Your Witness

Newsletter of the UK Register of Expert Witnesses published by J S Publications

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Issue 87

March 2017 © J S Publications

Get the basics right

No matter how good an expert might be, or how eminent, his evidence will be of little value if it fails to address an opponent's case. This point was driven home hard by Andrews J in *Sally Harris -v- Francis Johnston* [2016] *EWHC* 3193 *(QB)*. The case involved a claim for clinical negligence brought against the defendant consultant neurosurgeon. During the course of surgery, the defendant, using a Cobb dissector, caused injury. The court was asked to determine whether the neurosurgeon's standard of care had fallen below that to be reasonably expected.

In his report, the defendant's expert referred throughout to the defendant having used a Cobb *dissector*. For some reason, however, the claimant's expert referred in his report to the use of a Cobb *retractor*, which is an entirely different instrument. In his report, the claimant's expert had, therefore, proceeded on an entirely erroneous assumption as to how the injury had occurred. He had made no reference to what was pleaded in the defence or the evidence as to what actually happened, ignoring all references to the instrument being blunt – which the dissector is but the retractor isn't. It was clear from this that, at the very least, he had not read the material before him with the appropriate degree of care or asked the questions one would have expected of him to obtain clarification.

During cross-examination, the claimant's expert admitted that he should have checked the facts. He argued, however, that he was still able to respond to the defendant's expert's report and that, whatever instrument had been used, it had ended up in the wrong place and was indicative of negligence. The judge viewed this as being both intransigent and unhelpful. It is worth noting that this expert had been criticised previously in another case for making factual assumptions without checking their accuracy.

The judge could, of course, have allowed the expert to proceed to respond to the defendant's points on the grounds that the failings in his report would go only towards issues of his credibility as a witness. In this case, however, Andrews J took the view that the effect of the expert's failings went far beyond matters of mere credibility. His fundamental misapprehension as to how the injury was sustained meant that the first time he addressed the defence case was in cross-examination, at which point he had attempted to introduce two entirely new hypotheses, of which no mention had been made in his report.

The judge was in no doubt that the expert had failed in his duty under CPR Part 35 and this was made worse by the fact that he had been criticised previously for factual inaccuracy. Under the circumstances, the judge found that he had no option other than to disallow the claimant's expert's evidence in its entirety. Instead, the claimant would have to rely on the defendant's expert evidence which opined that, if the court accepted the defendant's account that he exerted only gentle pressure to pull away soft tissue which he found to be '*very tough and fibrous*', then he did not fall below an acceptable standard of care.

Experts must be alert to their duty to use care in checking their facts and to address the facts at issue. If necessary, they should seek clarification. Failure to do so may not only affect their credibility as an expert but might lead to the whole of their evidence being disregarded. On the basis that the failure is indicative of lack of care and breach of duty, it could prove disastrous to the expert personally and the expert's party, even if the error or misapprehension is less serious than in the instant case.

Seeking directions

We had an expert call our Helpline to ask about the procedure to follow when seeking directions from the court. He was faced with a lawyer trying to force him to modify his report. He wondered whether he could disclose to the court the offending instruction. The procedure contained in CPR 35.14 probably makes that a moot point.

The CJC's Guidance on seeking directions is:

28 *Experts may request directions from the court to assist them in carrying out their functions (CPR 35.14), for example, if experts consider that they have not been provided with information they require. Experts should normally discuss this with those who instruct them before making a request. Unless the court otherwise orders, any proposed request for directions should be sent to the party instructing the expert at least seven days before filing any request with the court, and to all other parties at least four days before filing it.*

29 *Requests to the court for directions should be made by letter clearly marked 'expert's request for directions' containing:*
(a) the title of the claim;
(b) the claim number;
(c) the name of the expert;
(d) why directions are sought; and
(e) copies of any relevant documentation.

So, in telling the solicitor that you intend to ask the court for directions under CPR 35.14, you may very well find that he backs off!

Chris Pamplin

Trial windows, dates and experts

We all have a duty to help the court use its time well

Expert witnesses, like other professionals, are busy people and have to juggle their available time (both personal and professional) as best they can. The courts, too, with increasingly over-stretched resources, must endeavour to manage court time as efficiently as possible. Both must seek to maintain some measure of flexibility, but what happens when their paths collide?

This was the question posed to us on the *Register*'s helpline by a GP who found himself saddled with **a 3-month trial window for a trial estimated to last 9 days**! (There's a sting in the tail that we will come to presently.) He tells us that his instructing solicitor did not consult him regarding his availability prior to the trial window being fixed, and neither has he responded to the expert's concerns in the period since. The trial window already clashes with other dates fixed for trials in which the same expert is involved, and also covers a period during which the GP had entertained the hope of a well-earned family holiday.

The expert wanted to know whether such long trial windows are considered appropriate and fair, and what he might do in circumstances where he is unable to guarantee his availability for the whole of the period.

Trial windows

Trial windows are managed by the court. It maintains a list of available time slots and must allocate cases based on a number of factors, including:

- the **expected length of the trial**
- whether there might be **other cases within that same trial window that might not proceed** (or 'go short'), and
- the **likely availability of counsel, witnesses, etc.**

Three months is quite a long trial window period but not unknown, and one must presume that the court listing officer had fixed it according to a reasonable consideration of all the relevant factors. It is not, of course, an exact science and difficulties are not uncommon.

Confusing the trial window and trial date don't help

As a general rule, **provision for fixing trial windows and trial dates will be made at the directions stage**. Initially, a claim may be given a 'trial window' of several weeks, during which it is expected the trial will take place. The estimate of the length of the trial is provisional at this stage. If a party comes to believe that too much or too little time has been allowed, the court must be informed and reasons given.

Standard directions in the civil courts will prescribe a date by when the parties must file with the court their availability for trial, preferably agreed and with a nominated single point of contact. They will subsequently be notified of the time and place of trial. If there are periods when a party or a witness would not be able to attend court, the party must inform the court of this by the date stated. If it isn't done, it may be very difficult, or even impossible, to change the trial date later.

In arranging the trial date, the court office will work with the persons named in the Directions Order as the 'single point of contact' for each party. That means the expert will always be dependent on the diligence of that contact person in keeping everyone informed of timetabling progress.

How timetabling is supposed to work

Rules and procedures for fixing trial windows vary between courts and according to the nature of the proceedings. But the considerations will be similar in most cases. We will take as an example the procedure adopted for cases to be heard in the Rolls Building in the Chancery Division. In such cases the court will give directions at an early stage in the claim with a view to fixing the period during which the case will be heard. This is normally done either when the case is allocated or subsequently at a case management conference or other directions hearing.

In determining the trial window, the court will have regard to the listing constraints created by the existing court list and will determine a trial window that provides the parties with enough time to complete their preparations for trial. **A trial window, once fixed, will not readily be altered.**

It must be borne in mind, however, that **a trial window is not the same thing as a trial date**. In the Chancery Court, when fixing the trial window the court will direct that one party, normally the claimant, makes an appointment to attend on the Judges' Listing Officer to fix a trial date within the trial window and gives notice of that appointment to all other parties. The order to attend on the Listing Officer imposes a strict obligation of compliance, without which the trial window that has been given may be lost.

At the listing appointment, the Listing Officer will take into account, insofar as it is practical to do so, any difficulties the parties may have as to the availability of counsel, experts and witnesses. The Listing Officer will, nevertheless, try to ensure the speedy disposal of the trial by arranging a firm trial date as soon as possible within the trial window. If, exceptionally, it appears to the Listing Officer that a trial date cannot be provided by the court within the trial window, the trial date may be fixed outside the trial window at the first available date.

A party wishing to appeal a date allocated by the Listing Officer must, within 7 days of the allocation, make an application to the Interim Applications judge. The application notice should be filed in the Listing Office and served, giving one clear day's notice to the other parties.

As mentioned, procedures in other courts may differ. However it is done, though, it will be a common feature in all cases that **when fixing trial dates the listing should be made with due regard to the availability of all those involved**.

This includes not just expert witnesses, but also counsel and the trial judge, all of whom are likely to have other trials and hearings during the period of or close to the trial window. Wherever possible, the listing must try to accommodate all the individuals involved, but sometimes it is simply not possible and compromises have to be made.

Case management requires that these matters are kept under review. There should be opportunities at pre-trial review and on fixing the trial timetable to check that everything is ready to proceed smoothly and to manage the attendance of witnesses.

Experts should notify their instructing solicitor at the earliest opportunity of any matters likely to affect their availability for trial. However, once a trial window has been fixed, it would, we suggest, be inappropriate to arrange holidays or other such personal commitments that would clash. Such an action is unlikely to be viewed favourably by the court. Indeed, as we shall see shortly, Lord Woolf himself made it clear that expert witnesses must be prepared to incorporate a degree of flexibility into their practices to meet the demands of court attendance.

It will be the nominated single point of contact (usually the solicitor's) responsibility to notify the court of the availability of witnesses. However, once a trial date has been fixed, it will, like a trial window, be altered or vacated only rarely. In exceptional circumstances an application to adjourn a trial date can be made. In a hypothetical situation where, late in proceedings, an expert whose evidence is vital is, through no fault of his own, unable to attend a trial on a specified date, an adjournment might be allowed where the trial date cannot stand without injustice to one or both parties.

Sting in the tale

What we have not revealed so far is that our unfortunate expert wasn't just warned about the 3 months, he has in his hand a **witness summons for the entire 3-month period**! Upon enquiry, our expert was told by his instructing solicitor that he was encouraged by the court to adopt such an approach. This is a worrying development for all witnesses and it seems odd to us.

The standard witness summons application (Form N20) is drafted on the assumption that there is a fixed date. Both Civil Procedure Rules (CPR) 34.2 and the accompanying practice direction refer to requiring the witness to attend court to give evidence on 'the date fixed for a hearing' or 'on such date as the court may direct' – there is no mention there of 3-month trial windows. So either way, it seems there should be a specific date. It has been usual for solicitors to wait until there is a fixed date for the hearing before issuing the witness summons, which would require attendance at court.

If there are good reasons for a 3-month trial window in this particular case, then the solicitors are right to warn the expert. But can it be reasonable for this broad trial window to be made to override all other commitments the expert might have through the use of a witness summons for three whole months?

Prior to the CPR, all that was generally required when fixing a trial date was to advise the court of a witness's unavailability. The court would then proceed to fix a date for trial avoiding such dates. That might have been sufficient in the past, but was certainly not acceptable following the advent of the CPR. There is now a **heavy burden of responsibility on the parties to agree a date as early as possible** if the conflicting commitments of their witnesses are to be accommodated. In *Matthews -v- Tarmac Bricks & Tiles Ltd*[1], Lord Woolf held that doctors who take on a case in the capacity of a medico-legal **witness must be prepared to incorporate a degree of flexibility into their practices to meet the demands of court attendance whenever practicable**. If a difficulty remains, parties should ensure that they are in a position to advise the court precisely why a witness is unavailable. This has become the leading case on availability of medico-legal witnesses and their availability for trial. However, issuing a witness summons for a 3-month trial window must surely be a 'degree of flexibility' several orders of magnitude beyond what was intended!

'Oppressive' witness summons can be set aside

What can the expert do?

The expert in this case has a few options. He could take the view that he will simply file the witness summons and work closely with the laywers to ensure the trial dates are fixed with full awareness of the expert's existing (and developing) commitments. The existence of the summons will, though, ensure he is able to get out of any clash once the trial date is known by letting others know he is bound by a court order to be in court.

Alternatively, the expert could take the view that the witness summons is 'confusing' and use his powers under CPR 35.14 to seek direction from the court.

Finally, if the expert considers the witness summons to be unreasonable, or even oppressive, he can make an application to the issuing court to have it set aside.

Have you seen this in your practice?

This is the first time our expert has seen such a move in a long medico-legal career. It is also the first time we have heard of such a thing. The collective wisdom of the lawyers, commentators and a judge we have consulted is that it isn't even possible to issue a witness summons that is so unspecific on time.

If you have been the unlucky recipient of such a witness summons, we would be most interested to hear from you. If this is a developing trend, it is only likely to be stopped once an expert takes an action to have one set aside.

References

[1] *Matthews -v- Tarmac Bricks & Tiles Ltd* [1999] *EWCA Civ* 1574.

Squier 2 – Using previous judgments

Is it fair to admit prior court criticism into disciplinary hearings?

In the previous issue of *Your Witness* (issue 86, *Confronting dogma demands extra special care be taken*) we made reference to the case of *Squier -v- General Medical Council*[1]. This was an appeal against a decision of the Medical Practitioner's Tribunal of the General Medical Council (GMC) that the neuropathologist, Dr Waney Squier, be struck from the medical register in connection with views she had expressed to the court questioning the existence of shaken baby syndrome.

Dr Squier's views on shaken baby syndrome are considered controversial and time will tell whether she is a courageous individual taking on the weight of the scientific establishment when others dare not, or a maverick who has strayed outside her area of expertise and is dogmatic, inflexible and evasive.

As we reported in our previous issue, in allowing the appeal, Mitting J found that although many of the Tribunal's findings regarding Dr Squier's conduct were justified, the overall determination was flawed in some significant respects.

Previous criticism

During the course of proceedings against Dr Squier, the Tribunal heard a great deal of evidence that was based on the judgments given in previous criminal proceedings in which she had acted as an expert witness. Many of these earlier court judgments contained criticisms of Dr Squier.

This raises an important question. As Dr Squier was not a party to these earlier cases, she was not in a position to defend herself against any criticism the judge made of her evidence in the judgment. How fair is it, then, for such criticism to feature in subsequent disciplinary proceedings?

Administration Court intervention

This question was tested in the Administration Court before the Tribunal hearing began. There was a challenge to the admissibility of such evidence heard by the Administration Court by way of an intervention at the pre-hearing stage of the Fitness to Practise Panel (FTPP). The issue the court was required to decide is an interesting one and of relevance to all expert witnesses practising in the courts of England and Wales.

Meadow case showed danger in not understanding the context

Expressed simply, the argument advanced was that evidence contained in these previous judgments, much of which was critical of the doctor, should not be admissible because its value was more prejudicial than probative. Dr Squier, although involved in the cases as an expert witness, had not been a party to those proceedings and, consequently, she would not have been given the opportunity to defend herself or reply to the criticism in the same way that a claimant or defendant would. The parties calling her as an expert witness did not necessarily have any interest in protecting her reputation, or dealing with criticisms of her, nor did they necessarily have the means or expertise to do so. Although the FTPP had already agreed that some of the critical content be redacted, it was submitted that the issues that arose in the judgments were not the same as the issues in the fitness to practise case. Moreover, faced with judgments that were implicitly highly critical of Dr Squier, the burden of proof would, in practice if not in theory, be reversed. In other words, Dr Squier would need to prove her innocence rather than the GMC prove her guilt.

The FTPP had rejected submissions made on Dr Squier's behalf that it should rely on the primary evidence rather than judgments. Indeed, the Panel decided that *GMC -v- Meadow*[2] was supportive of the propositions that:

(a) the facts of the case can only be understood in the context of the judgments, and
(b) a proper assessment as to a doctor's misconduct could only be undertaken by considering the judgments that led to the allegations of misconduct.

The Court ruled on this application in *The Queen (on the application of Squier) -v- General Medical Council*[3]. Counsel for the GMC argued that it was essential that the FTPP should be able to consider the judgments that had led to the allegations of misconduct because these would provide the context and offer an essential means of understanding the case background. Without them, it was submitted, the case would be difficult or impossible to try.

Probative value outweighs prejudicial value

Considering the application and finding in favour of the GMC, Ouseley J said:

> *'Where a judgment is required as to whether the probative value of relevant evidence is outweighed by any unfairness which its admission might cause, the view of the judge trying the case, here the FTPP, a specialist tribunal hearing a disciplinary case, should be given great weight. It would need to be clearly wrong, and especially at this stage, the unfairness of that balancing judgment would need to be very obvious, however the case might develop.'*

Ouseley J considered the dangers that lie in a tribunal not fully understanding the context in which expert evidence is given by reference to *Meadow*[2]. In that case, Thorpe J was clear:

> *'... that the failure to understand the full context in which Professor Meadow had given evidence meant that they never understood that his much criticised evidence ultimately went to a non-issue.'*

In the light of this, it was held that the FTPP had not acted unreasonably in concluding that the judgments would be relevant in providing:

- an **insight into the background** to the cases
- the **forensic context** in which the expert prepared and gave her evidence, and
- ***prima facie* evidence of certain facts** about the circumstances of the case.

The judgments were considered to be relevant to the scope of the medical issues and to the reasons why particular factual bases needed

to be considered, as well as to the potential effect on the outcome of the cases. Furthermore, the gravity and nature of the issues may be relevant to the care and precision required in understanding:

- what the reports say, and
- their limitations and nuances.

It was found that the FTPP had *not* decided the judgments were to be admitted to prove that the doctor's evidence was not accepted or was found to be lacking in certain qualities. Instead, the issue before the Panel concerned the **basis upon which the doctor gave her evidence, its scope and her use of the underlying research papers**.

Tribunal must make its own decisions

However, the judge made it clear that the disciplinary tribunal had to be the decision-maker on the issues and evidence before it. It should not adopt the ruling of another body, even of several judges, as a substitute for reaching its own decision on the evidence and the different issues before it. That said, the GMC is not precluded from considering prior judgments in a case in which evidence later at issue is given before the GMC.

Further, the opportunity for irrelevant or unfair use was reduced markedly by the redactions that had already been agreed. This meant there was less previous court case material available to require Dr Squier to devote her time and energy to dealing with findings from earlier litigation. Instead she could focus more on the quality or otherwise of her evidence to which the allegations related.

GMC rules permit appeals on unfair use

Reference was made to Rule 34 (1) of the General Medical Council's Fitness to Practise Rules 2004 (as amended), which provides that:

> *'The committee or a panel may admit any evidence which they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.' SI 2004 No. 2608*

This, it was considered, provided some safeguard. If irrelevant or unfair use was made of the evidence, the decision would be appealable on that ground.

What is 'unfair'?

In considering what constituted irrelevant or unfair use, the judge was at pains to distinguish between uses of the judgments for different purposes. They were not relevant, for example, to prove that Dr Squier's evidence was not accepted or was found to be lacking in certain qualities. The issue before the Tribunal was not whether Dr Squier was right or wrong (that was the issue before the original court), but concerned the basis upon which she gave her evidence, its scope and her use of the underlying research papers. That was the crucial issue for the Tribunal.

The actual outcome of the trials, and any finding in or inferred from the redacted judgments that Dr Squier's evidence had been rejected, was not relevant to the allegations of misconduct. However, the fact that the issues before the judges and those now before the Tribunal were different did not mean that the prior judgments were irrelevant. In fact they were pertinent to the background to her giving evidence and to the forensic context in which the evidence was given, even if before the original judge that context was highly contentious.

Ouseley J considered that the balance struck by the Tribunal – between the probative value of the judgments and any prejudicial effect – was reasonable. The original material was potentially relevant and the prior judgments were clearly not peripheral.

Guiding principles established and applied

Although the Administrative Court found in favour of the FTPP as regards its use of the previous judgments in Dr Squier's case, the decision did lay down some important principles to be followed by the courts in similar cases involving experts, doctors or other professionals facing disciplinary charges.

The distinctions made between fair and unfair use and considerations of relevancy have already been followed in subsequent decisions of the courts.

In *Enemuwe -v- NMC*[4] an agency midwife was the subject of disciplinary proceedings before the Conduct and Competence Committee of the Nursing and Midwifery Council. In reaching its decision, the Conduct and Competence Committee made use of previous findings against the midwife in supervisory investigations by a supervisor of midwives. Here there was no question, as in *Squier*, that the use of previous findings was to establish context and background to the complaint currently before the tribunal. In *Enemuwe,* Holman J found that the Committee's approach amounted to a '*serious irregularity*'. He said that there was a world of difference between the Conduct and Competence Committee knowing that there had been a previous investigation and it actually paying regard to the factual outcome of that investigation in reaching its own findings and conclusions on disputed issues of fact.

He agreed that, normally, the findings of fact made at some earlier investigation by another panel or another person are not admissible in proceedings. Referring to Ouseley's judgment in *Squier*, Holman J accepted and applied the criteria that had been established.

Holman J found that in *Enemuwe* the role and task of the Conduct and Competence Committee at the fact-finding stage of their hearing was identical to the role of the previous proceedings, namely to decide whether or not the appellant had said or done the various things alleged against her. Accordingly, he ruled that the prior findings by the supervisor of midwives were not admissible.

Disciplinary tribunals can't adopt another court's decisions

References

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

[2] *GMC -v- Meadow* [2006] *EWCA Civ* 1390.

[3] *The Queen (on the application of Squier) -v- General Medical Council* [2015] *EWHC* 299 *(Admin).*

[4] *Enemuwe -v- NMC* [2015] *EWHC* 2081 *(Admin).*

Cronyism and expert independence

Speak up early if a potential conflict of interest arises

In 2006 the leading case of *Toth -v- Jarman*[1] laid down some basic principles about expert independence. It also emphasised the importance of disclosure of any potential conflict of interest at the earliest opportunity. The Court of Appeal held that a conflict of interest did not necessarily disqualify an expert witness. The key question was whether the expert's opinion was **independent**. The Court of Appeal said that:

> *'... where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced. This means it is important that a party who wishes to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible... '.*

There is, however, no automatic disqualification merely because the expert has some connection with a party. This is at the discretion of the court; it will decide on a case-by-case basis (see *Factortame*[2]). However, there is a far greater risk that a relationship will give rise to a presumption of bias if there is a failure to disclose it. It is therefore important to notify the court at the earliest possible stage if there is any relationship that might have a bearing on one's independence.

The golden rule is that, to prevent any suggestion of bias, experts should **avoid accepting instructions from employers, family, friends or colleagues**. However, where they do so, they should make sure this fact is known to the court and should take care to be, and to be seen to be, independent throughout.

A tale of two doctors

It will be apparent that **openness and disclosure are key**. An example of how the court is likely to treat lack of candour was demonstrated in the recent case of *Exp -v- Charles Simon Barker*[3]. This was an appeal in a medical negligence case.

The respondent had suffered a ruptured aneurysm in the brain. In 1999 she'd had a brain scan, which the appellant had reviewed and pronounced as being normal. It was the respondent's case that the brain scan was not normal, but indicated the presence of an aneurysm that should have been identified by the appellant. At trial, the issue was whether the 1999 scan showed evidence of an aneurysm which a reasonably competent neuroradiologist would have identified and reported. The appellant's expert, Dr Molyneux, thought that the features of the imaging were consistent with the normal anatomy of the brain. However, the respondent's expert believed the scan to show a putative abnormality that could not be adequately explained by normal brain anatomy and required further investigation.

During the course of the trial, it became apparent that Dr Molyneux and Dr Barker knew each other well. Suspicions were raised when, at one point and in an unguarded moment, Dr Molyneux referred to Dr Barker as 'Simon' – the Doctor's middle name by which he was generally known. It emerged in cross-examination that Dr Molyneux and Dr Barker were, indeed, very well acquainted. Dr Molyneux had trained Dr Barker during his 7 years of specialist radiology training. He had also trained him for 2.5 years as a registrar and senior registrar in neuroradiology, including the particular area of interventional radiology in which Dr Molyneux specialised and in which Dr Barker had a special interest.

Given that the two men had worked closely together over a substantial period of time and that this fact had not been disclosed, the trial judge was placed in a difficult position. The relationship had not been revealed until cross-examination, and it was, therefore, far too late to appoint a substitute expert. Under the circumstances, the trial judge decided to exercise his discretion to allow the evidence but to treat it with caution when assessing its weight and credibility.

Upon hearing Dr Molyneux's evidence there were doubts in the mind of the trial judge as to the expert's approach. A scrupulous expert in his position should have pointed out the problem to the legal team well ahead of trial, but he had done nothing. In addition, he had known that evidence might well be given in relation to a paper which, as the judge described it, '*was seriously deficient and misleading*'. Dr Molyneux had asserted that there was no aneurysm in 1999 but he appeared to have given no explanation as to what was otherwise '*an impressive coincidence*'. Taking all these factors into consideration, the trial judge preferred the evidence of the claimant's expert, which he found to be more persuasive and reliable.

Court of Appeal unimpressed

Dr Barker appealed against the decision. The grounds included the assertion that, having decided to allow Dr Molyneux's evidence, the trial judge failed to evaluate that evidence on its merits. He wrongly performed a '*balancing act*' between competing expert opinions and had erred in holding that Dr Molyneux had an interest or bias in the outcome of the case.

In dismissing the appeal, the Court of Appeal held that the trial judge was fully entitled to take the view that Dr Molyneux had so compromised his approach that the decision to admit his evidence was finely balanced, and that the weight to be accorded to his views had to be diminished considerably. **The adversarial system depended heavily on the independence of expert witnesses, on the primacy of their duty to the court over any other loyalty or obligation, and on the rigour with which experts made known any associations or loyalties that might give rise to a conflict**. Dr Molyneux had failed to disclose his association with the appellant, despite an express direction to that effect.

References

[1] *Toth -v- Jarman* [2006] *EWCA Civ* 1028.

[2] *R (Factortame Ltd) -v- Secretary of State for Transport, Local Government and the Regions (no 8)* [2002] *EWCA Civ* 932.

[3] *Exp -v- Charles Simon Barker* [2017] *EWCA Civ* 63.

Protection against unfair criticism

Judge's frustration leads to guidance for experts facing personal attacks

Expert witnesses, it seems, are fair game when it comes to gratuitous criticism. Following the American example, it has become almost part of a litigator's armoury that, when all else fails, or even as a first resort, laying into the expert offers a convenient distraction.

While tough on poor old experts, it's something to which they are expected to become inured. To many it has seemed the courts are doing little to protect experts from overly harsh or unjust criticism, even though attacks can be offensive, humiliating and, at worst, damaging to the expert's professional standing and career.

Judge steps in to protect experts

It is, therefore, refreshing to learn that one judge, at least, has had more than enough of it. The case in which this welcome intervention comes is *Merck Sharp & Dohme Ltd -v- Shionogi & Co Ltd*[1]. It involved an anti-viral agent for treating HIV (*raltegravir*) which the claimant marketed.

The defendant asserted that the claimant had infringed one of its patents. The claimant denied infringement and claimed that the patent should, in any case, be revoked on the grounds of, among other things, the lack of any inventive step.

The claimant contended that the patent, both as granted and as proposed to be amended, was invalid for lack of inventive step, not because it was obvious over the prior art but because it made no technical contribution to the art, given the vast number of compounds covered by the formula defined in the patent. It was also submitted that the patent was invalid for insufficiency and/or added subject matter. The defendant asserted that the patent was valid and infringed by *raltegravir*.

In considering whether the patent was valid, the court heard expert evidence from both sides on inventive step and prior art in the science concerned. During the course of cross-examination, criticism of the experts was fairly relentless. In the main, it was concentrated on each expert's failure to make mention of various facts and issues in his report or oral evidence. At times, an expert's failure to remember relatively trivial points without reference to papers was treated with incredulity by cross-examining counsel... no doubt the sort of theatrical point-scoring performance with which many expert witnesses will be all too familiar!

In many instances it appeared to Arnold J that the criticism was misplaced, irrelevant or simply wasteful of court time. Accordingly, the judge took the opportunity to give some timely guidance in relation to the cross-examination of expert witnesses. He made reference to his own previous judgment in *Medimmume Ltd -v- Novartis Pharmaceuticals UK Ltd*[2] at paragraphs 99–114, when he said that **not only did expert witnesses owe the court a duty to be independent and impartial, but also the lawyers who assisted the experts to prepare their reports bore a heavy responsibility for ensuring that expert witnesses were not put in a position where they could be made to appear to have failed in their duty to the court, even though they conscientiously believed that they had complied with that duty**. In *Merck*, the judge considered that he needed to restate this and also expand on the guidance for the proper cross-examination of experts. Although the judge's guidance is intended for those working in the patent courts, we suggest that it has general application and will have persuasive power across all jurisdictions.

Five guiding principles

Arnold J's guidance is as follows (we have paraphrased his remarks).

- When cross-examining expert witnesses, **advocates should be cautious about criticising purely on the basis of omissions from the report unless it is clear that the fault lies with the expert** rather than the instructing lawyer.
- **Advocates should avoid spending too much time in *ad hominem* attacks** (i.e. 'playing the man, not the ball') that are unfair to the witness, unhelpful to the court and waste expensive time.
- In cases with many experts, **where there is a distribution of responsibilities between the experts and/or an overlap between the experts' areas of expertise, it would be legitimate and helpful for the cross-examiner to explore the division of responsibility between the experts and the extent to which, collectively, they had approached matters**. It would rarely be legitimate or helpful to criticise a witness for failing to deal with a point that he could have dealt with when it had been addressed by another expert, because that was unlikely to have been a decision made by the witnesses. Nor did it become any more legitimate or helpful if the cross-examiner either expressly asked the witness about the point or, more usually, asked the witness a question that led the witness to bring it up.
- **When questioning or exploring the relative expertise or experience of an expert, cross-examiners should restrict themselves to areas of relevant experience and not seek to criticise experts for lacking experience in areas that are not relevant**.
- Finally, it went without saying that **cross-examiners should question experts fairly**.

It might be a forlorn hope but perhaps the judge's words will have resonance in other courts and we might see some increase in the level of protection given to experts from harsh, unfair or irrelevant lines of cross-examination. At the very least, experts may be grateful to have his comments to hand should the need to tackle unfair criticism arise in future.

References

[1] *Merck Sharp & Dohme Ltd -v- Shionogi & Co Ltd* [2016] *EWHC* 2989 (*Pat*).

[2] *Medimmume Ltd -v- Novartis Pharmaceuticals UK Ltd* [2011] *EWHC* 1169 (*Pat*).

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