in nature but, for the purposes of the applicant's case, the relevant stage was a fact-finding hearing before the Family Court in September 2014.

In a judgment of October 2014, the Family Court judge rejected the allegations of sexual abuse. He also criticised the local authority and the professionals involved in the case. In particular, he found that (i) the applicant was the principal instigator in a joint enterprise to obtain evidence to prove the sexual abuse allegations, irrespective of the underlying truth and the relevant professional guidelines; (ii) she had lied to the court about important aspects of the investigation; and (iii) she had subjected one of the children involved to a high level of emotional abuse in the course of their interaction.

The applicant first became aware of the adverse findings when, at the end of the hearing, the judge gave an oral judgment. After delivery but prior to the case being finalised, the Family Court judge held a series of hearings to address submissions by the applicant on some aspects of the judgment, including the decision not to grant her anonymity. As a result, some changes were made to the text of the judgment, but the adverse findings against the applicant remained, as was the decision not to grant her anonymity.

In November 2014, the Family Court judge, having indicated that all cases involving the applicant should be scrutinised as a matter of urgency, directed that the judgment be sent to the local authority to which the applicant was then assigned and advised that his findings should be shared with other local authorities where she had worked and with the relevant professional bodies.

As a direct result of the criticism, the applicant was told by her personnel agency that her

assignment with the local authority had ended and she was asked to leave.

The applicant appealed, claiming that her Human Rights had been breached. The Court of Appeal found that the criticism of the applicant contained in the judgment was '*manifestly unfair to a degree which wholly failed to meet the basic requirements of fairness established under Art 8 and/or common law. In short, the case that the judge came to find proved against the applicant fell entirely outside the issues that were properly before the court in the proceedings and had been fairly litigated during the extensive hearing, the matters of potential adverse criticism had not been mentioned at all during the hearing by any party or by the judge, they had certainly never been 'put' to the applicant and the judge did not raise them even after the evidence had closed and he was hearing submissions.*'

Where a court is contemplating making findings that arise outside the original focus of the case, the court should embark on a process that allows those affected to make submissions before final judgment is given. For those additional steps to be an effective counterbalance to a process that might otherwise be unfair, they need to be undertaken before the judge has reached a concluded decision on the controversial points. While not impossible, it is difficult to conceive of circumstances where the overall fairness of a hearing can be rescued by any form of process *after* the judge has announced the concluded decision.

However, although the Court of Appeal decision set aside the impugned findings and found her Article 8 rights had been breached, it failed to provide her with an effective remedy. It was not in dispute that she would only have been entitled to damages for misfeasance in public office if she could show that the judge had knowingly or recklessly abused his power and either intended to cause her harm or was recklessly indifferent to the probability of causing her harm. Furthermore, the Government expressly accepted that she could not have made a claim for damages under the Human Rights Act 1998 because any attempt to establish the necessary lack of good faith on the part of the judge would have been unlikely to succeed. Consequently, she was advised by counsel that a claim for compensation would have no real prospect of success.

Court of Appeal didn't offer a remedy

On the application of the social worker, the matter came before the ECHR. Judge Grozev (President), mindful of the judgment given by the Court of Appeal that the criticism had been '*manifestly unfair to a degree which wholly failed to meet the basic requirements of fairness established under Art 8*', considered the interference with the applicant's Article 8 rights was neither in accordance with the law nor necessary in a democratic society. The case that was found to be proved against the applicant fell entirely outside the issues that were properly before the court. Indeed, it had not been put to the applicant, nor even mentioned, during the hearing. Moreover, these procedural shortcomings were not offset by any effective counterbalancing measures. Although the applicant was able to make some submissions to the judge after she became aware of his criticism of her work, it only happened after the judge had announced his concluded decision. As such, the process was wholly incapable of protecting the right to respect for her private life.

In light of the foregoing, the judge's direction that his adverse findings be sent to the local authorities and relevant professional bodies without giving the applicant an opportunity to meet them in the course of the hearing interfered both unlawfully and disproportionately with her right to respect for her private life under Article 8 of the Convention.

Article 13 of the Convention requires domestic legal systems to make available an effective remedy empowering the competent national authority to address the substance of an '*arguable*' complaint under the Convention. Its object is to provide a means whereby individuals can obtain appropriate relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. Although Article 13 does not require any particular form of remedy, contracting States being afforded a margin of discretion in conforming to their obligations under this provision, an effective remedy must be available in practice as well as in law. It must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State.

The ECHR found that the judgment of the Court of Appeal did not afford the applicant appropriate and sufficient redress for her complaint under Article 8. Neither had it been suggested that any other remedy was available to the applicant that would have provided her with the opportunity of obtaining such redress.

In light of the foregoing, the ECHR accepted that there had been a violation of the applicant's right under Article 13 because she did not have access to an effective remedy at the national level capable of addressing the substance of her Article 8 complaint and by virtue of which she could obtain appropriate relief. The UK government was ordered to pay the applicant €24,000 in non-pecuniary damages and €60,000 for costs and expenses.

What we need is a test case

Although the applicant in this case was a professional witness and not, strictly speaking, an expert witness, it seems that the finding of the ECHR might be applied equally to experts who find themselves in a similar situation. At the very least, it offers an avenue worth pursuing where previously there has been none.

ECHR judgment highlights the unfairness and offers a solution

References

[1] *Gardiner & Theobald LLP -v- Jackson (Valuation Officer)* [2018] *UKUT* 253 *(LC).*

[2] *R (on the application of Hamid) -v- Secretary of State for the Home Department* [2012] *EWHC* 3070 *(Admin).*

[3] *SW -v- United Kingdom (87/18) ([2021] 6 WLUK 605; Times, August 10, 2021).*

Assange: concealing material facts

A misleading yet reliable report must surely be a rare beast!

An expert's overriding duty to the court is well known. Surely, then, an expert can't justify withholding some material facts from a report... and if it did happen, the court couldn't accept the opinion contained in the report regardless? These were questions considered by the court in *United States -v- Assange*[1].

Assange's mental health under question

The US continues to seek the extradition of Julian Assange following the end of his lengthy stay inside the Ecuadorian Embassy. A district judge refused the initial request on the ground that it would be oppressive to extradite him given his mental condition. The judge's decision was based upon evidence which, in large part, was derived from the expert reports of an emeritus professor of neuropsychiatry. The expert had provided two reports, and both referred to Assange being in solitary confinement in the Embassy. The opinion of the expert was that there was a real risk of him attempting suicide. However, the expert's first report failed to mention that while in the Embassy Assange was in a relationship with his research assistant and two children had been conceived.

After the relationship become public knowledge, the expert made a second report in which he acknowledged that Assange was receiving visits from his partner and their children. The expert was cross-examined on why he had failed to mention these facts in his first report; he said he had not done so to respect the partner's privacy.

Some might think that this would put the district judge in a difficult position when assessing the weight to be given to the expert's opinion. While finding that the expert had acted in a way that was misleading and inappropriate in the context of his obligations as an expert witness, the district judge nevertheless took the view that the expert had not failed in his duty to the court. She said that his decision to conceal the information was '*an understandable human response to the partner's predicament*'.

This aside, it seems that the district judge found the expert to be a reliable and persuasive witness. She was in no doubt that his evidence was impartial, and she accepted his assessment of Assange's mental health. Accordingly, she refused the request for extradition.

The US appealed against the district judge's order on the grounds that:

1) the judge had erred in law
2) having decided that the threshold for discharge under the Extradition Act was met, she should have notified the US of her provisional view to afford it the opportunity of offering mitigating assurances to the court
3) having concluded that the expert had misled her on a material issue, she should have ruled that his evidence was inadmissible; alternatively, if his lack of independence as an expert witness went to weight rather than admissibility, she should have attributed no, or far less, weight to his opinion as to the severity of Assange's mental condition; and that she would not have discharged Assange had she not admitted the expert's evidence or attributed weight to it
4) she had erred in her overall assessment of the evidence as to Assange's risk of suicide
5) the US had provided a package of assurances that were responsive to the court's findings.

Permission to appeal was granted by the judge on grounds 1), 2) and 5), but not 3) and 4). The US applied to the court in advance of the appeal hearing, asking for a ruling on whether the US could also argue grounds 3) and/or 4) at the forthcoming appeal hearing.

This was a very unusual application, and the court would not normally consider challenges to findings of fact or factual assessments. The case presented something of a novel situation because the court was being asked to consider expert witness evidence that had been found by the court below to have been misleading in material respects but which had nonetheless been accepted. Under the Criminal Procedure Rules 2020 (CrimPR) Pt 50 r50.17(4)(b), however, the test was whether the grounds were reasonably arguable.

The court found that ground 3) was reasonably arguable. The expert was subject to the overriding duties under r19.4. to help the court to achieve the CrimPR overriding objective by giving independent assistance by way of objective, unbiased opinion. He had made a declaration in his report to that effect. Although it would have been open to him to make application under r19.9 to withhold information in his report from the opposing side, he had not done so. Given that his first report dealt with the solitary confinement and suicide risk, it was reasonable to take the view that the expert had not acted in accordance with his duty, as contained in his declaration. Consequently, there was reasonable ground under Part 50 for an argument that the district judge had erred by not taking that into account.

Giving leave to appeal under ground 3), the court said that it must also follow that, if the appeal succeeded under either ground 1) or 3), the US should also then be entitled to make its submissions on whether the district judge had erred in her overall assessment of the evidence as to Assange's risk of suicide. Consequently, the court also allowed the US to appeal on ground 4).

Watch this space

In many ways, this is a most unusual case. An expert's report that is, in the district judge's own words, both misleading and inappropriate, yet, at the same time one that is found by the court to be cogent and persuasive, must be a rare thing indeed. It will be interesting to see what the appeal court makes of it all at the full hearing.

Reference

[1] *United States -v- Assange* [2021] 8 *WLUK* 73.

Remembrance of things past

In *Sheard*[1], Judge Robinson recently illustrated the proper approach to the judicial treatment of personal recollections of witnesses. The case, although primarily concerning the issue of false memory in witnesses of fact, is of interest to medical expert witnesses where there is a conflict between the medical evidence and the recollections of a witness.

The claim was for damages for personal injuries and other losses arising out of alleged clinical negligence. The circumstances of the trial were difficult. It was conducted remotely, the wheelchair-bound claimant giving his evidence from a nursing home using a smart phone while trying to cope with two bulky files. Part way through his evidence the battery in his phone ran low and the hearing was adjourned to the following day, when he continued to give his evidence for a further 2 hours. Despite all of this, the claimant remained calm and polite. He appeared to have no trouble in recalling events, and the court had no reason to doubt that the evidence he had given was entirely truthful and in accordance with his clear recollections.

The problem was his recollections, in many respects, were at odds with those contained in the GP's records and the information that had been relied upon by the expert witnesses in preparing their reports. The judge had to balance the weight to be given to the entirely believable claimant's evidence with the conflicting evidence of the professional medical and expert evidence, which appeared to be accurate and persuasive.

It was in this context that the judge summarised what has grown to be a considerable body of authority setting out the lessons of experience, and of science, in relation to the judicial determination of facts and the part the evaluation of witness memory plays.

In *Gestmin*[2], the court identified that there was a common tendency to suppose memories to be more faithful than they are actually. The stronger and more vivid the recollection, the more likely it is to be believed accurate. Furthermore, the more confidently the recollection is expressed, the stronger this belief will become.

The litigation process itself can interfere

However, the court recognised that the process of litigation itself subjects the memories of witnesses to powerful biases. Indeed, preparation for trial can itself interfere with memory. Statements are often taken a long time after the event. They are drafted by a lawyer who is conscious of what the witness does or does not say, and their significance for the issues in the case.

The judge in *Gestmin* found that memories are fluid and malleable, being rewritten whenever they are retrieved. This is even true of '*flash bulb*' memories, i.e. memories of experiencing a particularly traumatic event.

The court also identified a type of transferred memory, when events can sometimes be recalled as memories that did not happen at all, or which happened to someone else. These sorts of memories can appear to be extraordinarily vivid to the witness, who believes them to be accurate.

Consequently, the court in *Gestmin* identified the best approach for the judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. Leggatt J said that '*this does not mean that oral testimony serves no useful purpose… But its value lies largely in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny...*'.

This guidance was quoted by Mostyn J in *Lachaux*[3]. In his judgment, he also highlighted Leggatt J's observation that '*witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance.*'

In *Carmarthenshire County Council*[4], Warby J said all these dicta were of considerable assistance, particularly in circumstances where medical records do not bear out of what is recalled by the claimant. He recognised that there was a tendency, long established in the common law, to treat oral testimony and cross-examination as the gold standard when assessing the reliability of evidence. However, in the light of the aforementioned dicta, testing this against the written evidence was the right approach.

The *Carmarthenshire County Council* case also identified reasons, other than false memory, as to why a claimant's recollections might conflict with evidence in written medical records. The court recognised that some medical practitioners make extensive notes, while others will make a briefer note. The court must also recognise that a claimant will not always give precisely the same account of an accident, or their symptoms, to every doctor who examines them. They will often be led by the specific questions of the consultant or focus only on those symptoms that are giving them the most trouble at the time. These, and other factors, must be balanced against the possibility that a witness's memory is inaccurate and unreliable.

Contemporaneous notes rule supreme

As Marcel Proust famously said, the '*Remembrance of things past is not necessarily the remembrance of things as they were*'. The inherent unreliability of memory does mean that it is fair and proper to test the accuracy of recollections of medical consultations against what is documented in the records. Unless there is good reason to decide otherwise, it is likely that information contained in contemporaneous documents will prevail.

Oral testimony suffers from well-known limitations

References

[1] *Thomas Sheard -v- Dr Paul Cao Tri Do, University Hospitals Birmingham NHS Foundation Trust* [2021] *EWHC* 2166 (*QB*).

[2] *Gestmin SGPS SA -v- Credit Suisse (UK) Ltd* [2013] *EWHC* 3650 (*Comm*).

[3] *Lachaux -v- Lachaux* [2017] *EWHC* 385 (*Fam*) [2017] 4 *WLR* 57.

[4] *Carmarthenshire County Council -v- Y* [2017] *EWFC* 36 [2017] 4 *WLR* 136.

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