Your Witness

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

Civil Liability Bill – update

Last time in *Your Witness* (issue 93) we reported on the Civil Liability Bill 2017-19 which was then before Parliament, Part 1 of which was concerned entirely with whiplash claims. The Bill proposes some fundamental changes in the way whiplash claims are conducted, the nature of the medical evidence and the settlement of such claims.

There are a number of key provisions contained in the Bill that are of particular relevance to experts. Chief amongst these is a **prohibition against settlement of whiplash claims before a medical report has been obtained**. As drafted, the Bill will prevent anyone from settling a claim without an approved medical report.

This, we suggested, was probably good news for medical experts engaged in this field of work, but we also highlighted a section of the Bill that provoked some concern. The Bill provides that the Lord Chancellor may, by regulations, make provision about what constitutes appropriate evidence of an injury for the purposes of this section.

Section 6(4) states the regulations may:

a) specify the form of any evidence of an injury
b) specify the descriptions of persons who may provide evidence of an injury
c) require persons to be accredited for the purpose of providing evidence of an injury
d) make provision about accrediting persons, including provision for a person to be accredited by a body specified in the regulations.

This, we suggested, would hand a huge amount of power to the Ministry of Justice (MoJ) in deciding exactly what will constitute allowable expert evidence in whiplash cases. We also mentioned the criticism attracted by the consultation document issued by the MoJ.

Our current understanding is that the Bill has passed through Parliament. The House of Lords approved the amendments made in the House of Commons without a vote, meaning that it will now head for Royal Assent.

In its current form, Section 6(4) remains unaltered and so could be enacted as it stands. However, the text of the Bill as published by Parliament on 11 September 2018 does not yet reflect any new amendments proposed since that date. We will report further as this Bill moves to become law.

New Register website

The *Register*'s website is a key element in the promotion and support of our member expert witnesses. Recently we launched a completely revamped website that plays nicely with every device that can browse the web. From the smallest smartphone to a desktop monitor, our new website scales and reflows to give the visitor the best possible access to the services we make available on line.

As well as giving the site a fresh and modern look, we have redeveloped the way people can search for experts. For example, there is no longer a requirement to create an online account to be able to search (we instead use modern monitoring techniques to ensure nobody hogs the service). We have also greatly reduced the number of clicks it takes to locate support and guidance information for member experts.

Recommend a lawyer

The printed version of the *UK Register of Expert Witnesses* is distributed free of charge to a controlled list of UK legal firms and barristers' chambers. It was the first printed expert witness directory back in 1988, and today remains the only printed annual expert witness directory.

For inclusion on our controlled list, we select firms with the appropriate litigation profile. There is no guarantee that any particular legal firm will remain on the controlled list year on year, but those firms on the list undertake approximately 80% of litigation in the UK.

We are in the process of refreshing our controlled distribution list ready for the mailing in May of our upcoming edition 32 of the *Register*. If you would like to recommend a particular lawyer, or lawyers, to be considered for inclusion on the controlled distribution list, please send their name, their firm's name and their address to us by email to *cdl2018@jspubs.com* before the end of December.

Draft time – new edition

Preparations for edition 32 of the *UK Register of Expert Witnesses* have begun. It hardly seems possible that the next edition will be our 32nd! 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 2019** you may wish to contact us now so that we can make appropriate alternative arrangements.

Of course, we are always looking to innovate and add value to your membership. So please do let us know of anything that you think we can do to enhance our service to you.

Meanwhile, everyone here at J S Publications sends their very best wishes to you for a Happy Christmas and prosperous New Year.

Chris Pamplin

Inside

Issue 94

Swift justice

Granting summary judgment without sight of the expert evidence rarely safe

Most experts will be aware of the procedure for summary judgment. It is defined in Part 24 of the Civil Procedure Rules (CPR), which allows the court, in certain circumstances, to decide a claim, or a particular issue, without a trial. The essence of the procedure is contained in CPR 24.2. Summary judgment can be made if:

- the **claimant has no real prospect of succeeding**
- the **defendant has no real prospect of successfully defending**
- there is **no other compelling reason** why the case or issue should be disposed of at a trial.

The procedure is commonly used in civil cases. Unsurprisingly, though, it is less evident in personal injury cases and, in particular, cases of medical negligence. An application for summary judgment in a medical negligence case prior to the exchange of expert reports has never been granted... until, that is, this year.

In *Hewes -v- West Hertfordshire Hospitals NHS Trust*[1], summary judgment was given by the Master at first instance on the basis that the claimant had no real prospect of establishing breach of duty. The order was granted prior to exchange of reports. The Master did consider the defendant's expert report and the response to it by the claimant's expert. He concluded, though, that the claimant's expert's response did not deal with the main issue. On this basis, the Master concluded that the claimant had failed to adduce credible medical opinion evidence to show that the claim had a realistic prospect of success at trial.

Case particulars

In brief, the claimant had developed symptoms of Cauda Equina Syndrome (CES). The doctor contacted him as part of the out-of-hours GP service. Following their conversation, he was taken to hospital by ambulance. He required decompression surgery. Generally, the earlier the surgery is performed, the better the outcome. The claimant was not operated on for several hours. Following the surgery, he was left with permanent bowel and bladder dysfunction. He brought claims against the NHS trust, the ambulance service and the doctor, alleging that each had contributed to an unreasonable delay in performance of the surgery. He argued that the doctor should have contacted the hospital immediately after their conversation to ensure that his assessment by the hospital team was expedited. Further, he held that had he been operated on earlier, he would have avoided a complete CES and its consequences.

Application for summary judgment

At a case management conference, the Master gave directions, including for the exchange of expert reports. Before exchange, the doctor applied for summary judgment, saying that the claimant had no reasonable grounds for the claim against him. In support of his application, he included his expert's report which stated that no responsible GP would have contacted the hospital to expedite the claimant's assessment. In response to that report, the claimant's expert provided a brief statement of his continued support of the claimant's case. The Master, granting summary judgment, considered that the claimant had been given ample time to obtain his expert's view on the central issue. In the absence of a fuller answer to the GP's expert report, the evidence from the doctor's expert led the Master to conclude that the claimant had failed to discharge the burden on him to show he had a realistic prospect of proving the doctor had failed to act in accordance with a responsible body of medical opinion.

Reasoning on appeal

The claimant appealed. Allowing the appeal, Foskett J noted that there would be few cases where an application for summary judgment could properly be contemplated before exchange of the expert reports, and indeed, in most cases, not until after the experts had discussed the case and produced a joint statement.

Explaining his reasoning, Foskett J said that there was always the prospect that experts might change their views in the light of expert discussions. Furthermore, whilst it was not encouraged, there were occasions when a party might be allowed to substitute another expert at some later stage. Consequently, the task of considering evidence that may or may not be available at trial on a summary judgment application was one that needed to be undertaken with caution. The Master had, therefore, been unjustified in taking the view that the claimant's expert evidence at trial would not be a sufficient response to the doctor's expert's view and that he'd fail to establish his case against the doctor.

The appeal judge thought it understandable that the claimant's legal advisers had been reluctant to allow their expert to tie himself to the terms of a rapidly produced short response. Any omission or infelicitously expressed observation would doubtless be seized upon in cross-examination, as would any failure to mention some relevant document, piece of research or guidance note.

Foskett J also pointed out that there were costs implications. The budgets had been agreed upon and the timetable set. Any alteration, therefore, had potential costs consequences. Even without evidence concerning the difficulties of producing a suitable response to the doctor's expert, it was unreasonable to expect that the claimant's expert should produce even brief reasons in response. Whilst the Master was right that the claimant had ample time to obtain his expert's view, the important factor was that, at the hearing before the Master, that view had not been fully articulated and developed in a final report. Indeed, there was no obligation on the claimant to produce that final view until the date fixed by the directions for exchange. The application for summary judgment, therefore, should not have been granted.

References

[1] *Hewes -v- West Hertfordshire Hospitals NHS Trust* [2018] *EWHC* 2715 (*QB*).

Virtual justice

In March 2018 an anonymous article in *The Guardian* sounded a warning over the Ministry of Justice's (MoJ) plans to 'digitise' the court system.

The correspondent, described as 'a legal advisor' working in the magistrates' courts, pointed out that, since 2010, over 220 magistrates', county and crown courts have closed across England and Wales. As a result, increasing numbers of people live far away from a court house and are encouraged to make pleas on line or give evidence via a video link.

Grave fears were expressed concerning the MoJ's £1bn justice transformation which, it is proposed, will pave the way for 'digital courts' where cases are conducted by video link. Concern has also been expressed about the impact this will have on vulnerable individuals who, it is claimed, will be at a disadvantage if their liberty is determined remotely. It is harder to assess and support them when they aren't physically there – and harder for them to be advised and give instructions. Additionally, the video link technique has been seen by some to underestimate the importance of body language and gestures in determining the credibility of an individual's evidence.

It was claimed that '*the digital future of our courts has been envisaged without consulting the staff who work every day in our courtrooms*', and it was alleged that changes are being made solely to meet government targets.

Even if digitisation was considered a good idea, it seems that the technology currently in place is less than adequate. Users complain that the technology is unreliable, slow, cumbersome and not user friendly. Indeed, in a survey of justice sector staff carried out by the TUC in 2016, only 4% of respondents agreed that court IT works effectively. The correspondent wryly concluded by saying that at least there were fewer court staff to find this an outrage! More than 5,000 of them have been cut since 2010 and there has been a 10-fold increase in spending on agency and contract staff. In short, the MoJ has seen its budget cut from £9.3bn in 2010/11 to £5.6bn by 2019/20.

A new era dawns

The first online courtroom hearings for claimants began in 2018. The pilot programme in the Tax Tribunal involves a judge in a court taking evidence from claimants over the internet via video links. Couples applying for divorce can already conduct the process entirely online.

The MoJ says that the software that enables the parties to communicate is free to install and, if the parties wish to be represented, their lawyers can sit alongside them at their computer, or participate remotely via video link.

The Under-Secretary of State at the Ministry of Justice, Lucy Frazer, said: '*We are spending £1bn on transforming and modernising the justice system. Video hearings have the potential to improve access to justice and speed up cases*'. According to Ms Frazer, the pilot scheme will '*provide important information – together with an increasing body of evidence from other countries – to drive innovation to make the wider system quicker, smarter and much more user-friendly.*'

Of course, whether or not the system is ultimately a success, there will be (and are) teething problems. For an example, one need only look at the recent case of serial rapist John Worboys. The judicial review of his release from prison on parole was brought to a halt when a video link failed repeatedly. The judge was obliged to adjourn and order Worboys to attend court in person.

The MoJ has envisaged that claimants will be able to 'attend' court hearings whilst at home or at work. Quite how that will operate in practice, and how they will avoid the myriad distractions that such an environment might pose, is anyone's guess. It might revolutionise access to justice or it might, equally, be cloud cuckoo land.

Government presses ahead with £1bn 'digital court' programme

Benefits for experts

Experts, as ever, will be swept along in the wake of this brave new innovation. Sir Andrew McFarlane, president of the Family Division, said that, assuming the technology works, '*for the right type of case, a fully or partial virtual hearing is likely to be an efficient, effective and economic way of conducting court business*'. He painted a rosy picture for expert witnesses who, he said, would benefit from less travel and waiting around. However, he went on to hint that more 'subtle' benefits would emerge too.

According to Sir Andrew, this method of delivering expert evidence had significant advantages. He proposed as an example a case he had presided over in which a paediatrician gave lengthy and complex expert evidence via a video link. Using a direct link from his own computer, the expert was able to include photographs and other material to illustrate his evidence. Furthermore, he could position key material on his own desk and move freely about his room, as and when he needed to refer to them.

Urging experts to keep an open mind about the potential advantages of the new technology, Sir Andrew said that, in his view, this could be a far more effective method of giving expert evidence than physical attendance.

An uncertain future

There are, undoubtedly, many who will welcome such innovation. Conversely, there will be those who sigh mournfully at yet another round of cost cutting led by bean counters rather than folk who understand what the system is supposed to be delivering. Many will remind themselves that if the IT investment in the NHS is anything to go by, there will be lots of pitfalls to come.

What is certain, though, is that the virtual court will lead to the loss of even more court buildings. The government is not yet finished with its planned court closures. In its mind, the virtual courts will sit nicely alongside virtual libraries, virtual health centres and a growing heap of other virtual public services.

Virtual courts will close court buildings

No property in an expert witness

Can a party approach the other side's expert?

'Interfering' with the other side's expert

We have looked before at questions surrounding the legal concept that there is no property in a witness and how this applies to *expert* witnesses. An interesting point arises in relation to this. **Can a party approach the other side's expert for a statement of fact without the expert's instructing party, or its solicitor, being present?** If so, could any statement so obtained be treated as evidence of fact and, if so, for this purpose, is the expert a witness of fact?

Of course, the circumstances would have to be unusual for a situation to arise where the factual evidence sought was unavailable elsewhere, or the expert was uniquely placed to provide such evidence. However, what if the expert operates in a very narrow field with a dearth of experts available to provide opinion? What about when the expert is employed or closely connected with one of the parties or the facts in issue? What would happen if the inquiries and investigations undertaken have put the expert in possession of facts that would otherwise not be discoverable?

If factual information is sought from an expert by a non-instructing party, could this be construed as improper interference with a witness? (If a single joint expert (SJE) is following the Civil Procedure Rules (CPR) on SJEs, it ought not to be possible. Before responding to an enquiry from a jointly instructing party without the participation of the other party, the expert would ensure all parties are 'in the loop'.)

No property in a witness

The concept that **there is no property in a witness** has been held to include expert witnesses. In *Harmony Shipping -v- Saudi Europe Line Ltd*[1], an expert was instructed briefly by the first party to give an opinion on the handwriting used in a document. He was subsequently instructed as a handwriting expert by the second party. When it became apparent to him that he had already advised the first party in relation to the document, he withdrew and declined to act for either party. The second party then issued a subpoena (witness summons) to compel his attendance. Refusing to set the subpoena aside, the Court of Appeal held that there is no property in a witness, whether an expert or a witness of fact. The court had to weigh this against the risk that privileged information might be disclosed. It concluded that, although communications with the expert would be, for the most part, protected by legal professional privilege and that this might create tensions between what the expert could and could not reveal, the principle of no property still applied.

Yes, and the expert can also be put on the stand by the other side...

Privilege must be preserved

In *Versloot Dredging -v- HDI Gerling*[2], the claimant sought an injunction to restrain the defendant from interfering with the claimant's attempt to interview the defence expert witness prior to trial. The claimant alleged that as there is no property in a witness, it was entitled to free and unimpeded access to the expert. Furthermore, the claimant stated that any interference from the defendants was a contempt of court and should not be allowed.

Applying *Harmony Shipping Company,* the court held that it may be a contempt to interfere with attempts by the other side to interview a witness, if such interference was improper. It would depend on the circumstances of each case. In this instance, the defendant's interference in telling the expert not to speak to the claimant about any technical evidence to avoid divulging any confidential or privileged information was not improper, so no injunction was necessary. Although the defence expert could, if he chose, give evidence to the claimant, he had to take care not to reveal any confidential or privileged information.

The court rejected the defendant's argument that any rights in relation to the expert were governed by CPR 32.5 and that it was inappropriate for the claimant to effectively engage in an advanced cross-examination. The court commented, as an aside, that the CPR cannot be treated as the sole source of rights and obligations in respect of witnesses. Such rights and obligations are also governed by the law relating to confidence, privilege and contempt.

In his judgment, Christopher Clarke J said:

> *'The fact that there is no property in a witness undoubtedly means that party A cannot prevent party B from calling as a witness at trial (under subpoena if necessary) someone from whom A obtained a statement or whom he intended to call himself. A has no right to have the witness to himself, or for no one else to have him. Further, a witness, once called, may be required to give evidence, if it is relevant, which would otherwise be confidential to A.'*

Pre-trial contact with expert witnesses

Referring specifically to approaches made to an expert witness pre-trial, the judge said that, in his view, there were a number of points that were clearly established.

- **The decision as to whether or not to cooperate with a party to whom no relevant contractual or fiduciary obligations are owed is for the witness in question.** Without a subpoena or other compulsory process, a witness cannot be compelled to provide assistance and information. Experts may, all other things being equal, make their own choices.
- **The 'no property in a witness' rule means that, in cases where no question of breach of confidence arises, a solicitor commits no impropriety simply because he seeks information and takes a statement from a witness, even though that witness has given a statement to the other side.** He must not, of course, tamper with evidence or threaten

or intimidate the witness, but that is a different matter.

- **The fact that a witness could at trial be compelled to reveal confidential information does not mean that the witness is entitled to do so before trial.** Witnesses are not allowed to do this. Further, the confidentiality obligation does not cease following disclosure in accordance with the CPR.
- **Neither before nor at trial is a witness entitled to reveal information that is legally privileged unless there has been a waiver, or unless one of the relevant exceptions applies.**
- **It cannot be a contempt of court for a party to whom obligations of confidence are owed, or where legal privilege exists, to tell a witness that he may not reveal information that is truly confidential or privileged.**

Experts can be called by both sides

Applying these points, the judge said that the expert in the case had been free to give evidence to, and to be interviewed by, the non-instructing party's solicitors and had done nothing wrong in allowing that to happen, the qualification being that he was not at liberty to reveal confidential or privileged information in relation to which he owed duties to the instructing party. Such information was likely to be details that had been communicated to him, or by him, in interactions between him and the instructing party, their experts and their solicitors.

However, if an expert had factual evidence to give of what he saw or witnessed, he was not precluded from revealing these facts simply because he had also told the instructing party of the same facts. In addition, if he had a technical opinion, he was not precluded from expressing that technical opinion. What he was precluded from revealing were the confidential exchanges between the instructing party, their advisors and himself.

As is clear from the judgment in *Versloot*, the information that can be sought from the expert includes factual details as much as expert opinion. That being so, can the expert be called (or even compelled with a witness summons) to give evidence so obtained as a witness of fact? The answer would appear to be 'yes'.

Postscript: side stepping 'equality of arms'

There is an interesting extension to this point in which a side can seek to side step the 'equality of arms' principle by introducing evidence from experts through the mechanism of adducing factual evidence from an expert.

In *Kirkman -v- Euro Exide Corporation*[3], it was held that just because a witness is a professional person, that did not mean that his or her evidence must always be treated as expert evidence. In *Kirkman*, an orthopaedic surgeon was called as a witness of fact to say whether the need for surgery was necessitated by an accident or was inevitable given the claimant's previous medical history. The court allowed the evidence on appeal, saying that this was evidence of fact. The surgeon was relying upon his knowledge, but he was not expressing an expert opinion. He was merely stating what he would have done. Unlike the expert witnesses who were to be called at the trial, he was not giving a view as to what most competent surgeons would have said in the same situation, he was speaking only for himself. The correctness or accuracy of his advice was not in issue. His statement merely said that, rightly or wrongly, that is what he would have advised.

This was an interesting decision because, on the face of it, the party calling the surgeon was breaching the 'equality of arms' rule. The parties had been limited to one expert apiece and the respondents had objected to the calling of the surgeon, arguing that this manoeuvre effectively allowed the appellant to call two experts.

However, whether or not you agree with the decision made by the court, the case does establish that there is nothing to prevent a professional expert from being called to give factual evidence. This would appear to be the case whether or not that expert has been instructed by the other side and regardless of whether the person is actually called to give expert evidence at trial. Naturally, faced with such a situation, one would expect the barrister to ensure the court understood the different weight that should apply to the various experts!

... even if it risks circumventing the equality of arms doctrine

CPR 32.5 Use at trial of witness statements which have been served

1) If –
   a) a party has served a witness statement; and
   b) he wishes to rely at trial on the evidence of the witness who made the statement,

   he must call the witness to give oral evidence unless the court orders otherwise or he puts the statement in as hearsay evidence.
   (Part 33 contains provisions about hearsay evidence)
2) Where a witness is called to give oral evidence under paragraph (1), his witness statement shall stand as his evidence in chief unless the court orders otherwise.
3) A witness giving oral evidence at trial may with the permission of the court –
   a) amplify his witness statement; and
   b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.
4) The court will give permission under paragraph (3) only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement.
5) If a party who has served a witness statement does not –
   a) call the witness to give evidence at trial; or
   b) put the witness statement in as hearsay evidence

   any other party may put the witness statement in as hearsay evidence.

References

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

[2] *Versloot Dredging -v- HDI Gerling* [2013] *EWHC* 581.

[3] *Kirkman -v- Euro Exide Corporation (CMP Batteries Ltd)* [2007] *Times*, 6 February.

'Irritants in person'

Litigants in person continue to wreak havoc in the courts

There can be little doubt that litigants in person (LiPs), through their lack of understanding of procedural rules and requirements, can pose difficulties for judges, the other parties to the proceedings and their opponent's legal representatives. Expert witnesses, whether instructed jointly or by one or other of the parties, will not be spared exposure to such difficulties. It is unsurprising, therefore, that in some legal circles unrepresented parties are wryly referred to as 'irritants in person'!

In 1995, in his interim report 'Access to Justice', Lord Woolf said that '*all too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists*'. The expense associated with litigation has increased hugely over recent years. This, coupled with drastic cuts in the availability of legal aid, has effectively rendered it impossible for many people, no matter how sound their claim, to afford legal representation. In addition, the Ministry of Justice (MoJ) continues with plans to increase the small claims limit to £5,000 in RTA cases, which will add further to the number of unrepresented litigants in the civil courts.

Despite Lord Woolf's assertion that a system of civil justice exists for LiPs, the reality is not so simple. LiPs are 'fish out of water', and their inability to understand and follow court rules and procedures is demonstrated daily.

Typical example of LiP-induced mayhem

In November this year, the sheer waste of time and expense to the courts and the parties was illustrated by an RTA case. It involved a claim for almost a quarter of a million pounds.

At the outset of proceedings, the claimant was represented. By the start of the relevant hearing, the defendant's costs already stood at just under £110,000. The claimant had lost his representation many months before and there was no realistic prospect of him instructing fresh solicitors. He possessed reports from two experts supportive of his claim, a consultant neurosurgeon and a consultant psychiatrist. In the process of investigation, the defendant obtained video surveillance footage on various dates which, it was alleged, showed that the claimant had exaggerated the injuries he suffered as a result of the accident. This evidence was reviewed by the experts instructed by the defendant and incorporated into its Counter-Schedule of Loss. On the basis of this evidence, the defendant alleged fraud against the claimant.

Experts continue to be wary of taking instructions from LiPs

The video surveillance footage was not reviewed by the experts instructed by the claimant because he was unable to pay them. The claimant had been without legal representation, or access to experts, for approximately 9 months prior to the trial date. He presented no evidence at all relating to the surveillance material.

Shortly before trial, the defendant made an offer of settlement to the claimant in the sum of £10,000, by way of a letter marked 'Without prejudice save as to costs'. The claimant did not accept this offer and the trial on quantum went ahead. During the course of the trial, the claimant revealed the contents of the defendant's 'without prejudice' letter to the judge, despite the judge's efforts to warn him that the letter was 'without prejudice' and he should not introduce it. According to the trial judge, the claimant was, in effect, unstoppable. Finding that the court would now be faced with the prospect of having to decide what damages might be fair knowing what offer had been made, the trial judge concluded that he had been placed in an unworkable position and adjourned the trial hearing. The judge, indicating that he would have to withdraw from the case, made an order that the claimant should pay the defendant's costs to date as a condition of being able to continue with his claim. So much for saving money by cutting legal aid!

LiPs and expert witnesses

There are three main areas of concern for expert witnesses when dealing with LiPs.

1. The litigant's **lack of understanding of the rules** is frequently coupled with an **inability to give clear and meaningful instructions**. This, in turn, can place the expert witness in difficulties in correctly complying with obligations and duties to the court.
2. Most LiPs are **unable to maintain an emotional detachment** from the proceedings, for perfectly understandable reasons.
3. There is the undoubted **uncertainty that the expert witness will be paid** in accordance with the contract.

It is, therefore, unsurprising that many experts are very wary of accepting instructions from LiPs. In our most recent survey, two-thirds of respondents said that they would not accept instructions from a LiP. For medical experts working in personal injury cases, the same statistic was even higher. Based on this, if the MoJ gets its way and succeeds in increasing the small claims limit for some personal injury cases, then there will be an awful lot of litigants going to court without expert witness reports. This is, we suggest, bad for the parties, bad for the courts and bad for experts.

With the numbers of LiPs set to rise even higher, we suggest that a point must be reached when the government will need to take some active steps to circumvent the chaos that this will bring to an already overburdened court system. It seems to us that we are close to the point where restoring some of the £400 million that has been slashed from the legal aid budget could be regarded as a saving when one considers the additional cost to the justice system and represented parties that LiPs undoubtedly create.

Wikipedia takes the stand!

In recent years, the number of cases passing through the Immigration and Asylum Tribunal (IAT) has increased greatly. There has been a commensurate rise in complex cases. This, we had concluded, would inevitably result in greater opportunities for expert witnesses. But perhaps we were wrong!

The often difficult and complex work undertaken by the IAT was highlighted in the recent case of *The Queen on the Application of KV -v- Secretary of State for the Home Department*[1]. In that case, the Court of Appeal was required to deal with the question of whether, under a foreign law, a person had lost citizenship of his country of origin and whether a withdrawal of British citizenship would render him stateless. For our purposes, the key point of interest is that the appellant relied on Section 20(5) of the Ceylon Citizenship Act No. 18 of 1948 which, astonishingly, the appellant's legal advisors had found on Wikipedia and produced without supporting expert evidence.

Expert evidence on foreign law

In the course of his judgment, Lord Justice Leggatt made detailed reference to the role of the expert witness in relation to foreign law, which you may well find surprising.

Leggatt LJ recognised that in English proceedings, matters of foreign law are treated as matters of fact, and they must be proved to the satisfaction of the court or tribunal. Traditionally, the general rule in court proceedings has been that this cannot be done simply by putting the text of a foreign enactment before the court, or by citing foreign decisions or books of authority. Rather, it can only be done by adducing evidence from an expert witness. Most authorities, such as *Phipson on Evidence,* state the reason as being that, without the assistance of an expert witness, the court is not competent to interpret such materials.

For some reason, Leggatt LJ took against this doctrine, particularly in relation to laws enacted by English-speaking countries with a common legal heritage. He cited the remarks of an American judge of the US Seventh Circuit Court of Appeals, Judge Posner, who had said:

> *'I cannot fathom why in dealing with the meaning of laws of English-speaking countries that share our legal origins judges should prefer paid affidavits and testimony to published materials.'*

Leggatt LJ said that an English judge does not generally need expert assistance to understand and interpret an enactment or decision of a court of another English-speaking country whose law forms part of the common law. Decisions of such courts are frequently cited in the English courts and treated as persuasive authority on questions of English law with no suggestion that the court needs the aid of an expert witness to interpret such materials. There is no reason why the court should be any less competent to interpret such materials when they are relied on to prove the content of the foreign law concerned.

He acknowledged that a second reason sometimes given for requiring expert evidence to prove foreign law is that, without it, the parties and the court are not competent to research the relevant foreign law and ensure that they have identified the most relevant and up-to-date materials. For example, an enactment may have been abrogated by subsequent legislation.

The judge pointed to advances in technology and the expansion of the internet which, he said, in recent years had '*revolutionised the ability to gain access to information*'. No longer, he said, was it generally necessary to consult books in a library to conduct legal research. A vast amount of legislation and case law in many jurisdictions is readily available online. Where, for example, the answer to a question of foreign law is to be found in a provision of an enactment published in its current version in English on an official government website, he could see no reason why a court should not look at the provision without the aid of an expert witness. In such a situation, he said, there is no material risk that the provision has been abrogated by subsequent legislation.

Whilst not actually encouraging the use of Wikipedia as evidence of foreign law, Leggatt LJ did say that, in his view, it should be a matter for the judgment of the court or tribunal to decide what material to accept as evidence in any particular case. It was, he said, relevant to consider not only the nature of the question raised and the nature of the materials relied upon, but also the importance of dealing with cases at proportionate cost. He considered that this, as with other matters of evidence, could justify a more informal approach in tribunal proceedings than in other court proceedings.

Relying on Wikipedia is troubling

Whilst it is entirely possible to follow the Court of Appeal's reasoning (and, by now, we are all used to the 'costs saving through proportionality' mantra that pervades the court's rulings), the decision does, we suggest, risk creating quite a dangerous precedent and one that might be of particular concern to expert witnesses.

The use of Wikipedia as a source of evidence in court leaves a lot to be desired. It will not have escaped your notice that the 1948 legislation thus sourced referred to 'Ceylon', notwithstanding that the country changed its name to Sri Lanka in 1972. We have no idea whether the enactment has been repealed or replaced in the interim, but without expert evidence, neither does the court!

If evidence of foreign law gleaned from an online encyclopaedia can now be admitted in tribunals, it would be a most unwelcome development if this were to be extended to other areas where the court has hitherto relied on the assistance of expert witnesses.

Who needs expert witnesses when they have access to Wikipedia?

References

[1] *The Queen on the Application of KV -v- Secretary of State for the Home Department* [2018] *EWCA Civ* 2483.

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