Your Witness

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Paying LiP service

We received an interesting call to the *Register* Helpline recently concerning a case in which the instructing solicitor wrote to the expert to say...

> *'Please note that with immediate effect, we no longer act on behalf of the Claimant in this matter. He will be acting as litigant in person (LiPs).'*

The expert had prepared reports and a joint statement with the defendant's expert in this civil case, and had been warned for trial in the county court several weeks hence. The expert's contract was with the solicitor, not the solicitor's client.

The risk of coming into contact with LiPs is ever increasing, so it's worth considering what one might do in such circumstances.

As the instruction of expert witnesses is governed by contract, once the solicitor stepped away from this case, the expert's contractual duties ended. The expert concerned thought he should tell the LiP he would take instructions direct, but only if the LiP paid up front. In offering to work on a 'cash on account' basis (and I would not blame him for taking that line!), the expert would be forming a new contract.

One important consideration for the expert, though, is his **overriding duty to the court**. Once an expert agrees to act in a given case, an overriding duty to the court arises. In the current situation, the expert must consider that duty in deciding how to proceed. Unless withdrawing completely from the case, his duty to the court may cause the expert to act in a way different from how he might proceed in a purely commercial context. In my view, the closer one is to any trial, the more heavily must weigh that duty to the court.

Professional indemnity insurance

The *UKREW Professional Indemnity Insurance Scheme* (see back page) has been saving expert witnesses serious amounts of cash since it began back in 2011. However, when it comes to medical experts, the loss of revenue to the mutual insurers (e.g. MDU, MPS, etc.) seems to have risen to the point that they now feel the need to take action. We have heard, so far from just a single medical expert, that one of the mutuals has said the expert must take all his PII cover with it, or it will refuse to provide any cover. The mutual claims that if the expert has his clinical work covered by the mutual and his expert witness work covered by another insurer, then it creates a conflict of interest. This seems to me to be a spurious claim, and with any medical consultant a risky game for the mutual to play since Lockton's Professional Negligence Division is able to provide quotes for complete cover!

If you've been told by a medical mutual insurer that it operates an 'all or nothing' policy, I'd be interested to hear from you so as to judge whether this is an isolated incident.

Bank of the Expert Witness

One of our arboricultural experts wrote to say that he is receiving ever more requests to withhold billing until the case in question is concluded. They usually come from solicitor firms which are themselves working under a CFA ('no-win, no-fee' agreement). If you are contemplating agreeing to such requests for business reasons, there are a few issues worth considering.

The rules for experts working on a contingency fees basis used to be very clear: there was a complete ban. But the current position is '*that it will be a rare case indeed*' when the court will be prepared to consent to an expert being instructed under such an agreement. It has always been permissible, though, for experts to agree terms that allow for payment at the end of the case.

I think that if litigants want to use me as a bank, they ought to **pay for the privilege**. But one also needs to be clear about what 'the end of the case' means. Indeed, it could be argued that until you have been paid, the case isn't closed! You must also consider the **creditworthiness of instructors**. Leaving credit tales of 18 months and more opens you up to a much higher risk of someone defaulting on your invoice.

Our advice is to set up a contract that makes it clear the premium you will charge for lending your money, potentially offering a discount for earlier than expected settlement. Your contract should also detail what 'end of the case' means. You may conclude that, given you have no control over case conduct, you instead prefer to work on a defined timescale, say payment in 18 months. It is wisest, though, to invoice as work is completed, issue bills with defined deferment periods, and be quick to take up debt recovery measures should your already generous nature be abused. And having a contractual clause that creates the right for you to claim your debt recovery costs is a sensible move given that there is no statutory right to costs in small claims proceedings.

Draft time

Preparations for edition 30 of the *UK Register of Expert Witnesses* have begun. A draft of your entry for the new edition will be sent in the New Year for you to check, sign and return. **If you will be away during the first half of January 2017** you may wish to contact us now so that we can make appropriate alternative arrangements.

Chris Pamplin

Confronting dogma demands extra

Confronting dogma carries significant reputational risk

Publicly confronting dogma is a risky business that can have long-lasting consequences. Galileo was found guilty of heresy in 1615 for claiming the Earth moved around the sun. He was finally exonerated by the Catholic church in 1992! Thankfully, Waney Squier didn't have to wait quite as long.

Challenging professional dogma

Dr Squier, a consultant at the Radcliffe Infirmary in Oxford and lecturer at Oxford University, has practised as a neuropathologist since the 1970s, and in the late 1980s she developed a medico-legal practice. Her work included cases involving babies who had died from suspected non-accidental head injuries (NAHI). The balance of medical opinion at that time was that the so-called triad of injuries (subdural haemorrhage, retinal haemorrhage and encephalopathy) was itself indicative of a non-accidental head injury. However, by 2003, Squier came to doubt the majority view and the reliability of previous medical evidence (including her own) in cases of shaken baby syndrome. It seems this was due, at least in part, to research carried out by Dr Jennian Geddes which had cast considerable doubt on the then prevailing professional view. Consequently, Squier appeared as an expert witness for the defence in a number of cases where NAHI caused by shaking was alleged.

A complaint was made to the GMC about reports she had provided and evidence she had given between 2007 and 2010 in relation to six babies. The charges she faced were that she had failed to discharge her duties as an expert by failing to work within the limits of her competence, failing to be objective and unbiased, and failing to pay due regard to other experts' views.

As many as five witnesses were called in support of Squier, including Dr Geddes, who described her as '*an outstanding academic neuropathologist*' and '*a woman of great integrity*'. However, the tribunal held that Squier was dogmatic, inflexible, evasive and unreceptive, and that her determination to pursue her own opinion led her to make *'outrageous and untruthful assertions*'.

GMC decision-making found wanting by the High Court

Following the decision, Michael Birnbaum QC, who appeared for Squier, said that in his 43 years of practice at the Bar he had '*rarely read a judgment of an English Court or Tribunal so deeply flawed and unfair as this*'. Fears were expressed that, if the decision was allowed to stand, it would have consequences for the wider justice system and would discourage experts from challenging any established dogmas in the light of new findings and new research. Louise Shorter, of the group 'Inside Justice', said that the decision would '*only serve to silence experts who ought to be applauded for sharing their knowledge and understanding. And if that situation is allowed to remain, that is a serious threat to us all*'.

Clearly the case raises some issues of profound concern for experts who go against the grain to challenge established professional doctrine.

On appeal

Dr Squier appealed. In a lengthy judgment[1], issued in November 2016, Mitting J found that although many of the tribunal's findings regarding Squier's conduct in the six cases were justified, the overall determination was flawed in some significant respects. The Court held that on occasion Squier had strayed outside her area of expertise. In other instances, she had cited medical papers and research that did not necessarily support her conclusions, and this should have been made clearer in her evidence.

Guidance on citing the research of others

Mitting J gave guidance on the way other research should be cited in an expert report. He said that the duties of an expert when citing the work of others are not controversial; it is axiomatic, and so does not need to be spelt out in a rule. However, an **expert must not cite the work of others as supporting his or her view when it does not**. If another's work is capable of being supportive, but only with significant qualification, that must be stated clearly.

Counsel for Squier had suggested that, in a field such as NAHI in babies, the number of experts able to give relevant evidence is small, and those who are willing to do so is smaller still. Counsel argued that when dealing with such a small group of experts, it is sufficient for an expert to cite the research paper by name and date and to leave it to others to point out the respects in which the paper does not support the view. The judge did not accept that proposition.

He said that **one of the overriding duties of an expert is not to mislead**. Baldly stating, without qualification, that a research paper is a proper foundation for the proposition the expert is seeking to advance is justified if that is the conclusion of the research paper; but if it is not, it should not be cited, without qualification, as supportive. From a detailed analysis of Squier's practice in relation to citing research, it seems that she often cited a paper, not for its conclusion (which did not support her opinion), but for some nugget within it that she thought did. It was the Court's view that when she took that approach, she was not fulfilling her duty as an expert witness.

GMC's 'disturbing lack of understanding'

However, the judge was quite clear in his view that many of the findings of the tribunal had been deeply flawed and unjustified. Whatever the limitations created by Dr Squier's approach to citations, she had not been untruthful and neither had she intended to mislead the court or manipulate the evidence.

Allowing the appeal, the Court found that some of the tribunal's errors revealed a disturbing lack

of understanding and overstatement about what had occurred. Several of the sub-charges should not have been found proven, and the flaws included the tribunal:

i) finding that Squier had strayed outside her expertise when she'd been pressed to do so in cross-examination and had twice stated that she was not an expert in the field
ii) mis-stating expectations as to the citation of research papers
iii) finding that Squier had failed to pay due regard to the views of other witnesses, when she had not
iv) finding aspects of Squier's evidence misleading, when it was not
v) making inappropriate findings about dishonesty and deliberateness, and
vi) inaccurately summarising Squier's reasoning.

It may be relevant that the GMC's tribunal panel was composed of a retired RAF wing commander (chair), a retired senior policeman and a retired geriatric psychiatrist. Following the decision of the tribunal, the accusation was levelled that this panel had simply been insufficiently competent to understand and make a proper assessment of the complex issues in the case. Michael Birnbaum went further and said that '*the Tribunal appeared to be strongly biased against Dr Squier, not only because it omitted most of the defence case, but because of its outrageous treatment of the five expert witnesses who gave evidence on her behalf*'. In a letter to *The Guardian*, Michael Mansfield QC and Clive Stafford Smith said that it was '*a sad day for science when a 21st-century inquisition denies one doctor the freedom to question 'mainstream' beliefs*'.

Responding to these criticisms, Niall Dickson of the GMC said that the GMC did not try to be, and had no intention of being, the arbiter of scientific opinion. He said that the allegations brought against Squier did not rest on the validity of her scientific theory, but upon her competence and conduct in presenting her evidence to the courts. He said that the GMC recognised that scientific advance is achieved by challenging, as well as developing, existing theories, and expressed the view that neither the GMC nor the courts are the place where such scientific disputes can be resolved.

It appears, however, that the appeal court did have real concerns over the constitution of the tribunal and the manner of its deliberations. Concluding his judgment, Mitting J said that, from the perspective of both case management and understanding the context in which expert evidence was given in civil, family and criminal proceedings, it would have been desirable for the tribunal to have been chaired by a lawyer with judicial experience. Under the *General Medical Council (Constitution of Panels, Tribunals and Investigation Committee) Rules 2015*, the tribunal was obliged to maintain a list of tribunal members, including lay members. Under r.6(4), it was also obliged to maintain a list of persons eligible to serve as tribunal chair, including 'lay' members. A lawyer with judicial experience fell within the definition of a 'lay member'. There was nothing in the rules to prevent a lawyer with judicial experience from being appointed to chair a complex case, and it would have been better if such a power had been exercised in this case.

Exemplary expert witness practice essential when challenging dogma

Pot calling the kettle black?

So one might expect a little eating of humble pie from the GMC. Not a bit of it. On 3 November the GMC's website said the court '*has confirmed that this case was not about scientific debate and the rights and wrongs of the scientific evidence, but the manner in which Dr Squier gave evidence*'. It goes on: '*the ruling makes clear that she acted irresponsibly in her role as an expert witness on several occasions, acted beyond her expertise and lacked objectivity, and sought to cherry-pick research which it was clear did not support her opinions*'.

The use by the GMC of the phrase 'cherry picking' is interesting. In seeking to defend its own position, the GMC has chosen to steer clear of comment by the Court on the errors and woeful inadequacies of the GMC's tribunal, the selective way it dealt with the witness evidence, the fact that it got most of its decisions plain wrong and the judge's comment regarding its constitution. The words 'pot' and 'kettle' spring to mind!

Lessons for experts challenging dogma

However, a major concern from this case is the chilling effect it could have on the supply of experts willing to stand up in court and confront professional dogma. Whatever the GMC thinks about the proper place to challenge dogma, it should be recognised that shaken baby syndrome, and the triad of supposedly diagnostic injuries, is a ***forensic diagnosis***. It is not a diagnosis that seeks to help the child, but rather one to point a finger of blame.

Based on the Court's judgment, Dr Squier's expert witness practice opened her to some justified criticism, but that should not distract from her entirely legitimate attempts to call into question current dogma. For her to risk losing her professional reputation as she confronts dogma that she doesn't support is troubling.

If you are about to set out to challenge a piece of professional dogma, what lessons can you take from this case? First, experts are under a duty to present the **range of opinions that exist** in a field. It simply isn't safe to ignore the majority position just because you think it is flawed. Second, **when challenging the majority, you can expect to face strong resistance**, and one easy way to neutralise your challenge is for the other side to 'play the man, not the ball'. Your expert witness practice, the way you write reports and how you give evidence must be exemplary if you wish to avoid giving others easy sticks with which to beat you.

References

[1] *Squier -v- General Medical Council* [2016] *EWHC* 2739 *(Admin).*

Requests to change an expert witn

When is it acceptable to change a report should a lawyer ask?

We often receive inquiries from member expert witnesses expressing concern about being asked to make material changes to a report by the instructing solicitor. In a recent helpline query, our expert wondered how to respond to such requests and the extent to which he can reasonably comply with them yet remain within the bounds of both his duty to the court and his role as an independent expert.

The basics

As set out neatly in the criminal case of *Harris*[1], the primary duty of expert witnesses is to **provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise**. This overrides any obligation to the party from whom the expert is receiving instructions. Of course, all experts are (or should be) familiar with the principles laid down in *The Ikarian Reefer*[2] case. It established the following duties and responsibilities of expert witnesses in civil cases, which have since been followed in criminal cases too.

- Expert evidence presented to the court should be, and be seen to be, the **independent product of the expert** uninfluenced as to form or content by the exigencies of litigation.
- The witness should only provide expert opinion on matters **within his expertise**, and **not assume the role of advocate**.
- The witness **should not omit facts that detract from his final conclusions or opinions**.
- The witness should **state whether it is a provisional opinion, and state any qualifications**.

While these are well-known 'pillars of wisdom' on the role of the expert witness, they are not entirely satisfactory. For example, how can an expert witness be '*uninfluenced by the exigencies of litigation*' when it is only because of the litigation that any instructions have been received – and the form of those instructions will most certainly be influenced by the litigation. The instructing solicitor has an important role to play in issuing instructions, as well as ensuring that the expert fully understands the instructions, the issues to be addressed and the form and content of the report.

Experts should never agree to distort their true opinions

The role of the solicitor in instructing the expert and the expectations of the court in this regard are set out in the Civil Justice Council's *Guidance for the instruction of experts in civil claims 2014* (CJC's *Guidance*) and the commentaries thereon. Experts should not be surprised, therefore, if an instructing solicitor raises questions, or asks for a report to be clarified or amended, to ensure compliance with one or more of the following.

Clarity of reasoning

If it is not immediately clear how a particular conclusion has been reached, the expert witness can legitimately be asked to **explain the reasoning**. The solicitor will be expected to **ask questions about any aspects of the report that are unclear**.

Fact checking

A solicitor may also check that matters contained in the report are factually correct, the report does not go beyond the pleaded case and it supports the pleaded case to the requisite standard of proof. That isn't to suggest that it is proper for a lawyer to ask an expert to 'beef up' an opinion to try to reach the necessary standard of proof. If the expert's opinion does not support the case to the necessary degree, then so be it.

Paragraph 65 of the CJC's *Guidance* states that it is acceptable for instructing solicitors to **ask for amendments to the draft expert report in relation to factual accuracy and procedural compliance**, but they **must not ask for the expert to amend a report in a way that distorts the opinion**.

> *'65. Experts should not be asked to amend, expand or alter any parts of reports in a manner which distorts their true opinion, but may be invited to do so to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues. Although experts should generally follow the recommendations of solicitors with regard to the form of reports, they should form their own independent views on the opinions and contents of their reports and not include any suggestions that do not accord with their views.'*

There is sometimes a fine line between what constitutes a reasonable and legitimate request for amendment and one that strays into potentially dangerous territory. It might be particularly so when the instructions emanate from a very junior or inexperienced lawyer. It should, however, be reasonably apparent to most experts when the line has been crossed. In considering whether a request to alter a report is acceptable, it is a useful test to imagine yourself standing before the judge, who has in hand both versions of your report, and explaining the justification for the change you are about to make. The more comfortable you feel about that encounter, the more likely it is that the change is a permissible one to make.

Staying within one's area of expertise

Paragraph 24 of the CJC's *Guidance* stipulates that **experts must neither express an opinion outside the scope of their field of expertise nor accept any instructions to do so**. If there is an issue in the pleading that is within the competence of the expert and it is one that has not been covered in the report, then an expert should have no objection if it is pointed out with a request that the report be amended to correct the omission. The expert is not, of course, required to address every point in the pleadings if they include areas that fall outside the expert's area of expertise. For example, in a case where there are experts from different disciplines, let us say a forensic

pathologist and a neurosurgeon, and a solicitor requests an expert in one discipline to add material to the report purporting to support or undermine the findings of the other, it would obviously be wrong to do so. The expert would be stepping outside his area of expertise, and it would serve only to invite criticism and to diminish the weight of his evidence as a whole.

Avoid speculation

It may also sometimes happen that a solicitor tries to make do with one expert when the breadth of expertise needed makes instructing more experts preferable. In *R -v- Clarke*[3], an expert in fractures and bone disease was asked to give an opinion as to the cause of death. The court held that he did not have the experience or expertise to consider all of the causes of death and that a forensic pathologist should have been instructed. **Experts should be vigilant of such 'penny pinching' and decline to speculate**, even though it is sometimes tempting to do so.

Avoid advocacy and the ultimate issue

Experts should also beware of requests to include comment or opinion on judicial or evidential matters or those that stray into areas of advocacy. In *R -v- Cleobury*[4], a DNA expert prepared a report for the purposes of an appeal that criticised the judge's summing up in the original trial and commented on the importance of the forensic evidence to the case as a whole. Thomas LJ refused the application, stating:

> *'This comment, quite apart from involving an expert in straying into matters of advocacy rather than providing an expert opinion, further underlines the dangers of an expert so opining because he simply did not understand the sequence of events'.*

That is a common theme: experts who think they have spied some injustice but who are, in truth, only privy to a small window on the evidence in the case. When taking the broad overview of the complete evidence base, such concerns often evaporate.

Another example might be if an expert in an asylum case who, having opined in the report on the position of certain ethnic groups in a particular country, is then asked by a solicitor to state specifically whether the person is a refugee. Such a statement would, of course, be to **usurp the function of the tribunal**, and is one that the wise expert would avoid. In *Gomez -v- SSHD*[5], the court pointed out that an **expert is not a judicial decision-maker**, and the '*duty to test and evaluate the evidence in accordance with the legal criteria contained in the 1951 Refugee Convention*' falls to the judge.

It is possible that an expert might be asked to go even further and to express a view on, for example, whether a witness with an injury is telling the truth concerning the circumstances of a road traffic accident. Again, it would be outside the competence of an expert to give an opinion on such an issue. These matters are for the court alone to decide.

So far as the ultimate issue in a case is concerned, it has long been the accepted rule that expert witnesses should not express an opinion on issues the court has to decide. However, recent cases have suggested that the courts are increasingly less squeamish about this in situations where:

- the expert's view on the ultimate issue may, in any event, be implied by the content of the report, and
- there appears to be little point in stopping short of actually expressing an overt opinion.

However, as the recent appeal in *Sellu -v- The Crown*[6] shows, in such cases it is vital that the judge clearly explains to any jury the weight it should give to an expert's expressed view on an issue that it should be deciding for itself.

Late-stage changes

The foregoing is of relevance primarily in considering requests to amend reports at the draft stage. There may, of course, be perfectly good reasons to amend or supplement an expert's report at a later stage, for example:

- because **new evidence** has come to light after the first report was served
- **following an agreement reached at a meeting between the experts**
- **following an exchange of questions and answers**, and/or
- because the expert **missed an important or significant point**.

Where amendment is requested as a result of new evidence or a missed point, the amendments must be restricted to updating the report rather than re-writing it entirely, and changes must be limited to dealing with the new evidence. An amended report should **set out the reasons for the amendments**, and the amendments should be **clearly marked**.

There is one other area where the CJC's *Guidance* makes a specific prohibition, and that is in relation to meetings of experts. Paragraph 77 stipulates that **instructing experts must not tell experts to avoid reaching an agreement** (or to defer doing so) **on any matter within the expert's competence**. Experts are not permitted to accept such instructions.

Conclusion

The general rule is that **experts should not be asked to amend, expand or alter a report in a manner that distorts their true opinions, but may be invited to do so to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues**. Although experts should generally follow the recommendations of solicitors about the form of reports, they should form their own **independent views** on the opinions and contents of their reports, and **not include any suggestions that do not accord with those views**.

Changes to ensure accuracy, clarity and relevance are acceptable

References

[1] *R -v- Harris & others* [2005] *EWCA Crim* 1980.

[2] *Ikarian Reefer* [1993] 2 *Lloyds Rep* 68 at p81.

[3] *R -v- Clarke & Another* [2013] *EWCA Crim* 162.

[4] *R -v- Cleobury* [2012] *EWCA Crim* 17.

[5] *Gomez -v- SSHD* (00/TH/02257).

[6] *Sellu -v- The Crown* [2016] *EWCA Crim* 1716.

Medical reports for employers

Medical reports for employers: a growing market

A growing area of work for experts is in the field of employment. Aside from expert reports in connection with litigious matters, there is an increasing tendency for employers to request medical reports in other circumstances. It throws up a whole number of issues for the experts involved.

Employment-related medical reports

There are a number of instances when an employer might wish to obtain a medical report in respect of an employee or prospective employee. Prior to employment, an employer might seek a report if health or physical ability is relevant to the job or it is a prerequisite for membership of any of the benefits the employer offers, such as health insurance. After employment has commenced, a report might be sought to establish whether:

- an employee's record of short-term intermittent absences results from an underlying medical condition
- an employee is suffering from a physical or mental impairment that might constitute a disability under discrimination law
- there are any reasonable adjustments that might help a disabled employee to do their job or to avoid workplace disadvantages, or
- someone on long-term sickness leave is likely to return to work in the future.

Medical reports that fall into this category are governed by a number of provisions that need to be observed carefully. They require that such reports should:

- not be unnecessarily obtrusive
- be focused on the relevant questions, and
- not breach the employee's right to privacy or the Data Protection Act 1998, or be discriminatory under the Equality Act 2010.

On the first point, the employer's request for medical information should be made with reference to the employee's ability in respect of the job, adjustments to that job or alternative employment, and should not relate to the employee's medical condition generally. Where the purpose of the report is to determine eligibility for health insurance or early retirement, details of any scheme must be provided with supporting documents.

When a treating physician is asked to report it carries extra burdens

Access to Medical Reports Act 1988

One of the most important provisions to consider before providing a medical report to an employer is the employee's rights under the Access to Medical Reports Act 1988 (AMRA). The Act contains important provisions designed to protect the employee in cases where medical reports for 'employment purposes' have been requested from a medical practitioner who has been responsible previously for the employee's clinical care. This includes medical reports obtained in connection with investigations into an employee's sickness record or absence, or with a view to possible dismissal. It also includes reports obtained in connection with recruitment. The main provisions of AMRA can be summarised as follows.

- Employers must give employees a statement of their rights.
- Employees must provide written consent to the examination and report preparation.
- Employees must have the opportunity to see any report before it is sent to the employer.
- Employees may request changes to the report, but cannot insist on them.
- Employees may refuse to allow the report to be disclosed to the employer.

Although the Act places the burden on the employer to notify the employee of the right to withhold consent, there is also some obligation on behalf of the medical practitioner to ensure that there is compliance. The BMA was involved in the drafting of the Act and has also published its own guidance on access to medical reports.

It will be noted that to trigger AMRA, the medical practitioner must have been responsible for the clinical care of the individual. At first sight it would appear that one-off medical reports prepared, for example, by a company doctor, an occupational health physician or an independent specialist will fall outside the scope of AMRA. However, there would be dangers in making this assumption. For example, a practitioner may have seen the employee before in connection with an entirely separate illness or injury, and the Faculty of Occupational Medicine advises that '*it is up to the occupational physician to determine, on each occasion, whether previous activities amount to provision of care*'.

Even if there has been no previous contact between the practitioner and the employee, it would still be necessary to observe the provisions of the Act if the practitioner was to obtain, for instance, a report from the employee's GP for the purposes of his assessment.

Notwithstanding that a one-off report from a specialist is deemed to fall outside the scope of AMRA, guidance issued by the BMA advises that doctors should still be prepared to discuss the contents of their reports with patients and that, in any event, patients are entitled to seek a copy of the report under the Data Protection Act 1998. The GMC also advises that practitioners should offer to disclose the report to the patient, whether or not this is required by law.

Definition of 'employee' a bit vague

The rights of individuals arising under these provisions are limited under section 1 of the Act to those who are employed '*whether under a contract of service or otherwise*'. The definition is somewhat vague and does not conform to standard definitions of employees found elsewhere in employment legislation. Consequently, it is unclear how far, if at all, the provisions can be applied to the self-employed, contractors and consultants.

Disclosure of draft reports

A recent decision of the Birmingham County Court has suggested that in some circumstances the court can order the disclosure of items such as draft documents and even a solicitor's attendance notes of conversations with experts.

Expert witness reports are disclosable...

It has been established as a general principle that **where a party makes an application to the court to change experts, the court may order disclosure of the first expert's report as a condition of allowing the change**. This also applies to any draft report containing the substance of the expert's opinion. It was the approach taken by the court in *Beck*[1] and followed in the more recent case of *Edwards-Tubb*[2].

In *Edwards-Tubb*, the court emphasised that the condition on disclosure of the first report was a matter of discretion. Hughes LJ took the view that disclosure should be the usual order of things rather than the exception. The issue did not concern simply whether a second expert should be instructed.

It was accepted that there may be good reason why a party wants to instruct a second expert, and that it may not always be that the first expert's report is considered to be too favourable to the other side. If a party merely wishes to seek a second opinion, it would be unfair to deny that and instead force the party to rely on an expert in whom it had lost confidence.

However, should the first expert's opinion be denied to the other party? The court thought that, whatever the reason for subsequent disenchantment, **there could rarely be any justification for not disclosing the earlier report**. It is important for the court to exercise the control afforded it by Civil Procedure Rule (CPR) 35.4 to maximise the information available to it, and to discourage 'expert shopping'.

... but expert advice is considered secure

It is apparent that if a party later needs permission under CPR 35.4 to adduce expert evidence and the opponent is aware that an earlier report exists, that permission is likely to be granted conditional upon disclosure of the earlier report. The position is, however, thought to be different when a party obtains expert advice prior to court proceedings being commenced, when pre-action protocols are in force and the expert is not at that point instructed to prepare a court report.

In *Edwards-Tubb*, Hughes LJ stated it this way:

> *'Where a party has elected to take advice pre-protocol, at his own expense, I do not think the same justification exists for hedging his privilege, at least in the absence of some unusual factor. As Brooke LJ observed in* Carlson[3]*..., a party is then free to take such advice on the viability of his claim as he wishes. An expert consulted at that time and not instructed to write a report for the court is in a different position, and outside CPR r 35.2'.*

Now that quite straightforward position has been cast into doubt by the case of *Coyne -v- Morgan*[4], in which Birmingham County Court was asked to consider whether a first structural engineering expert's draft report should be disclosed as a condition of allowing a party to change experts.

Latest cases blur the distinction

In *Coyne*, the judge took notice of the judgment in *BMG (Mansfield) Ltd*[5], which at paragraph 21 appears to suggest that the court has the power to require the disclosure of all former undisclosed expert reports as a condition for permission to call a new expert. If this decision is correct, it creates some blurring of the distinction between what constitutes a document that contains 'the substance of the expert's opinion' (e.g. a telephone log) and a true draft of the expert's evidence. It also creates some ambiguity as to the fine line between expert advice and expert witness reporting.

The judge in *Coyne* went on to consider the question of disclosure of other documents that might, under normal circumstances, be considered privileged. The judge quoted paragraphs 29–32 of the *BMG* judgment, referring to circumstances where the court might order disclosure of documents, e.g. attendance notes of telephone calls with the expert that record (or purport to record) the substance of the expert's opinions.

The judge in *BMG* identified at least two difficulties in the disclosure of such documents, which are, of course, privileged. The first is that they will probably not record the expert's actual words, but rather the substance of what the solicitor understood the expert to have said; the two may not be the same. The second is that the notes may well contain material that is not expert opinion.

He considered that, while it may be said that the second difficulty could be overcome by appropriate redaction, as so often happens when confidential documents have to be disclosed, this would not prevent the problem that the disclosed passages often have to be read in the context of the redacted passages so that they make sense.

However, the judge in *BMG* went on to conclude that there would have to be '***a very strong case to justify a condition that such expert's attendance notes should be disclosed in addition to any reports or draft report by the expert***'.

In doing so, in the opinion of the judge in *Coyne*, this comment implies that the court can order the disclosure of such documents if such a 'strong case' is made.

Conclusion

If this principle is a correct interpretation, it creates an alarming extension of the law in this area, and one that seems more likely to add confusion rather than clarity to the proceedings.

Releasing details of early conversations unlikely to assist the court

References

[1] *Beck -v- Ministry of Defence* [2003] *EWCA Civ* 1043.

[2] *Edwards-Tubb -v- JD Wetherspoon plc* [2011] *EWCA Civ* 136.

[3] *Carlson -v- Townsend* [2001] *EWCA Civ* 511.

[4] *Coyne -v- Morgan & Another (t/a Hillfield Home Improvement)* (unreported), 24 May 2016.

[5] *BMG (Mansfield) Ltd & Another -v- Galliford Try Construction Ltd & Another* [2013] *EWHC* 3183 (*TCC*).

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