Your Witness

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The 'Beeching' of legal aid

There's a new pre-action protocol out, this one focusing on debt claims. Learn all about it on page 2. It makes grim reading for creditors dealing with individuals or sole traders, and will add impetus to the growing trend of requiring payment in advance from, for example, litigants in person.

Part of the problem with debt cases is of the Ministry of Justice's (MoJ) own making. The widespread factoring of commercial debts, coupled with the centralised, semi-automated way in which the court deals with many claims *ex parte*, make many individual debtors feel that they are up against a system they don't understand and offers them no voice.

The Beeching-like destruction of our legal aid system, painful branch by painful branch cuts, has removed one of the most important paths to early settlement – 30 minutes with a solicitor under a 'Green Form'. It gave debtors (and sometimes creditors) a clearer understanding of their options. It also frequently resulted in payment, an offer to pay by instalments, or the setting up of some sort of voluntary arrangement. Legitimate defences or counterclaims were identified much earlier, offering creditors a better understanding of the debtor's position. Despite the new Protocol talking about giving debtors time to seek advice, the fact is that most debtors no longer consult a solicitor – they simply can't afford it!

Is it cynical to assume that the Protocol has been designed purely to discourage reasonable litigation? It seems likely to me that will be the effect. The Protocol may have some useful function if it promotes rational discussion and negotiation between the parties. The exchange of financial information could, at least, persuade the creditor that the debt is 'not worth the candle' and should be written off in preference to costly litigation. However, the majority of creditors make every effort to reach reasonable agreement despite the beliefs of the Protocol's authors. If the MoJ really wanted to save itself time and money, it should have spared the expense of the Pre-Action Protocol Subcommittee and diverted more of its meagre resources to creating a court system that works for ordinary people.

Prior judicial criticism

We had a call to our Helpline recently asking about how to deal with a couple of instances of adverse comments from judges. The expert had taken the criticism seriously and his company had conducted a review of each of the elements of the comments. These reviews concluded that the expert had given solid and scientifically valid facts. Furthermore, the opinions provided had been formed based on the facts, and had also been valid and supportable.

The problem the expert faced was that the criticism was now being cited in court by opposing barristers as a means of trying to discredit his standing. The expert asked whether he had any duty to disclose adverse comments to a party in subsequent instructions.

To my mind, the whole issue of judicial criticism of experts is problematic. Of course, if a judge prefers one expert's opinion over another, that is fine. But to express that preference through overt criticism of the unfavoured expert can quickly become unfair. The expert will not have been a party in the case and will have had no opportunity to make any defence against the judicial criticism of the expert evidence. And there is no mechanism for an expert to challenge such criticism. None of that is fair.

Of course, some judges upon hearing such attacks will be quick to understand the attacker's motivation. They will appreciate that whatever the criticism, it is sure to be bound up in the specifics of the earlier case, and therefore of little relevance to the current trial. The impact on a jury may be different.

Philosophical matters aside, though, the practical reality is that one can almost guarantee that **a party will at least consider making use of any judicial criticism as a means of 'playing the man'** rather than the more difficult task of undermining the expert opinion. If that challenge comes as a surprise to those who instruct the expert, they may well feel doubly aggrieved.

With that in mind, it makes sense to be open about these sorts of criticism from the outset. Citing the myriad cases in which one's expert evidence has not been criticised, and then discussing the handful that have been, along with an analysis to explain any unfairness involved, will forewarn those who instruct you and quite possibly give them time to prepare a counterargument should the opposing side start to 'play the man'.

Draft time – new edition

Preparations for edition 31 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 2018** you may wish to contact us now so that we can make appropriate alternative arrangements.

Chris Pamplin

New protocol for debt claims

Debt cases seen as clogging civil court system

Whatever the original aims of Lord Justice Jackson's Final Report on Civil Litigation Costs (2010), successive governments have attached greater emphasis to **reducing the number of cases in the civil courts** and **encouraging some form of alternative dispute resolution** (ADR) as a substitute for the traditional judicial forum. This approach to access to justice is fast becoming the norm in the seemingly endless years of cut-price Britain that we have all had to endure.

In his report, Jackson identified commercial debt cases as one of the causes of our clogged court system. These constituted, he said, '*a huge swathe of business of the courts*' and he suggested that they needed their own specific protocol.

A Civil Procedure Rules Subcommittee was set up to formulate a pre-action protocol for debt recovery and on 9 December 2016 a protocol was approved, the final version of which was published by the Ministry of Justice (MoJ) in March 2017. The *Pre-Action Protocol for Debt Claims* came into force on 1 October 2017. You can find a copy on the MoJ's website at https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/protocols/pre-action-protocol-for-debt-claims.pdf.

Halcyon days

Before dealing with the provisions of the Protocol, we should, perhaps, remind ourselves of how things worked in the 'good old days'. If you were a business or a trader to whom someone owed money, you would send a reminder followed, after a suitable time, by a final demand (or a series of letters with a graduated level of ire and frenzy!). Eventually, you would reluctantly trot along to your local county court and issue a default summons. All this was generally at modest expense, depending on the amount you were hoping to recover. Assuming the debtor did not enter a defence, you could apply for judgment by default and then begin the fun task of enforcing the judgment. A judgment could be enforced by a bailiff, or by obtaining a charging order on property, or in a variety of other ways. The approach was always something of a lottery. Generally speaking, though, if the debtor was solvent, you stood a good chance of making some recovery, to include your costs.

New Protocol adopts a prescriptive approach

To prevent parties from resorting too precipitously to the courts, previous conventions have required that there should be a letter before action containing sufficient information to identify the debt and liability, and to afford the debtor the opportunity to make payment or to dispute liability. In reality, where litigants in person were concerned, most district judges gave considerable leeway and exercised discretion in all but the most lamentable shortcomings in pre-action letters.

Enter the new prescriptive protocol

This approach, it seems, did not go far enough in keeping the troublesome debt cases from darkening the doors of the disinterested courts. The new Protocol tries to deal with the perceived shortcomings by imposing a prescriptive and rather tedious list of requirements on all commercial creditors... basically things they must now do before they can come anywhere near the court's hallowed precincts.

Of course, that is not what the Protocol actually says. Its stated purpose is to **encourage early communication between the parties** and **avoid court proceedings**, by **agreeing a repayment plan or considering using a form of ADR**. It goes on to say that parties are encouraged to act reasonably and proportionately to the size of the debt, and to support each other in the efficient management of proceedings that cannot be avoided. Well, of course, we can see that creditors will want to give a lot of support to malingering debtors who are keeping the jam off the children's bread!

Expert perspective

Expert witnesses are, perhaps, more fortunate than most in this regard. The majority of experts, particularly those with well-drafted terms of business and effective retainers, will only rarely have to sue for their fees. However, debt recovery action is by no means unknown, and consequently experts need to be aware of the requirements of the new Protocol.

The first thing to say is that experts contracting with other businesses will not need to comply with the Protocol, unless the other business is a sole trader. The Protocol applies to any business (including sole traders and public bodies) claiming payment of a debt from an individual (including a sole trader). **Experts who contract with firms of solicitors will, therefore, not be affected unless the solicitor is a sole practitioner**. The Protocol will, however, apply to debt claims against individuals, such as litigants in person.

The new Protocol will *not* apply if the debt is covered by some other pre-action protocol, for example those applicable to construction and engineering cases. Similarly, it will not displace any existing regulatory regime to which the creditor is subject.

However, if an expert does become involved in debt recovery that is covered by the Protocol, the main provisions are as follows.

Letter of claim

The main aim of the Protocol is that **creditors will provide debtors with all the information they need to obtain advice on their position prior to the issue of a claim** and that, if possible, the **parties should attempt to resolve the dispute without the need for court proceedings**.

Crucial to this aim, the creditor is required to send a **letter of claim** to the debtor. It should contain the following specific information:

- the **amount of the debt**
- whether **interest** or **other charges continue**
- the **date** of the letter, to be given at the top of the first page

- if the debt arises from an **oral agreement**, then the **identity of the parties** to the agreement, **what was agreed, when and where**
- if the debt arises from a **written agreement**, then the **identity of the parties** to the agreement and the **date of the agreement**, with confirmation that the debtor can request the creditor to supply a written copy
- a **statement of account for the debt**, including the amount of **interest** and any **other charges** imposed
- if the **debt's been assigned** (e.g. to a debt collector), then **details of the original debt and creditor, when it was assigned and to whom**
- **if the debt is currently being paid on behalf of or by the debtor**, an explanation of **why these payments are not acceptable** and why proceedings are being considered
- details of **how the debt can be paid**, and what the debtor can do to **initiate discussions on payment options**.

The letter of claim must enclose the **Information Sheet** and **Reply Form** as prescribed and set out in Annex 1 of the Protocol. It must also include a **Financial Statement** for the debtor to complete (see Annex 2 of the Protocol).

The **letter is to be sent to the debtor by post** on the day it is dated or, if that is not reasonably possible, on the day following. **Transmission by electronic or other means is not permitted unless the debtor has provided alternative contact details and has made an explicit request that the letter should not be sent by post**.

Debtor's response

In the event that the debtor does not respond at all to the letter of claim within 30 days of the date at the top of the letter, the creditor is permitted to commence court proceedings. This is, however, subject to the proviso that the creditor has given the debtor 14 days' notice of an intention to do so. This notice period might be relaxed in exceptional circumstances. For example, if the limitation period is imminent.

If the debtor chooses to respond, he (or she) must do so as prescribed by paragraph 4 of the Protocol and should use the Reply Form enclosed with the letter of claim. When doing so, the debtor is permitted to request copies of any documents and may also supply copies of any documents he considers to be relevant.

Assuming that agreement cannot be reached, payment has not been made and there has been no agreement to pursue ADR, the creditor is permitted to commence proceedings after the expiry of 30 days from the receipt of the Reply Form, or 30 days from provision by the creditor of requested documents, whichever is the later.

Court's expectation

Both the creditor and debtor will be expected to do all they can to explain their respective positions. Documents and information are to be exchanged freely if available; if not available, an explanation should be given. Any request must be responded to within 30 days. If, after all this, the parties are unable to reach agreement, they are expected to consider an appropriate form of ADR.

Compliance

Paragraph 7 of the Protocol makes clear that **the parties should have complied fully with the Protocol before proceedings are issued.** Indeed, any noncompliance can be considered by the court when giving directions for case management. The court is likely to employ a fairly wide discretion. A claim could be struck out or, more likely, stayed until there has been compliance. In any event, there would almost certainly be costs consequences.

Prevaricator's Charter?

Assuming that 14 days' notice had not been given prior to expiry of the initial 30 days and that the debtor left it to the last minute to return the Reply Form, the shortest time between letter and proceedings would be 74 days. If the debtor raises requests for additional information, further time would be added. On top of this, if the debtor says legal advice is being sought, the creditor must allow 'a reasonable period' of time to do so. Whatever well-meaning intentions lie behind the Protocol, even at a most cursory glance, it appears to offer the determined debtor all manner of opportunities for prevarication. The most glaring of these is that if agreement for repayment is reached but subsequently breached by the debtor, the creditor must start from scratch by sending an updated letter of claim and beginning the timetable all over again!

Protocol is a Prevaricator's Charter

Saving grace?

The courts must have regard to the MoJ's own *Pre-Action Conduct and Protocols* practice direction in terms of assessing delay and proportionality. It states that pre-action protocols must not be used by a party as a tactical device to secure an unfair advantage over another party. **Only reasonable and proportionate steps need be taken by the parties** to identify, narrow and resolve the legal, factual or expert issues. Furthermore, the costs incurred in complying with a pre-action protocol should be proportionate (Civil Procedure Rules 44.3(5)). Where parties incur disproportionate costs in complying with any pre-action protocol or this practice direction, those costs will not be recoverable as part of the costs of the proceedings.

For any expert wishing to avoid becoming ensnared in the provisions of this protocol, the message is clear. **As far as possible, don't contract with individuals**; if you must, give serious consideration to imposing 'cash on account' terms so that you don't have to think about debt chasing.

Experts may seek 'cash on account' to avoid becoming ensnared

The GDPR – data protection regulatio

GDPR is ambitious, strict and complex...

The worldwide use of the personal computer, access to the internet, on-line shopping and globally distributed corporate networks have vastly and irrevocably increased the ease with which personal data are collected, transmitted, stored and disseminated. Somewhat sluggishly, laws have been formulated that attempt to address the potential harms posed by the wholesale and unregulated exploitation of personal data. It's probably fair to say, however, that UK law has always been a step behind the technology. Perhaps based on its more lamentable historical record in the field, Europe has a more finely tuned awareness of fundamental rights, particularly in relation to the individual's right to privacy.

General Data Protection Regulation 2016

The data protection provisions affecting England and Wales are currently embodied in the Data Protection Act 1998. This Act was, itself, born out of EU legislation contained in the Data Protection Directive (95/46/EC). It is now viewed as outmoded, and the EU is looking to strengthen the rights of individuals and to impose stricter obligations on data controllers and data processors. The new provisions are contained in the General Data Protection Regulation ((EU) 2016/679) (GDPR).

The regulations – described as ambitious, strict and admittedly complex – are **designed to harmonise data protection laws across the EU and to radically transform the way in which personal data are collected, shared and used *globally***. While it remains to be seen what amendments may be made to UK domestic laws after Brexit, the Secretary of State has confirmed that the UK will be implementing the GDPR, and it will **come into force on 25 May 2018**.

Given that the implementation date falls before the projected date of Brexit, this does create some uncertainty about the position post Brexit. Subject to any legislative provisions that may be introduced between now and then, the GDPR would cease to apply after the UK has left the EU and the applicable law would revert to the Data Protection Act 1998. However, as with so many other European regulations, the needs, obligations and requirements of businesses that will continue to operate across European borders are likely to dictate that the UK will continue to abide by such regulations and adopt the same into domestic laws. Indeed, the Information Commissioner has already said that it is crucial to businesses and consumers that there should be data protection consistency with other European countries. So much for having control over our own laws and institutions after Brexit!

... and Brexit won't stop its implementation

UK businesses should assume, therefore, that they will be obliged to conform to the GDPR post Brexit. They should implement their compliance strategies as soon as possible and identify any steps that need to be taken to bring their current practices into line.

Stronger data protection environment

Those involved in any aspect of data control or protection will recognise much in the GDPR, but there are a number of key areas that have been substantially developed or strengthened. They can be broadly divided into four categories.

1. Harmonisation of EU national laws and the expansion of geographical scope
2. Rights of the subject and the nature of consent
3. Security and transfer of data
4. Penalties for noncompliance

The regulations are long, detailed and complex. Thankfully, most expert witnesses are not involved in much data processing and nor do they maintain managed databases. However, those who do will wish to familiarise themselves with the detailed provisions. The fine details are outside the scope of this article, but we are preparing a new factsheet ('Complying with the EU's General Data Protection Regulation') offering a deeper analysis.

What follows is a brief overview of the main changes the new regulations make to existing law for the benefit of the majority of experts who have only 'light' data protection duties.

Harmonisation and expansion

The new regulations will apply not just to all EU Member States. **Data controllers in non-EU states will be expected to comply** where goods or services are offered to data subjects in the EU (regardless of whether payment is received), or where there is any monitoring of a data subject's behaviour that takes place within the EU.

Rights and nature of consent

The existing law, formulated under the old Data Protection Directive, does assume some level of consent by a data subject to the storage of personal information. The nature of that consent, and whether it is implied or explicit, depends on the nature and sensitivity of the data. The new regulations will make it much harder to imply consent. The standard will now be considerably higher and will require some clear affirmative action (such as a written, electronic or oral statement) establishing a freely given, specific, informed and unambiguous indication of the individual's agreement to their personal data being processed.

Businesses will be prohibited from making consent a condition of the performance of a contract or the supply of goods and services where consent is not necessary to the proper execution of the contract.

The burden of showing that consent was validly obtained and freely given will fall on the data controller. The new regulations will impose particular vigilance on situations where there is a 'clear imbalance' between the parties (for example, between an employer and an employee) because there is a rebuttable

ns get tougher

presumption that consent has not been freely given.

Where data are subject to multiple uses or processes, the individual's separate consent will be required to each such use and process. Data controllers will need to ensure that there is some affirmative process that makes clear that the data subject has opted in (such as ticking a blank box). **Failure to opt out will not constitute an affirmative agreement**. Businesses should consider how they will be able to provide evidence that consent has been obtained validly.

The data subject must be **free to withdraw consent at any time**, and the process must be made simple and easy.

The data subject will also have the **right to erasure** ('right to be forgotten'). This enables them to request that their data be erased if it is no longer required for the purpose for which it was collected, or if they simply withdraw their consent. It remains somewhat unclear how this will actually work in practical terms.

The individual will also have other rights, such as the **right to object to tracking of activities and profiling**. This practice is, of course, widespread on internet sites, and developments in this area will need to be monitored closely.

For expert witnesses, there are several exemptions to the requirements for consent and erasure, most notably where processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity.

Security and transfer of data

The GDPR will impose on businesses and their data controllers responsibility for assessing the degree of risk that their processing activities pose to data subjects. Businesses will be expected to carry out **privacy impact and risk assessments** and will be accountable to national Supervisory Authorities (SAs). Businesses will be required to implement **'data protection by design'** (e.g. when creating new products or services) and by default (e.g. data minimisation), both at the time of designing a means for processing data and at the time of the processing itself. Various technical requirements, such as **pseudonymisation**, will have to be planned into future product cycles.

Data controllers will be required to keep and maintain records of their processing activities, and the GDPR specifies the information this record must contain. In some circumstances, it will be necessary for businesses to appoint a **dedicated data protection officer**.

The data subject will have new rights to request copies or transmission of their data. Copies should be provided in a commonly used, machine-readable format, and individuals have the right to transmit those data to another controller, such as an on-line service provider. The subject can, in this regard, request direct transfer if it is technically possible.

The GDPR requires businesses to **notify the SA of all data breaches without undue delay** and, where feasible, within 72 hours, unless the data breach is unlikely to result in a risk to the individuals. If this is not possible, the business will have to justify the delay to the SA by way of a 'reasoned justification'. In cases of breaches that might result in a high risk to data subjects, those subjects will normally also need to be informed.

Generally speaking, **the greater the storage and use of data, the higher the responsibility for risk assessment and the burden of compliance**. More minimal use and lower risk activities may have a reduced burden of compliance. Some of the obligations on data controllers (such as documentation requirements) will only apply to organisations who employ more than 250 people. However, all the obligations will be imposed on smaller businesses if their processing of data is not 'occasional', includes sensitive personal data or is likely to result in a high risk to individuals. It will be for each business to determine whether it is likely to fall into one of these categories.

Data protection by design, not as an afterthought

Penalties and enforcement

The **new regulations will greatly increase penalties for breach of data protection** provisions. Currently, the maximum penalty that can be imposed by a court in England and Wales is £500,000. Implementation of the regulation will mean that, depending on the nature of the breach, fines can be levied at up to 4% of annual worldwide turnover of the preceding financial year or 20 million euros, whichever is the greater. To make enforcement easier, the regulations substantially increase the reach of SAs, who will be given extensive powers to request information, carry out audits or demand access to premises or databases.

It should be noted that the **GDPR imposes obligations on both data controllers and data processors**, and both may be subject to penalties. If external processors are used, this is likely to make contracts harder to negotiate in future, and more expensive.

Impact of GDPR on experts

The GDPR is likely to be something of a headache for bigger businesses like insurance companies, social media sites and advertisers, who process large volumes of personal data. It will be less of a concern to smaller operations or businesses, such as expert witnesses, who do not store or process large amounts of data. However, the nature of any data that experts do store is likely to be of a potentially sensitive, personal and high-risk nature. As such, **care will be needed to ensure that processing and use of that data do not fall under the ambit of the GDPR**. Health data, in particular, have a wide definition under the GDPR and represent one of the classes of data that falls into a special category.

Do you hold sensitive and high-risk personal data?

The secret expert

Can an expert give evidence anonymously?

For more than a century, the principle of open justice has been jealously guarded, and successive cases have emphasised its importance. But an interesting dilemma presents itself when an expert wishes to give evidence while preserving a degree of confidentiality or even anonymity. Such circumstances may arise when the nature of the evidence itself is highly confidential or commercially sensitive, or the expert's identity needs to be shielded for some reason. So is any attempt to grant an expert anonymity doomed to failure?

Court rules on anonymity

Although Civil Procedure Rule (CPR) Part 39 (Miscellaneous Provisions relating to Hearings) does not define a 'hearing', its definition must include hearings of claims on the fast track and multi-track. CPR 39.1 makes clear that a reference to a hearing includes a reference to the trial. While there is no obligation on a court to provide accommodation for public spectators (e.g. where a hearing is held in chambers), the hearing is still technically public because any order or judgment is made available for publication.

The circumstances in which a hearing may be held in private are to be found in CPR 39.2(3). They include situtations where, in the view of the court:

- **publicity would defeat the object of the hearing** (commonly used in applications for a freezing injunction or a search order)
- there are **matters relating to national security**
- there are **matters involving confidential information** (including information relating to personal financial matters)
- it is necessary to **protect the interests of any child or protected party**
- the matter is **not contentious** and arises in the **administration of trusts or of a deceased person's estate**, or
- it considers this to be necessary, **in the interests of justice**.

The court is also required to take into account the Human Rights Act 1998 (HRA). When deciding whether a hearing or any part thereof should be conducted in private, the court must weigh CPR 39.2(3) against the provisions of the European Convention on Human Rights (ECHR) rights for a fair trial, respect for private and family life, and freedom of expression. Applications to hear in private any part of a hearing, including any expert evidence, must be made to the judge. Unless the judge decides that a formal application is not necessary, the application should be made under CPR 23. The judge conducting the hearing must decide whether to hold it in public or private, having regard to any representations made.

Applications for private hearings can also be made in proceedings in the Court of Appeal. However, a first instance decision will not bind the Court of Appeal and will not determine how the appeal should proceed (see, for example, *Pink Floyd*[1]).

Courts will give great weight to the principle of open justice

Necessity is the key test

The court will apply a test of **necessity**. The test requires any party seeking secrecy or privacy to satisfy the court that by nothing short of exclusion of the Public can justice be done. An order for a hearing to be held in private must be limited in scope to what is required in the particular circumstances. Furthermore, restrictions on access and reporting should be kept to the minimum necessary to enable justice to be done.

Richards J in *McKillen -v- Misland*[2] emphasised that supporting evidence must be '*clear and cogent*' and would be scrutinised carefully by the court.

The sort of case typically involving expert evidence where confidentiality might be an issue would be one involving, for example, industrial processes and trade secrets, the identity of children, terrorism and national security, or financially sensitive or other personal and/or confidential information.

In *D -v- P*[3], a case involving the enforcement of a negative restraint in an employment contract, the court allowed most, but not all, of the proceedings to be conducted in private because it was deemed reasonably necessary to protect the claimant's legitimate commercial interests in its trade secrets. In this case, privacy was also extended to the judgment. The Court of Appeal recognised that open justice should be the norm, but that sometimes, in order to do justice, the general rule had to yield. Only 'appropriate' parts of the full judgment (which was issued in private) were set out in the open judgment.

Contrast this with the judgment of Legatt J in *GSTS Pathology*[4]. In that case an application was made to remove commercially sensitive material from the transcript. It was rejected by the High Court because the material was said to be relevant to the underlying issues. In addition, there was no claim made that the claimants would be prejudiced if it formed part of the judgment. If this had been a genuine concern, the party should have raised the issue before the information had been referred to in open court. Legatt J opined that it was

> *'a fundamental aspect of the principle of open justice that all the reasoning which has led a court to its conclusions should be publicly available, and compelling reasons are required to justify any departure from that principle'.*

Where it is not deemed necessary for the whole of a hearing to be conducted in private, the court can address concerns about confidentiality by making another form of order. For example, it is possible to seek an order that any **confidential material is referred to only on paper that does not enter the public domain**. When preparing documents in such cases, the parties can place confidential material in an annex that the court can readily identify and order *not* to be disclosed. If, during the course of the hearing, any confidential information is revealed accidentally

in oral testimony, the court can make an appropriate order preventing its reporting.

Where proceedings are held in private, the publication of information 'relating to' such proceedings will not automatically constitute a **contempt of court**. There are, however, certain specific circumstances in which publication will be deemed contemptuous. They include **breach of an express prohibition** by the court of publication of all information relating to the proceedings; where the court sat in private for reasons of **national security**; or where the information relates to a **secret process, discovery or invention** that is in issue in the proceedings.

All of the foregoing is of relevance only to the nature and context of evidence that might be contained in an expert's report or matters that might be referred to in the course of expert oral examination or cross-examination. It is more likely in such cases that any application for privacy or exclusion of the Press would be made by one or other of the parties.

What is the position, however, when it is the identity of the expert that is the sensitive factor? **Is it possible to protect the identity of an expert witness to the extent that only the judge and the parties' legal advisers (but perhaps not the parties themselves) are aware of the expert's identity?**

Anonymity orders

CPR Part 39.2(4) gives the court the **power to order that the identity of any party or witness must not be disclosed**. The court will only do so, however, **where non-disclosure is considered necessary to protect the interests of that party or witness**. The rule allows the court to make an order anonymising the judgment. Anonymity orders are usually made following a private hearing if the court considers there is a continuing need to protect the interests that justified the hearing being held in private in the first place. However, the **court's power to grant anonymity orders is quite separate from its powers to order private hearings**. Accordingly, if there is a wish to hide the identity of a witness, whether by the party or the witness, the application can be made independently or in addition to an application for a private hearing. The **court can impose reporting restrictions or an anonymity order instead of an order that there be a private hearing**.

Consequently, the court has the power to anonymise its judgment or the identity of a witness even after a public hearing has been held. In practice, though, the general rule is that material will have entered the public domain once it is read or has been referred to in open court.

The Supreme Court has ruled[5] that the test to be applied by the court when deciding whether to grant an anonymity order is **whether there is sufficient public interest in publishing a report of proceedings that identifies the party (or, by implication, any witness) to justify any resulting curtailment of that party's rights to respect for private and family life under Article 8 of the ECHR**. Lord Roger, in the Supreme Court judgment, was critical of the lower courts. He thought they were too ready to grant such orders without careful consideration or clear explanation. In cases where there is no physical risk to those involved, it is necessary for a balance to be made between the right of the Press to freedom of expression under Article 10 of the ECHR and any other right protected by law, such as the right to respect for private and family life under Article 8.

Expert anonymity

The court is, however, much more likely to grant an anonymity order for an expert witness in cases where there are real and reasonable concerns regarding **physical risk to the witness**.

In *AB, R -v- Secretary of State*[6], the court made an anonymisation order in the course of judicial review proceedings relating to an asylum claim. In addition to prohibiting certain information that would have identified the claimant, the country to which he had been deported and any political parties in that country, the order also prevented identification of the claimant's expert witness.

The court is also likely to consider applications to protect the identity of an expert witness where that witness is involved in matters of **national security** or **anti-terrorism** and there would be **risk to that individual's safety** if his or her identity was revealed, or if national security measures and procedures would otherwise be placed in jeopardy.

In some cases, the court might, alternatively, consider dealing with sensitive information under the **'closed material procedures'** (CMPs). This provides a mechanism whereby sensitive evidence that would otherwise be disclosed to the other party or parties can still be used in the proceedings, rather than being excluded completely under a **Public Interest Immunity (PII) certificate**. The evidence is heard in a closed hearing, with the other parties excluded and their interests represented by a special advocate. Application for CMPs can be made by the Secretary of State, any party to the proceedings, or as a result of the court's own motion. CMPs can be used when a party to the proceedings or a witness would otherwise be required to reveal sensitive material which, if disclosed, would be damaging to the interests of national security.

Conclusion

It will be apparent that the scope for making expert evidence confidential or concealing the identity of an expert witness is somewhat limited. Experts who are shy of the glare of publicity are probably in the wrong job! Nevertheless, there are mechanisms that can be employed to shield experts when there are cogent reasons to do so.

Anonymity most likely where risk of physical harm to expert exists

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[3] *D -v- P* [2016] *EWCA Civ* 87.

[4] *R (GSTS Pathology LLP & Others) -v- HMRC* [2013] *EWHC* 1823 *(Admin).*

[5] *Secretary of State for the Home Department -v- AP (No 2)* [2010] *UKSC* 26.

[6] *AB, R (on the application of) -v- Secretary of State for the Home Department* [2013] *EWHC* 3453 *(Admin).*

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