Your Witness

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

Inside

Issue 89

Take care who you sue!

The Court of Appeal has rejected the pleas of a claimant who, faced by two law firms set up by the same man, and with similar names, sued the wrong one. Given the increasing need for expert witnesses to contemplate taking civil enforcement action against instructing solicitors, who often use multiple linked 'service companies' to deal with payment of experts, the case has a particular resonance.

In *Godfrey Morgan Solicitors -v- Armes* [2017] *EWCA Civ* 323, the Court of Appeal heard that, following a breakdown in their relationship, Mr Armes instructed solicitors to launch a professional negligence action against Godfrey Morgan Solicitors (GMS).

In separate proceedings, the very similar sounding Godfrey Morgan Solicitors Limited (GMSL) sued Armes for unpaid fees, a claim rejected by a deputy district judge in 2013, on the basis that Armes only had a contractual relationship with the firm GMS and not with the company GMSL.

The chronology was that GMS was run as a partnership until September 2007, when it became a sole practice under Mr Morgan, before GMSL started trading in October 2007. The court found that '*The two entities then ran in parallel as distinct businesses with, for example, different VAT registration numbers. They were regulated as different entities by the Solicitors Regulation Authority.*'

Professional negligence proceedings were issued in October 2013 against GMSL, the day before the limitation period expired. In February 2014 they were amended to add the name of GMS to the claim. GMS applied to the court to disallow the amendment, on the grounds that the amendment was outside the limited permitted circumstances.

Both the district judge and Judge Moloney QC, sitting as a High Court judge at Norwich County Court, rejected GMS's application, concluding that it was a matter of substitution of a defendant, which is permitted, rather than addition. GSM appealed.

In allowing the appeal, Burnett LJ ruled that the amendment amounted to the 'addition of a new party outside the limitation period' and was not sanctioned by the rules. He went on to say:

> *'If he has joined a party who can demonstrate that it cannot be liable, a claim may be struck out, or summary judgment obtained. There may be costs implications. Equally, amending to join an additional party within the limitation period is not subject to the same strictures.'*

There are two points to note. First, if you leave making a claim until the very end of the limitation period you may well find that the court isn't that sympathetic if 'administrative errors' cause problems.

Second, while the court could conceivably have found a way around the problem in this case by finding that the right party had been sued, but had simply been misnamed, it really is much simpler if you take care at the outset to identify carefully the correct party to sue!

Pro-bono caution

An expert in the *Register* contacted our Helpline telling us that he provides pro-bono advice on the merits of cases to solicitors contemplating litigation. He had provided a very short pro-bono advice to a claimant firm. Many months later he was contacted by a defendant firm and realised that this was the same case. What perplexed the expert was that the letter of claim included a line to say the claimant solicitor had supportive expert evidence... which the expert strongly suspected was his pro-bono input! If correct, that meant the expert had deprived himself of a fee through his pro-bono generosity.

The whole area of experts and pro-bono work is worth a few words of caution. **Pro-bono work generally carries with it all the responsibilities, duties and risks you would attract as if you had been paid.** So, if you advise a lawyer that his client had a strong case and it turns out that you had been negligent in that advice, you could be sued for any financial losses suffered.

Whether the expert had a conflict of interest in the situation he outlined is a complex legal question centring around there being no property in a witness (see *Your Witness* 30). For example, if the expert had been given legally privileged information in his role as an advisory expert (NB experts are not, in such pro-bono work, an expert witness proper bound by the CPR, etc.), then there is a good chance his freedom to take on the subsequent paid work would be fettered by the initial pro-bono work.

But, to cut through this legal Gordian knot, our advice is to **adopt a clear protocol with these pro-bono requests** that gets in writing:

1. indemnity from the lawyer
2. agreement that any information given to you loses any legal privilege
3. agreement that your pro-bono advice does not prevent you from taking subsequent instruction from the other side, if that opportunity arises, without needing to refer back to the first side for permission.

Chris Pamplin

Expert witness survey 2017

On average, 61% of workload is expert witness-related

Enclosed with our June 2017 issue of *Your Witness* was a survey questionnaire, the twelfth of its kind over the past 20 years. By the end of August 2017, some 200 forms had been returned. A big thank you to all who took the trouble to take part and contribute data.

The experts

Of the 201 experts who responded by the end of August 2017, 107 were medical practitioners. Of the remaining 94 experts, 21 were engineers, 18 were in professions ancillary to medicine, 12 were accountants or bankers, 16 had scientific, veterinary or agricultural qualifications, 13 were surveyors or valuers and 6 were architects or building experts. The small 'others' category totalled 8.

Work status and workload

Of the respondents, 39% undertake expert witness work full time, with 46% part time and 28% describing themselves as retired. Between 2003 and 2013 this split was fairly stable, with the full-time figure at around 50%. It dipped a little in 2015 and again in the 2017 survey. Increasingly we are looking at experts who are mixing their forensic work with other activities, or are undertaking forensic work in retirement.

Overall, expert witness work accounts for 61% of their workload. This figure was 37% in 2003 and rose to 45% in 2011. It is the second time that the figure 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, 97% have been practising as expert witnesses for at least 5 years, and 91% have been undertaking this sort of work for more than 10 years. Six years ago, well over half of the respondents (60%) saw expert witness work as an expanding part of their workload, despite the increasing pressures on expert witnesses and the then recent removal of expert witness immunity. But our 2017 survey supported the conclusion from our 2013 and 2015 surveys that this optimism is decreasing. Now we observe 47% of expert respondents expecting expert witness work to be a growth area in their business.

47% 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. Over 65% of these experts exclusively undertake civil work. 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, it was no surprise that with civil work dominating, 46% of our respondents undertook no publicly funded work. This time the majority – 51% – say they do no publicly funded work. Of those who do accept such work, it averages 33% of their workload – which is around the same as 2 years ago. 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, 66% 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 each year. One of the difficulties that can arise with litigants in person is apparent in the increase in the last 4 years – from 38% to 51% – in the percentage of experts who require payment on account in such cases.

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.

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 parties 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

Report type	2007	2009	2011	2013	2015	2017
Advisory	17	19	15	18	16	21
Single party	54	57	56	55	56	47
SJE	14	15	9	8	8	5

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

it is becoming less likely in the multi-track. In 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 1.7. This survey does not separate civil cases from criminal and family cases (in which most will reach court), so the number of civil cases reaching court will be much lower even than 1.7.

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? This information is summarised in 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 2015 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, 27% of our respondents earn less than £20k per year, 27% earn between £20k and £50k per year and 43% 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, 34 respondents charge on average 40% of their fee if notice is given at least 28 days before the trial is due, 74 respondents charge 47% on average with 14 days' notice, 114 charge 60% on 7 days' notice and 135 charge 87% 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 only 49%. On average, 32% of solicitors pay within 8 weeks, 14% pay between 9 and 12 weeks and 36% pay between 13 and 48 weeks.

Against this background, while 91% of experts say they stipulate terms, only 55% use a written form of contract. Mind you, that is a 10% point improvement on a decade ago, so the message must be getting through – slowly! 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 the *Terminator* service on 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.

Jackson Reforms

We have asked about the Jackson Reforms in our last three surveys. When it comes to the 'hot tub', 12% of our respondents have 'dipped their toe in the water', up from 8% in 2013 and 10% in 2015. But 80% of these think the approach is an improvement over traditional methods.

In 2013, 40% of respondents had been asked to provide a costs budget. This had increased to 53% in 2015 and now stands at 63%. But experts continue to find it a challenge to generate accurate budgets at the outset of an instruction.

Despite plenty of judicial support, the 'hot tub' is still seldom entered

All experts should use written terms

Professional group (*n = number of respondents*)	Reports	Court appearances	Advisory reports	SJE instructions
Medicine (*n = 107*)	64.6	1.7	29.5	5.6
Paramedicine (*n = 18*)	42.9	0.8	3.1	13.5
Engineering (*n = 21*)	14.1	1.8	6.1	3.0
Accountancy (*n = 12*)	15.6	2.6	5.4	4.6
Science (*n = 16*)	42.1	4.7	29.1	2.2
Surveying (*n = 13*)	12.5	1.1	14.1	2.6
Building (*n = 6*)	7.3	0.2	3.8	1.2
Others (*n = 8*)	17.5	1.0	12.6	1.5
Aggregate averages	45.6	1.8	20.7	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)	
	2017	2015	2017	2015
Medicine (*n = 107*)	226	218	1,680	1,524
Paramedicine (*n = 18*)	150	135	1,091	1,074
Engineering (*n = 21*)	151	142	1,165	1,142
Accountancy (*n = 12*)	209	241	1,177	1,833
Science (*n = 16*)	149	118	1,271	963
Surveying (*n = 13*)	215	188	1,739	1,396
Building (*n = 6*)	157	150	1,580	978
Others (*n = 8*)	132	129	754	1,145
Aggregate averages	198	185	1,492	1,353

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

Is disclosure of report inevitable?

When changing expert, disclosure of the first report is not mandatory

It is not uncommon for a party in possession of an unfavourable expert report to want to 'shop around' for an expert whose opinion is more supportive of its case. Expert shopping is, of course, a practice that has been frowned upon by the courts. Indeed a body of case law and procedural practice has developed that aims to deter, and ideally prevent, such behaviour.

As a consequence, when a party makes an application for permission to change expert, the court, if granting the application, will usually impose a condition that the report of the outgoing expert should be disclosed. So common has this become that many presume that the imposition of such a condition is automatic.

A question of limitation

However, in *Vilca -v- Xstrata*[1], the High Court delivered a judgment that tests this assumption.

The defendant applied for a time extension to instruct a new expert. The claimants submitted that the court should grant the application only on condition that the defendant disclosed the reports of the previous experts. The claimants were Peruvian nationals employed at a copper mine owned by a company registered in Peru, but which was an indirect subsidiary of Xstrata, a company registered in England. The claimants had all sustained injuries during a protest at the mine and alleged that their injuries had been inflicted by Peruvian security forces.

Much of the argument surrounded whether liability was to be determined by Peruvian, English or EU law. The question of determining law was an important one as, under Peruvian law, the defendant would be able to argue that all of the claimants' claims were barred by limitation, on the basis that the protests were in May 2012. The limitation period under Peruvian law is 2 years. No claim under Peruvian law was introduced until service of the Amended Particulars of Claim in mid-2015. The trial has been set for October 2017 and is expected to determine whether the defendant might be liable under Peruvian law for acts committed by the security forces.

Both sides were ordered to serve evidence from experts in Peruvian law by mid-May 2017. Early in the proceedings, the defendant replaced its first expert with a more experienced expert when it was realised that the case was unlikely to be settled before trial. However, the second expert had to withdraw in May 2017 due to ill health. The defendant applied for an extension of time to instruct a new expert, and it was at this point that the claimants sought a condition that the reports of the defendant's first and second experts be disclosed. The defendant objected.

A two-stage process

Stuart-Smith J considered the existing case law. He determined that the question of whether the court could or should impose a condition was to be considered in two stages. First, whether the circumstances gave rise to any case management powers to impose a condition and, second, how those powers should be exercised on the facts of the particular case.

With regard to the first stage of this process, the judge had no doubt that the defendant's application for an extension of time brought into play the court's case management powers, and that these powers included the power to order that the substance of the opinion of prior experts be disclosed as a condition of granting the extension (*Beck -v- Ministry of Defence*[2]).

The second stage, however, was not so clear cut. Stuart-Smith J observed that the authorities had consistently said that the object of imposing a condition that reports of previous experts should be disclosed was to prevent 'expert shopping' and to ensure that the court had full information. He considered the leading authorities of both *Vasiliou -v- Hajigeorgiou*[3] and *Edwards-Tubb -v- JD Wetherspoon Plc*[4] and was unable to find any suggestion in these authorities that the imposition of such a condition was mandatory.

Considering the circumstances of the application before him, Stuart-Smith J found that there was no sound basis for concern about undesirable expert shopping. Throughout, the defendant's explanation of the need to switch from the first expert to the second had been coherent and fully explained, and the judge had no good reason to doubt that, but for her ill health, the second expert would have been the defendant's expert at trial.

The judge acknowledged that there could be differences between the reports of the second expert and the new expert. Such differences of opinion were, he thought, inevitable and to be expected. While there was nothing to suggest that the new expert would change or exclude anything that might have been contained in the second expert's report, he considered that there was, in any event, equality of arms between the parties and that any errors or omissions in the new expert's report could be addressed adequately by the claimants' own expert.

Allowing the extension of time to instruct the new expert, the court held that it was not obliged to impose a condition that the party disclose reports of its previous experts if there was no concern about undesirable 'expert shopping' or abuse of process by the party, and if there was no other good reason to impose the condition.

Conclusion

The case is an interesting one and of some importance. Examples of expert shopping or other circumstances giving rise to sanctions, such as lateness of applications, should be readily identifiable. In other instances, though, where there are reasonable and fully explained grounds for instructing a new expert, it should not necessarily follow that the disclosure of an earlier report will be inevitable.

References

[1] *Daniel Alfredo Condori Vilca & Others -v- Xstrata Limited, Compania Minera Antapaccay SA* [2017] *EWHC* 1582 *(QB)*.

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

[3] *Vasiliou -v- Hajigeorgiou* [2005] *EWCA Civ* 236.

[4] *Edwards-Tubb -v- JD Wetherspoon Plc* [2011] *EWCA Civ* 136.

Can evidence be reused?

We had an enquiry that raised the question of whether CCTV evidence that an expert had studied in one case, which settled, could be reused when the expert was subsequently instructed in another action flowing from the same incident, but in which the new instructing solicitor did not know of the CCTV footage.

Confidentiality is key

Assuming the material is not in the public domain, there are two areas to be considered:

1 Is it covered by legal privilege?
2 Is it otherwise confidential information?

The general rule is that case-specific information given to an expert is confidential unless told otherwise. Indeed, our own model terms of engagement for experts (see Factsheet 15) highlight the need for confidentiality. Depending on the nature of the confidential information, the expert risks breaching this duty of confidentiality merely by mentioning the existence of 'unknown evidence', even if stopping short of giving details of the substance.

At one time, an expert breaching confidentiality would have been covered by the immunity enjoyed by expert witnesses. However, since *Jones -v- Kaney*[1], an expert no longer has this protection. In theory, therefore, an expert can be sued directly for breach of confidentiality, and will owe a duty of care towards all who might be harmed by the breach of duty.

The fact that an expert is acting as an expert in court proceedings is not, in itself, sufficient reason for the disclosure of confidential information. For example, a medical expert's duty of professional confidence is not waived automatically by being called to give evidence, and such a doctor should not provide confidential information without the patient's express informed consent. The profession's guidelines are that if asked for such information, the expert should explain that he does not have the necessary consent to give it, and to decline to answer. However, experts must disclose information if ordered to do so by the court.

In addition to the risk of incurring personal liability, the disclosure of confidential or privileged information also runs the risk of making the expert's evidence inadmissible. In some circumstances, the mere fact that the expert has seen such confidential information may prevent the expert from acting for another party. However, the position here is by no means clear cut, and any expert faced with this dilemma should seek specific professional legal advice.

Example court cases

In the oft-cited case of *Harmony Shipping*[2], a handwriting expert was retained to advise a party in proceedings. He subsequently received instructions from the opposing party and, without realising that they related to the same proceedings, offered advice. As soon as he became aware of this, the expert withdrew and declined to act further for either party. The second party issued a witness summons compelling his evidence, and the first party objected. The Court of Appeal stated that there was no property in a witness, and Lord Denning said that: '*the Court has a right to every man's evidence*'. However, he held that privileged communications should remain privileged.

In *Meat Corporation of Namibia*[3], an expert was approached by Meat Corporation (MCN) to act as its expert in proceedings. Along with his instructions, the expert received a quantity of confidential and privileged information about MCN and its business. The expert did not accept the instructions but retained the documents he had been sent. Subsequently, he was instructed by another company, Dawn Meats (DM), in unrelated proceedings. Although the expert agreed with DM that it should not make use of any privileged information, MCN objected to the expert acting at all. MCN said that the expert was in a position analogous to a solicitor who had come into possession of information by virtue of instruction by another client; as a result, he should be disqualified from acting.

The court held that an expert is not in the same position as a solicitor. The expert had not, in fact, been engaged by MCN. The information had merely been received in the course of inquiries as to whether the expert should act. Furthermore, the expert had given an undertaking not to use any privileged information.

The common characteristics in cases involving this dilemma are that the expert is in possession of confidential or privileged information, that someone has (or may) objected to the disclosure and that someone will potentially be harmed by it. The questions are always going to be whether the information is of a sufficiently confidential or sensitive nature, whether, in reality, anyone is likely to object to its disclosure and whether any actionable harm is likely by such disclosure.

Clearly, the potential for difficulty is negated by:

a) confidentiality or privilege being waived by the party who claims it, or
b) the court making a specific order for its disclosure.

Conclusion

Wherever possible, experts faced with this sort of dilemma should seek to unburden themselves of the responsibility for what are, essentially, matters of law. It is always preferable to acquaint the instructing solicitor with the circumstances, and to leave it to the solicitor to make any approaches to third parties or applications to the court. In the case of the CCTV footage, the expert could safely prompt the new solicitor to find out if any CCTV footage exists without ever revealing that the answer is already known!

In relation to confidential and privileged documents, best practice is to always return (or gain permission to securely shred) them at the end of a case or after declining an instruction!

Case-specific information is normally confidential

References

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

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

[3] *Meat Corporation of Namibia -v- Dawn Meats (UK) Ltd* [2011] *EWHC* 474.

Opinion versus fact

Treatment of expert opinion is distinct from that of fact

An expert's evidence may sometimes be relevant to establishing matters of primary fact. Take, for example, the evidence of a motor mechanic who is called upon in a case concerning a fatal crash. The expert might be required to give opinion evidence concerning the cause or significance of the vehicle's condition. In doing so, he may be giving evidence of primary fact concerning the vehicle's condition. The value of such evidence in establishing the primary facts of a case (in addition to the opinion evidence connected with the primary facts) has long been recognised and held to be relevant.

Sometimes it is possible and necessary to separate one from the other. In the Commercial Courts, for instance, the parts of an expert's evidence relevant to primary facts are required to be incorporated in an *additional* factual witness statement, to be exchanged with other factual witness statements. The purpose of this practice is to avoid postponing the disclosure of a party's factual evidence until service of the expert reports.

Fact, opinion, admissibility

The distinction may, at first glance, appear to be fairly academic, but there are some quite important consequences that flow from these different elements of the expert's evidence. One concerns admissibility, and the questions the court must consider when giving leave for evidence to be admitted.

The test for **admissibility of expert evidence includes the need to review whether expert evidence is *necessary*** to aid the court in understanding technical matters that would ordinarily be outside its comprehension. **Necessity is key**. If the expert opinion is not considered necessary, then it will not usually be admitted. However, the same is not true of factual evidence. **Factual evidence from a witness will be permitted where the court feels it is merely *desirable*.**

Part 35 of the Civil Procedure Rules (CPR), being concerned with opinion expert evidence, is silent on the broader question of factual evidence contained in an expert report. Indeed, until recently, questions concerning the necessity of, or desirability to admit, an expert report containing factual evidence had not been addressed specifically by the court. **So what is the position if an expert's evidence contains both opinion and factual evidence – especially where the opinion may not be deemed a necessity but the factual evidence is desirable?** If the report fails the necessity test, does that operate to exclude it entirely?

Unpicking necessity from desirability

We have reported previously on *Kennedy -v- Cordia*[1], in which the Supreme Court gave detailed consideration to the admissibility of expert evidence generally. In that case, the court offered its views on the distinction between opinion and expert evidence of fact. It confirmed that, in relation to the former, the approach is one of necessity. However, in the latter, the approach could not be one of strict necessity, otherwise the court might be deprived of the benefit of an expert witness who had collated and presented to the court, in an efficient manner, the knowledge of others in his or her field of expertise. **If witness evidence of fact is likely to assist the efficient determination of the case, it should be admitted**.

It might be argued that an expert's evidence containing a mix of opinion and fact should be admitted in its entirety if the evidence of fact is deemed desirable, even though the opinion evidence is not held to be a strict necessity. This interpretation has been scotched, though, by the more recent decision of the English court in *Hayden -v- Maidstone & Tunbridge Wells NHS Trust*[2].

Hayden purports to follow the approach of the Supreme Court in *Kennedy*, and the judge cited the case and the conclusions drawn. *Hayden* was a personal injury case, and the defendant sought to adduce expert evidence in the form of surveillance. The surveillance evidence contained both factual evidence and opinion drawn from it. Delivering his decision in a late application for permission to adduce the evidence, Edis J noted that the law had been revisited recently by the Supreme Court in *Kennedy*. He commented that '*assisting the court*' had the meaning that access to the evidence was necessary rather than merely preferable. Thus he rejected the application to adduce the expert evidence of opinion.

Going on to deal with the factual evidence, and, in doing so, treating it as quite separate and distinct, Edis J considered that it would be likely to assist the efficient determination of the case, and so ordered that it should be admitted.

Together, these two cases establish that where there is a mix of fact and opinion in an expert's evidence, they will have different tests applied for admissibility. If the opinion evidence is deemed a necessity to assist the court, then it is unlikely that the admissibility of any factual evidence in the report will be an issue. However, where the opinion evidence is deemed not to be a necessity, that decision will not operate to also exclude factual evidence where such evidence is thought to be helpful and desirable.

Such factual evidence would, however, need to be separated and distinct from any opinion, in effect turning the expert into a witness of fact. Of course, the expert would then be unable to draw any conclusion from the facts or be invited to give any opinion arising from them. To our mind, this does raise some interesting questions concerning the status of the witness, the relationship with the court, the overriding objective and costs issues in relation to the instruction of the expert.

References

[1] *Kennedy -v- Cordia (Services) LLP* [2016] *UKSC* 6.

[2] *Hayden -v- Maidstone & Tunbridge Wells NHS Trust* [2016] *EWHC* 1962 *(QB)*.

[3] *Darby Properties Ltd & Another -v- Lloyds Bank plc* [2016] *EWHC* 2494 *(Ch)*.

Fact and opinion treated separately

This concept, which might be described as a duality of substance and nature, suggests that the court is unlikely to willingly merge fact and opinion. Although it might perhaps be done unwittingly from time to time, any attempt to sneak in unnecessary expert opinion with expert evidence of fact is now not likely to succeed.

To reinforce this point, in another recent case, *Darby Properties Ltd -v- Lloyds Bank plc*[3], the court rejected an application to adduce expert evidence in a negligence claim on the ground that the evidence was of a factual nature and there was nothing in CPR35 to restrict the admissibility of factual evidence, whether or not given by an expert. The case involved a claim for damages for breach of contract and negligence against the defendant.

The 'expert evidence' comprised largely a detailed explanation of the nature of interest rate derivative products sold by the bank. Master Matthews held that, although a tutorial on the nature of the products would undoubtedly be of some assistance to the trial judge, such evidence was not necessary and did not meet the threshold requirements for the admissibility of expert evidence set out in Civil Procedure Rule Part 35. However, it was, in his view, open to the parties to adduce such evidence as evidence of fact, for which the permission of the court was not required.

An unhelpful development?

While the logic of this argument can be followed, it does appear to us that it is a somewhat unwelcome development.

Civil Procedure Rule Part 35 does not contain a definition of expert evidence, but common sense tells us that expert evidence also includes evidence of fact that might only be discernible to the trained professional or that requires expertise in its comprehension or description. Expert factual evidence can also be given that draws together and explains the work of others and the current state of understanding of a particular topic or discipline. Sometimes factual evidence by an expert is needed merely to better explain the meaning of technical words and phrases.

The Master's finding in *Darby Properties* – that all relevant evidence of fact is admissible without permission – does, we suggest, fail to appreciate fully the wider purpose of some expert evidence. The effect of the judgment could mean that such evidence can be adduced entirely outside the scope of Part 35 and without the safeguards and regulation that it would provide. It would also leave the way open for factual evidence of a deeply technical nature to be given by non-experts outside the scope of the rules.

It would be surprising if this was the intention of the court, and it will be interesting to see whether this question is revisited to clarify the matter.

Titbits

Hidden sources

On page 5 we consider whether an expert who came into possession of CCTV footage in one case can reuse that material in a separate action. We conclude that to do so without explicit permission, or the protection of a court order, carries significant risk. But this situation raises a linked issue. **Can an expert make use of information but keep the source confidential?**

At first sight it would appear not, but there is limited authority to suggest that, in some circumstances, the approach might be possible. For example, there have been a few cases involving applications for asylum and human rights where experts have been in possession of confidential information subject to the Chatham House Rule (i.e. information disclosed during a meeting may be reported by those present, but the source may not be identified explicitly or implicitly). The court has taken the view that to ignore the knowledge an expert acquires in this way would be unreasonable, and the expert's value as a witness may rest in part upon access to sources that are unavailable to the public.

Where the court has permitted such expert evidence, it has been on the basis that the expert quotes the publicly available sources and explains so far as possible the additional corroboration obtained from confidential sources. In *Zarour -v- SSHD*[1], the tribunal allowed an expert to make reference in his evidence to information obtained from a confidential source. But it laid down the proviso that experts should:

a) only use confidential sources where no open ones are available
b) give the best indication they can of the general nature of the source, and
c) make it clear why the source must remain confidential, and why no open source can be used.

Clearly this approach is not a close fit for CCTV evidence, but it is worth bearing in mind because many experts deal with evidence that fits this approach more easily.

Before criticising, check the instructions

Experts are (generally) not lawyers, and the courts have stressed that much criticism of experts could be avoided if solicitors properly briefed and instructed them. In *Medimmune -v- Novartis*[2], Arnold J emphasised that lawyers who instruct experts bear a heavy responsibility for ensuring that those experts are not put in a position where they appear to have failed in their duty, even though they conscientiously believe that they have complied. He also said that it was important that courts should be cautious about criticising an expert witness unless it is clear that the fault lies with the expert rather than those instructing him. In tricky waters such as these, experts should require their instructing solicitors to deal with matters that are, in truth, legal issues.

It may be possible for an expert to conceal source of information

References

[1] *Zarour -v- SSHD* (01/BH/00078).

[2] *Medimmune Ltd -v- Novartis Pharmaceuticals UK Limited, Medical Research Council* [2011] *EWHC* 1669 *(Pat).*

Services for registered experts

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

Your Witness – FREE

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

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 69). All are available on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, etc.

E-wire – FREE

Now exceeding 100 issues, our regular condensed e-wire is our fast link to you. Containing shortened articles, as well as conference notices and details of urgent changes that could impact on your work, it is free to all members.

Little Books series – DISCOUNTED

Distilled from three decades of working with experts, our *Little Books* offer insights into different aspects of expert witness work. Go to www.jspubs.com/LittleBooks/lbe.cfm to find out more.

Court reports – FREE

Accessible freely on-line are details of many leading cases that touch upon expert evidence.

LawyerLists

Based on the litigation lawyers on our Controlled Distribution List, *LawyerLists* enables you to buy recently validated mailing lists of UK litigators. A great way to get your marketing material directly onto the desks of key litigators.

Register logo – FREE

If you are vetted and a current member you may use our undated or dated logo to advertise your inclusion. NB Successful re-vetting in 2017 will enable you to download the 2017 logo.

General helpline – FREE

We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for help, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas to both enhance your expert profile and give you access to our 2017 dated logo. The results of re-vetting are published in summary form in the printed *Register*, and in detail in the software and on-line versions.

Profiles and CVs – FREE

Lawyers have free access to more detailed information on our member experts. At no charge, you may submit a **profile sheet** or a **CV**.

Extended entry

At a cost of 2p + VAT per character, an extended entry offers you the opportunity to provide lawyers with a more detailed summary of expertise, a brief career history, training, etc.

Photographs – FREE

Why not enhance your on-line and CD-ROM entries with a head-and-shoulders portrait photo?

Company logo

If corporate branding is important to you, for a one-off fee you can badge your on-line and CD-ROM entries with your business logo.

Multiple entries

Use multiple entries to offer improved geographical and expertise coverage. If your company has several offices combined with a wide range of expertise, call us to discuss.

Web integration – FREE

The on-line *Register* is also integrated into other legal websites, effectively placing your details on other sites that lawyers habitually visit.

Terminator – FREE

Terminator enables you to create personalised sets of terms of engagement based on the framework set out in Factsheet 15.

Surveys and consultations – FREE

Since 1995, we have tapped into the expert witness community to build up a body of statistics that reveal changes over time and to gather data on areas of topical interest. If you want a say in how systems develop, take part in the member surveys and consultations.

Professional advice helpline – FREE

If you opt for our Professional service level you can use our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment, etc.

Software – FREE

If you opt for our Professional service level you can access our suite of task-specific software modules to help keep you informed.

Discounts – FREE

We represent the largest community of expert witnesses in the UK. As such, we have been able to negotiate with publishers and training providers to obtain discounts on books, conferences and training courses.

Expert Witness Year Book – FREE

Containing the current rules of court, practice directions and other guidance for civil, criminal and family courts, our *Expert Witness Year Book* offers ready access to a wealth of practical and background information, including how to address the judiciary, data protection principles, court structures and contact details for all UK courts.

Address
J S Publications
PO Box 505
Newmarket
Suffolk
CB8 7TF
UK

Telephone
+44 (0)1638 561590

Facsimile
+44 (0)1638 560924

e-mail
yw@jspubs.com

Web site
www.jspubs.com

Editor
Dr Chris Pamplin

Staff writer
Philip Owen