Your Witness

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What is the GDPR?

The General Data Protection Regulation (GDPR) imposes new and stricter obligations on those who handle data. It comes into force in May 2018.

Does it affect me?

It is likely that all expert witnesses handle personal data that fall under the ambit of the GDPR. Indeed, the scope and impact of the GDPR are far reaching and the consequences of non-compliance severe. Many of the GDPR's main concepts and principles are similar to those contained in the existing Data Protection Act 1998 (DPA). Accordingly, experts already complying with the provisions of the DPA will be working from a good starting point.

Data controllers and data processors

Someone who acquires personal data and who determines the purposes and means of the processing of that data is a *Data Controller*. Someone who manages, modifies, stores or analyses personal data on behalf of, or in conjunction with, the data controller is a *Data Processor*. Both roles have responsibility for complying with the GDPR, but the specific duties vary between the roles.

Both a data controller and a data processor may be subject to penalties.

Which am I – controller or processor?

When expert witnesses are provided with personal data by an instructing solicitor, they will be acting as data processors because how they process the data is controlled by the instructions received. It is conceivable, though, that expert witnesses will hold personal data as both a controller and a processor.

What are data governance agreements?

Experts who are data controllers will need to:

- put in place **compliance procedures**
- ensure that **any person or organisation they share data with is also GDPR compliant**, and
- ensure that **any person employed by them is aware of the new regulations**.

Consequently, it would be wise for experts to:

- **undertake a thorough review of how they manage data**, and
- **check the contracts and other arrangements** they have in place with third parties with whom information is shared or by whom information is supplied.

A *data governance agreement* embodies this chain of control. By the same token, experts should not be surprised if they are now required to enter into data governance agreements with law firms or other suppliers or controllers of data.

Getting ready

The Information Commissioner's Office (ICO) has published a handy guide, *Preparing for the General Data Protection Regulation*, which sets out some key steps.

- **Be aware** of the changes.
- Carry out an **information audit** to find personal data you hold, where it came from and who you share it with.
- Publish **privacy notices** that provide accessible information to individuals about how their personal data will be used.
- Ensure your procedures cover all the **individuals' rights**, including how you would delete personal data or provide data to them electronically.
- Update your procedures and plan how you will handle **subject access requests** within the new time scales.
- Identify the **lawful basis** for your processing activity and explain it in your **privacy notice**.
- Review how you seek, record and manage **consent** (see below).
- Identify data on **children** and obtain **parental or guardian consent**.
- Detect, report and investigate a personal **data breach**.

Consent

The GDPR makes it much harder to imply consent. The standard will now 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. The burden of showing that consent was validly obtained and freely given will fall on the data controller. For consent to be informed, the data subject should be aware of at least the data controller's identity and the intended purposes of the processing.

The ICO's thinking on this is still evolving, but I think that it is part of the processor's task (the expert witness) to ensure that there is a valid consent obtained by the controller (the instructing lawyer) and that this consent identifies any third parties (e.g. expert witnesses) to whom the data will be passed.

Please do be specific

This is a major new regulation and not one that Brexit will remove. If you have specific questions on the operation of GDPR in your forensic practice, please do use our Helpline to raise them with us. In that way we can hone in on the practical issues that experts need to tackle.

Chris Pamplin

Confidentiality too far?

Commercial sensitivity can lead to restrictions on experts...

... and these can become onerous

When litigation involves sensitive commercial information, trade secrets or valuable scientific research, it poses particular problems with expert confidentiality. On occasion, the court and parties might consider that the expert's standard obligations and duties are insufficient.

Detailed understanding required

Such a situation may arise in cases dealing with experimental processes and patents, particularly the experiments carried out in the 'work-up' to the final outcome.

In *Honeywell Limited -v- Appliance Components Limited* (unreported, 22 February 1996), Jacob J expressed the view that, in the context of a work-up of an experiment, there should be an objective fixed point against which the opinion evidence of the expert could be judged and, accordingly, the full story had to be revealed.

In *Mayne Pharma*[1], the claimants sought to invalidate four patents relating to a drug used in the treatment of colorectal cancer. The claimants alleged that one of the patents (which defined a method of preparing the compound under conditions within a specified pH range) was anticipated by a piece of prior art. The claimants filed a notice of the prior art and a notice of experiments they themselves had carried out. The prior art document, however, made no mention of pH range. The defendant, who had done its own experiments, could not replicate the experiments as described in the notices. The claimants did not disclose how they had devised the protocol for their experiment, and their expert, in his report, said that he had no part in devising the protocol but had simply been asked to review it.

Ordering disclosure to the defendant expert witness, Pumfrey J said that the defendant's expert had identified a number of differences between the experiment as performed using the information in the notice of experiments and when conducted in light of the prior art disclosure. However, the expert could not comment on the effect of these differences without knowing why the claimants' experiment was conducted as it was.

In ordering disclosure of work-up experiments, the court is opening up to scrutiny some of the most sensitive and secretive commercial and industrial processes and creating a danger that these could be abused. To guard against this possibility, **the court can permit limited disclosure or restrict disclosure to certain select persons**. Where disclosure is to be made, or an inspection carried out by a party's expert, it is not uncommon for confidentiality undertakings to be required from that expert. These **undertakings can be so strict that, in some cases, they can operate to severely restrict the expert's ability to operate in future in a particular field** – having almost the effect of a severe restraint of trade.

A catalyst that would bind experts

This whole question of expert confidentiality and trade secrets came before the courts recently in *Magnesium Elektron Ltd -v- Neo Chemicals & Oxides*[2].

The case concerned a claim for infringement of the claimant's patent of a rare-earth mixed oxide used in automotive emissions catalysts. It was alleged that a substance manufactured by the defendant in China infringed this patent. Tests on the imported product raised *prima facie* evidence of such an infringement. Birss J, granting leave for service out of the jurisdiction, ordered that there should be an inspection of the defendant's process in China and that it should commence as soon as reasonably practicable. The claimant's inspection team was to be permitted to be present at any stage of the manufacturing process, 24 hours a day. However, recognising the commercial sensitivity of the manufacturing processes of the two competitors, the court ordered that the inspection team must be restricted to specific individuals who had signed strong confidentiality undertakings.

The judge considered the case law affecting confidentiality. He recognised that if permission was to be given to disclose confidential product information to a third party, including an expert witness, the court must be satisfied that this was necessary to address a serious issue at trial and, if so, should be protected by confidentiality provisions sufficient to:

> *'... minimise and/or mitigate the risks of the confidential information becoming known, disclosed or used in an unauthorised manner having regard to all the circumstances including the nature of the information in question, the identity of the proposed recipient and the proposed use of the information for the litigation'.*

In cases where trade secrets are involved the judge said that the court should be:

> *'.... particularly astute to ensure that no unnecessary risks were taken with them and that any necessary risks of unauthorised disclosure were kept to a minimum'.*

To facilitate this, the court created two tiers of confidentiality. The external lawyers and two named experts were to constitute an inner circle and would be permitted to see the whole product and process description (PPD). However the in-house lawyers and the claimant's commercial director would only be permitted access to a redacted version. So sensitive was the PPD, involving a secret ingredient 'X', that the experts in the inner circle agreed to and gave undertakings that imposed full industry-wide lifetime restrictions, effectively preventing them from future work in the field of catalysts. The argument was that, once in possession of the information, it would be almost impossible for them not to make use of it (or at least be aware of its effects) when undertaking future work

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Not truly 'expert'

There is no doubt that evidence labelled as 'expert' carries a certain extra weight. It sometimes happens that parties try to adduce 'expert' evidence on matters that are not, in reality, legitimate matters for expert opinion.

Recently there has been a spate of cases in which attempts have been made to dress up fairly unremarkable trade evidence of fact as expert evidence. In *Glaxo Wellcome UK Ltd (t/a Allen & Hanburys) -v- Sandoz Ltd*[1] the court took steps to address the matter. In his judgment, Chief Master Marsh emphasised the court's existing duty to restrict expert evidence. He further offered useful guidance on the nature of expert evidence and the circumstances in which it can legitimately contain evidence of trade or professional practice.

The case of the inhaler

The *Glaxo* case involved a passing off claim in relation to a leading brand of asthma inhaler. The claimants alleged that the defendants had mimicked the appearance, colour and 'get up' of their inhaler. The defendants contested this, pointing out that the inhalers were not consumer products but were dispensed on prescription by pharmacists who were unlikely to be influenced by the appearance or 'get up' of the product. Furthermore, the defendants pointed to conventions in the colour coding of generic products for specific uses which, they said, were recognised by healthcare professionals and patients alike. To support these assertions, the defendants wished to call expert evidence in relation to the types of inhaler generally available and their active ingredients, and a healthcare professional's practice in relation to prescribing and dispensing. The proposed experts were a respiratory specialist, a GP and a pharmacist.

Although the Master gave consideration to the useful case law on whether the admission of expert evidence was likely to assist the court and was reasonably necessary to resolve the issues, he concentrated his mind on whether the evidence of these proposed expert witnesses was outside the scope of expert evidence altogether.

It should be noted that, in this case, the application to adduce the evidence was made without identifying the proposed experts and without the provision of any information regarding their qualifications and experience and the nature of the evidence they were able to give. Neither had the parties made any progress towards agreeing a list of matters that were agreed or disputed. Had these steps been taken, the court might have viewed the application somewhat differently.

Dealing with the application on its merits, the Master concluded that the evidence proposed in relation to prescribing and dispensing of the inhalers could not be properly classed as *expert* evidence. He observed that there was no standard model for assessing patients' medical needs, decisions in relation to treatment or prescribing and dispensing. Professionals thus engaged would be dealing with many variables, all of which would require separate consideration. The Master was unable to see any circumstances where the health professionals would be able to provide a reliable expert opinion based on a body of knowledge and a set of assumed facts. All they could do, in reality, would be to say what they would do personally in given circumstances.

Dressing up fact as opinion can backfire

Experience -v- established body of expertise

Although the Master accepted that evidence in relation to the different types and ingredients of inhaler might be useful, it had not been demonstrated to his satisfaction that it was properly characterised as expert evidence. There could, he said, be instances in which didactic evidence could be described as expert evidence because it was in a field in which the court could not be expected to gain an understanding without expert evidence and explanation going beyond a mere description of facts. However, he could not see that this evidence was in an area that was contentious. The proper course would have been for the parties to cooperate in agreeing relevant facts and in establishing where agreement could or could not be reached.

Considering the case of *Fenty -v- The Arcadia Group Brands Ltd*[2], the Master distinguished evidence based on a witness's own experience of medical practice from evidence based on an established body of expertise. He was clear in his mind that the evidence proposed in relation to trade and professional practice was, here, merely evidence of fact.

Just trying to 'brand' factual evidence

Given that the permission of the court is not needed to adduce evidence of fact, one might be forgiven for wondering why it was necessary for the application to be made at all. This was a question that did not escape the Master's attention. He found some force in the claimant's argument that the defendant was merely seeking to enhance the value of the evidence with a branding exercise. The substance of the evidence would be largely the same whether given by a trade witness of fact or a healthcare expert.

However, there is undoubtedly a perception that the weight and probative value of expert evidence is the greater, and that evidence branded as such will be more persuasive. In refusing the defendant's application, the court gave a clear indication that **draping trade evidence of fact with the mantle of expert evidence will not be permitted**. We suspect, however, that this ruling is unlikely to result in a decline in such applications. The fault often lies with instructing solicitors who do not always appreciate the difference between trade evidence of fact and expert opinion, and who value the potential benefit of well deployed expert evidence almost as much as a slap-up lunch at Simpson's on the Strand!

References

[1] *Glaxo Wellcome UK Ltd (t/a Allen & Hanburys) & Another -v- Sandoz Ltd & Others* [2017] *EWHC* 1524 (*Ch*).

[2] *Fenty -v- The Arcadia Group Brands Ltd (1)* [2013] *EWHC* 1945 (*Ch*).

Cost orders against experts

Are experts distinct from 'the team' when cost orders are involved?

When considering orders for costs against one or other of the parties, it is reasonable for the court to take into consideration the conduct of the parties and any failures or omissions made by them. It might seem reasonable that this extends to the activities of all persons involved on the party's behalf, including expert witnesses. In this respect, then, one might think that expert witnesses are indivisible from the 'legal team'.

This was the view taken by the Crown Court sitting at Aylesbury, whose cost order against the Crown Prosecution Service (CPS) was the subject of an application by the Director of Public Prosecutions (DPP) for judicial review. The DPP's application was made following an order that the CPS paid the defendant's costs following the collapse of a trial where the prosecution's expert witness was found to have made a fundamental error.

The trial had involved the prosecution of a defendant for the possession of indecent images of children said to have been on his computer. The Crown had instructed a senior digital forensic technician as an expert witness. He conducted an examination of the computer's hard drive and, in his subsequent report, concluded that there were 123 indecent images of children, of which 122 were inaccessible to the user of the machine. The exception was a category A1 image, which was stated to be accessible. The defendant had stated when questioned by the police that he had been sent the images by someone else and, as soon as he had realised their nature, had deleted them immediately.

The defendant's solicitors instructed an expert who made an examination of the computer. The defendant's expert sought clarification from the prosecution's expert on the precise location of the image and was told that it was contained in a deleted system file. The defendant's expert report concluded that no indecent images of children were found to have been saved anywhere on the computer's hard disk drive, and that the only pictures that could be identified were either deleted or in system-created areas to which the user had no access. In the light of these exchanges and the defendant's expert report, 1 month after the defendant had pleaded not guilty the CPS decided to offer no evidence. The court acknowledged that the defendant was a man who was and is of good character.

Basis of cost orders

Section 19 of the Prosecution of Offences Act 1985 (POA 1985), together with the Costs in Criminal Cases (General) Regulations 1986 (the Regulations), permits a party to proceedings to recover its incurred costs where those costs are attributable to an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings. Relying on this, the defence team made application for payment by the CPS of the defendant's costs in their entirety. The defence case was that the expert's error was the result of '*insufficient care*'. The Crown Court Judge attributed no blame to the CPS but held that the Crown is indivisible in terms of the parties it relies upon. Consequently, he allowed the application for the defence costs, although he said he did so with a heavy heart on the basis that:

> *'... equality of arms is a very important point, and if one side can recover their costs when there is an error by the other side, I cannot see why it is not so the other way round, and I don't think it is for the judge to start adding third parties.'*

Judicial review

In *R -v- Aylesbury Crown Court*[1], the DPP applied for judicial review of the decision, and this was granted by the High Court. During the course of the judicial review, Lady Justice Sharp made some interesting and, perhaps at first sight, surprising findings in relation to expert witnesses and their role and status as part of the CPS's legal team.

The main submission made by the CPS was that the Crown Court Judge had made an error and acted without jurisdiction in ruling that the CPS should be liable for the actions of an expert witness. It argued that the expert witness was an independent third party and that, furthermore, the judge had not identified any unnecessary or improper act or omission sufficient to make the order under Section 19.

The Crown argued that the judge had been wrong in his statement that the expert witness was indivisible from the CPS. Even if he had been right in this belief, he should not have made the order under Section 19 unless there had been a '*clear and stark error*' by the expert. The Crown asserted that there had been no investigation of the error made in this case, let alone a finding that it amounted to an improper act. It followed, so said the Crown, that there was no evidence to support such a finding. The error was – to put it at its highest – a negligent mistake, which fell far short of impropriety.

This argument was countered on behalf of the defendant. The defence said that, in the absence of binding authority on the point, the judge was entitled to regard the expert as 'part of the Crown' for the purposes of the costs application. In the alternative, an improper act or omission was committed by the CPS itself: the finding of only one accessible image among the 123 recovered from the computer was anomalous, and this anomaly should have provoked an inquiry of its expert by the CPS.

Lady Justice Sharp acknowledged that the Crown Court only has jurisdiction to order a party to pay the costs of another party to the proceedings if those costs have been incurred as a result of the improper or unnecessary act or omission '*by or on behalf of*' that party. She identified the material words as being '*on behalf of*'. She further recognised that it was common to

References

[1] *R (on the application of the DPP) -v- Aylesbury Crown Court* [2017] *EWHC* 2987 (*Admin*).

[2] *R -v- Maidstone & Tunbridge Wells NHS Trust* [2016] *EWHC* 779 (*QB*) [2016] *Crim LR* 560 (*Crown Court*).

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refer to an expert instructed by the CPS as giving evidence '*on their behalf*'. However, she was satisfied that the relationship between the CPS and the expert was a contractual one and not one of agency. The CPS was, therefore, no more responsible for the acts or omissions of an expert than it would be responsible for the actions or statements of a witness of fact.

Expert witnesses are not 'part of the team'

Experts, she said, are not to be regarded as part of the Crown. She contrasted and distinguished the role of the police and the role of experts. She observed that:

> *'... all too often, when a mistake is made in the preparation or conduct of a CPS prosecution, the police and the CPS blame one another. But for the purposes of section 19 no distinction can be drawn between them'.*

The CPS and the police were two arms of the Crown and could, therefore, be regarded as indivisible. This is not true of expert witnesses and it would be antithetical to the duty of an expert if that were to be the case. She was in no doubt that the wording of the Criminal Procedure Rules firmly established that expert witnesses are independent third parties, whose principal duty is owed to the Court, not to those instructing them.

She then had to deal with the suggestion that the CPS should have recognised the possibility of an error and questioned the expert more closely; in not doing so, it had been guilty of misconduct, thus justifying the cost order. Lady Justice Sharp held that the error in this case was not one that should have been obvious to the CPS.

In *R -v- Maidstone & Tunbridge Wells NHS Trust*[2], the prosecution of an NHS Trust for manslaughter was halted by the trial judge on the ground that there was no case to answer. The prosecution evidence was based on expert evidence that was found to be flawed, and the trial judge was very critical of the expert. However, in refusing an order for costs, he held that the evidence of the expert had not been so plainly wrong that it should have been obvious to the Crown.

Independence comes with a cost!

In some respects it is not difficult to see why the Crown Court Judge made the order he did. Although he had power under Section 19B of the 1985 Act to make a third-party costs order against the expert, such an order would require serious misconduct, the threshold of which is very high. It is, perhaps, unsurprising that a judge should therefore seek some alternative mechanism to enable an innocent party's costs to be met by public funds. The judicial review has, however, made clear that this is not a proper exercise of the judge's powers under Section 19. **The CPS does not generally bear costs responsibility for the errors or failings of its experts**.

of their own. It was accepted that, once the information was known, it was unlikely that it would simply be forgotten and that it could unconsciously affect future work by the expert, possibly with a competitor of the defendant.

The parties agreed a process for the testing of some of the raw materials by laboratories in China and the UK but were unable to reach agreement on testing samples of the final product. The claimant argued that it was not possible for its inspection team to be present at the manufacturing facility for every minute of the process. Therefore it could not be certain that the samples handed to it at the end of the inspection were the same as those it had seen at the various stages of the inspection. Furthermore, some of the samples exported for testing in the UK would first have to be tested in China to determine whether they were safe to be transported by air.

A difficulty arose when one of the claimant's experts in the inner circle declared that his expertise was insufficient to give an opinion on the equivalence of the samples. The claimant sought permission to introduce a third expert into the inner circle. This expert, a professor and an expert in the field of catalysts, was not, however, prepared to give any undertaking containing a restrictive covenant preventing him from doing further work in this field.

Middle ground still weighs heavy

The court had a difficult task to perform in effecting a balanced approach. The court recognised that, whichever course was taken, there would be risks. It did not wish to hamper proceedings by denying access to an expert who, by common agreement, was admirably suited to assist. Neither did the court want to run the risk of confidential information leaking out. It recognised that a balanced approach was needed and that it might not, in all cases, be possible to eliminate the risks altogether.

Although the court in *Neo Chemicals* came very close to denying access of the new expert to the inner circle, it did, in the end, decide that the interests of justice demanded it. Although the professor was not required to enter into the same lifetime restrictions that the other experts had agreed to, he was given very firm instruction by the judge concerning the nature of his duty of confidentiality. He was required to confirm that he fully understood the consequences of this and that the possession of the information would constitute a real burden. Consequently, if the expert believed that possession of the information would cause difficulties in relation to his current or future work in the field, then he would need to consider very carefully how he should address this.

The case provides a timely illustration of the **heavy weight of confidentiality that experts often carry**, particularly in cases involving subject matter of a commercially sensitive nature.

Possession of confidential data constitutes a real burden

References

[1] *Mayne Pharma Limited & Another -v- Debiopharm SA & Another* [2006] *EWHC* 164 (*Pat*).

[2] *Magnesium Elektron Ltd -v- Neo Chemicals & Oxides (Europe) Ltd & Others* [2017] *EWHC* 2957 (*Pat*).

Late application to change experts

Applications to change experts are often fraught

We have reported previously on the attitude of the courts in applications to change experts, and the court's reluctance to permit this, particularly when close to the trial date.

There is a heavy burden on a party looking to change expert late in the day which, save in exceptional circumstances, will be difficult to discharge. However, there has been a steady stream of cases where the court has accepted that the particular circumstances of the case justify the application.

'Guntrip' set the bar quite high

The often quoted authority of the Court of Appeal's decision in *Guntrip*[1] back in 2012 emphasises the nature of the burden. In that case, the decision of a trial judge to refuse permission to instruct new experts following a joint statement that was unfavourable to the claimant was upheld. However, this must be weighed against, and contrasted with, the decision in *Edwards-Tubb*[2] which established that, in the ordinary course of events, a party should not be forced to rely on the evidence of an expert witness in whom confidence has been lost.

Generally speaking, **the nearer the application is to the scheduled trial date, the less likely it is to be granted**. The court will also consider any **delay in making the application**. For example, in *Clarke -v- Barclays Bank Plc*[3], the claimant's expert had completed his report but had subsequently retired and was unavailable for trial. The claimant's solicitors had been fully aware of the situation but left it for several months before making application to the court to instruct a replacement expert. Permission was refused.

Guntrip established that whether permission should be granted, or whether leave should be given, to adduce additional or alternative evidence is a **case management decision**. The onus is on the applicant to explain the reason for changing the expert, and it is the role of the judge hearing the application to exercise his or her discretion in accordance with the overriding objective. The judgment in *Guntrip* placed considerable emphasis on the need to **retain, where possible, the court timetable and preserve any trial date set**. The later the application, the less ready the court should be to accede to the request.

Court is ever alert for a party that appears to be 'expert shopping'

Is the court softening its approach?

Since *Guntrip*, there has, we suggest, been a discernible softening in the court's attitude towards the granting of permission to change experts. It has extended to some applications made at a very late stage in proceedings.

In 2015, the court gave permission to change expert where the claimant's expert stated that he had signed the wrong version of his report, although it later transpired that an amended version of the report had been created by the expert only after he had signed the original (*Cintas Corporation No 2 -v- Rhino Enterprises*[4]). The trial judge in that case considered that such inappropriate and improper conduct by the expert justified the claimant in instructing a new expert to provide evidence to replace the evidence that had been tainted by the original expert's conduct.

In the same year, the court also allowed a late application to change experts where the original expert, although still in private practice, had been dismissed from his post within the NHS. The court recognised that this had so undermined the expert's credibility that it had created a crisis of confidence sufficient to merit a change of expert (*Lee -v- Colchester Hospital*[5]).

A second bite of the cherry

In 2017, the court made a ruling that **permission may also be granted where there has been a change in circumstance, even if the change of circumstance comes after a previous application to change experts has been refused**.

In *Murray -v- Martin Devenish*[6], a claimant had instructed an expert to prepare a report in support of his claim that he had been abused by a teacher at a Catholic seminary in the 1970s. It was then discovered that the expert had been severely criticised by the court in another case, so a second expert psychologist was asked to provide a further report. On the advice of counsel, a third expert (a psychiatrist) was subsequently instructed to produce yet another report. The defendant instructed its own expert, who reported that the claimant had been seen by the discredited expert, and the claimant applied to the court to rely on the report of the third expert, together with a supplemental statement. The application was made very close to the trial window and the court refused permission, following the authority of *Guntrip*, ruling that the desirability of a change of experts was outweighed by the risk that the trial date would be lost. Permission to appeal the decision was given. However, there was subsequently a stay of proceedings for unconnected reasons and the original trial date was vacated.

The stay was later lifted and at the hearing of the appeal the claimant argued that the second expert had diagnosed him as suffering from narcissistic personality disorder, whereas the third had identified post-traumatic stress disorder, and that he should be allowed to rely on the expert of his choice.

The defendant argued that the appeal should be dismissed on the basis that the order made at the case management hearing had been within the ambit of the judge's discretion. The defendant argued that the proximity of the application to the trial date had been relevant and the claimant had not been clear about his previous reliance on the discredited expert. Furthermore, the defendant believed that there had been a switch in the nature of the claimant's application. At the directions hearing, the claimant's emphasis had been on the difference in status between

the psychologist's and the psychiatrist's evidence, but at the appeal hearing it appeared to have been shifted to the differences in their conclusions. This, it was alleged, constituted expert shopping and should not be permitted.

Allowing the appeal, Gross LJ said that tough case management decisions were integral to an increased emphasis on proportionality and the overriding objective. He pointed out that this necessitated the careful scrutiny of expert evidence by the court and active discouragement of expert shopping. However, this assessment had to be balanced with the need to consider the reasons for changing, the interests of justice and the candour of the application. The judge at the directions hearing had been concerned about the impending trial date and had believed that the second expert's report was sufficient to resolve proceedings. If he had allowed the introduction of the third expert's report there was a danger that the trial date would have been lost or, at least, preparation for trial would have been disrupted. Accordingly, he had acted correctly and was within his discretion in refusing permission. However, since the date of the original hearing, the proximity of the trial date was no longer an issue, and the circumstances and the balance of justice had changed. Accordingly, the Court of Appeal held that the claimant should not be confined to an expert in whom he had lost confidence and should be permitted, instead, to rely on the report of the third expert.

The court acknowledged that, at some point, it might simply be too late to change an expert. **There is no unqualified right to change experts, but not every change will be disallowed or judged pejoratively**. The inference is that in their directions, judges should not be too dogmatic in their adherence to the principles emphasised in *Guntrip* and should also have regard to the court's approach in *Edwards-Tubb*.

Changing expert after a joint meeting

In January 2018 there was a further development. In *Wright -v- First Group plc*[7], an expert instructed on behalf of the claimant in a personal injury case had made statements in a joint report which, on the face of it, appeared to constitute a change in his views. The views he had expressed were potentially very damaging and would severely undermine the claimant's claim for substantial damages for life-threatening and life-changing injuries. The expert had also failed to explain the reasons for his apparent change of view. A week prior to the date fixed for trial, application was made by the claimant to change experts.

The brief facts of the case were as follows. The claimant had been struck at a road crossing and seriously injured by a bus that was being driven by an employee of the defendant. The lights at the crossing had been in the bus's favour, but it was argued that the driver should have been alert to the danger and seen the claimant standing at the crossing. Consequently, he should have approached with caution. The claimant admitted that he had crossed when he should not have done and admitted that there was an element of contributory negligence. The issue was whether the driver should have been driving slower and whether he could have avoided the accident by breaking earlier or by swerving. The bus had been travelling at 27 mph before the driver started breaking and, at an earlier disciplinary hearing, the driver had admitted that he had been aware of the presence of the claimant. Both sides instructed experts in accident reconstruction.

In his initial report, the claimant's expert expressed the opinion that the driver should have been alert to the hazard and could have slowed sufficiently to avoid impact. However, following a joint meeting of the experts, the claimant's expert appeared to have had a substantial change of view when he signed a joint statement indicating the opinion that there was nothing the driver could have done to avoid the collision unless the speed before breaking was considerably less than 27 mph.

Hearing the application, the judge identified the lack of clarity in the claimant expert's views, exacerbated by his answers given to written questions and the failure to offer an explanation. The judge recognised that this was an important case in which damages on a full liability basis would be substantial. There was a real risk that refusal of the claimant's application, even at this late stage in proceedings, would place the claimant at an unjustified disadvantage.

The judge was mindful that the simple fact that an expert had expressed a view that might be disadvantageous to a party was not sufficient justification for allowing a change of experts, particularly at such a late stage in proceedings. He also recognised that one of the main reasons for a joint meeting of experts was to explore possibilities for agreement between experts on the various issues, and that discussions could sometimes lead to a shifting in ground. However, under Civil Procedure Rules Practice Direction 35 para 9(8), an expert who has significantly altered an opinion is required to include a note in the joint statement explaining the change of opinion. The claimant maintained that his expert had significantly altered his opinion but the joint statement had contained no such explanatory note.

Allowing the application, the judge adjourned the trial to give the claimant time to instruct a new accident reconstruction expert. This was an exceptional course demanded by what the judge viewed as unusual circumstances. Indeed, the judge was at pains to stress that his decision should not be relied upon as a precedent. Nevertheless, **the ruling does seem indicative of a trend towards allowing changes of expert, even very close to trial, where the court perceives real prejudice to a party and the risk of injustice if an application is refused**.

Even very late requests are allowed on occasion

References

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[3] *Clarke -v- Barclays Bank Plc* [2014] *EWHC* 505 (*Ch*).

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