Your Witness

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GMC and expert witness mentoring

In issue 95 of *Your Witness* we looked at the case of *David Pinkus -v- Direct Line Group* [2018] *WL* 00660352, which set out that **expert witnesses should disclose any mentor or quality assurance processes** in use. This has some broad ramifications, as the General Medical Council's (GMC) guidance to doctors exemplifies.

The GMC's ethical guidance to practitioners contains broad-brush advice for those who provide expert evidence in court. Practitioners are required to understand and follow the law and codes of practice that affect their role as an expert witness, and to consider undertaking training for the role, where available (e.g. from their medical defence body or employer's legal department). The GMC guidance also states that practitioners should, in particular, make sure they understand:

- **how to write a report** that follows the procedures set out by the courts, and
- **how to give oral evidence**.

It envisages some form of **peer guidance**, and suggests that, if practitioners have experience of acting as an expert witness, they should be willing to **share their knowledge with colleagues** who might be called to give evidence in court. This, it says, will help build the inexperienced expert's confidence and willingness to give evidence in the future.

It is worth noting, though, that the GMC's guidance – that neophyte expert witnesses should seek the advice and assistance of experienced expert witness colleagues – might lead the unwary to stray into dangerous territory bearing in mind the *Pinkus* ruling. While general guidance and encouragement from appropriate colleagues is no doubt useful to medical practitioners moving into forensic work, it would be quite a different matter if inexperienced expert witnesses were to seek help and advice in relation to specific cases, evidence and report drafting.

Of course, medico-legal reports often attract legal privilege as well as medical confidentiality, so it would be necessary to obtain proper consent before making any disclosure to a colleague, be it the doctor's Responsible Officer, or as part of a governance procedure, or indeed to anyone else. Simple anonymisation may not be sufficient. So, before making any disclosure, an expert would:

- need written consent through the instructing solicitor, and
- possibly require consent to disclosure from other parties to the action.

Any input into the report itself from a colleague would have to be acknowledged and might well lead to the suggestion that the expert opinion provided was not that of the expert instructed but rather that of a third party.

The same applies to any 'training' experts might receive from instructing or other parties. Legitimate training in the generalities of forensic work is one thing, but it is quite another to receive assistance in the writing of an expert report for a particular case – that would be deemed coaching and is strictly forbidden. Even very well known commercial trainers have fallen foul of the 'no coaching' rule.

As we say all too often, transparency is the key. Experts should bear in mind that **any assistance or mentoring received concerning the substance and format of a report would likely fall foul of the *Pinkus* decision if undisclosed**.

Multiple sets of Part 35 questions

When an expert witness instructed as a single joint expert (SJE) under CPR 35.7 receives questions of clarification from both parties, but neither party has copied the other in on their questions, how should the expert proceed? Should the questions be answered for each solicitor in confidence or should the expert copy the questions and answers to all parties?

SJE instructions are permitted by CPR 35.7, and CPR 35.8 sets out how they should work. Furthermore, as questions are in effect instructions to the expert, they're covered by 35.8(2) and para 6.1 of the Practice Direction.

The combined effect of these rules is that the **questions to an SJE should have been shared already, and answers to any questions, whoever asks them, are part of the expert witness report and so should be made available to all**.

Survey 2019

What is it that expert witnesses most want to know about their colleagues? Well, how much they charge comes close to the top of the list! In my mind, there is no more useful way to satisfy this demand for information than to conduct regular surveys among our readers and to publish the results in *Your Witness*. Our 2019 survey will look at your work as an expert witness, your terms, conditions and charging rates, and the trends in your volume of work. It's the 13th survey we have run, and the resulting analysis of trends over more than two decades offers valuable insights.

I would be grateful if you can find time to complete the short questionnaire, anonymously if you prefer, by simply pointing your browser at *www.jspubs.com/survey2019*. I will report on the results in a future issue.

Chris Pamplin

Inside

Issue 96

Expert witness availability and trial

Fixing trial dates has always been a dark art

Fixing of trial dates has always been a difficult task. A court has to juggle with numerous variables to ensure that the date fixed complies with the need to deal with cases efficiently and promptly and without incurring unnecessary cost. It must also have regard to the availability of witnesses (including expert witnesses) and allow sufficient time for the parties to properly prepare and carry out any necessary pre-trial steps.

An expert's instructing solicitor should, of course, obtain from the expert a **list of any unavailable dates**. If the solicitor does not ask for these, the **expert should be proactive in supplying them**. It would also be prudent to offer the **reasons for unavailability**. Naturally, experts must notify instructing parties of such dates in good time and before the fixing of any hearing date at which the expert might be required to attend. Should there be any changes in the expert's schedule or circumstances, these, too, should be notified without delay.

The Civil Procedure Rules (CPR) 1998 place a duty on the parties to a case to assist the court in the listing of cases for trial, and this would include expert witness availability.

Lord Woolf sets out the ground rules

In *Matthews -v- Tarmac Bricks*[1], Lord Woolf MR heard an appeal from the order of a judge in a pre-trial review in the Plymouth County Court. In that case (a personal injury claim), there had been questions regarding the availability of expert witnesses. The judge at the pre-trial review had suggested 15 July as a trial date and had asked the defendant's legal representative whether that date would suit. The defendant was represented by very junior counsel and no one was in attendance from the defendant's solicitors. Counsel for the defendant replied that this date was inconvenient for the defendant's experts because they had supplied 12–16 July as unavailable dates. The judge, who was reluctant to lose the possible trial date if it could be avoided, asked for the experts' reasons for being unavailable. However, the junior barrister had not been instructed on this. What she did not know was that one expert would be out of the country on the suggested date and the other was engaged on another trial.

Woolf reforms set a new focus on expert availability

The judge asked counsel if she would like a short adjournment to find out the reason why the experts would be unavailable or whether she would prefer the matter to be listed for the date he had suggested. She told the judge that it might as well be listed for that date and it duly was. The defendant's solicitors later contacted the court and asked that the judge give permission for an appeal. The judge, who had no more information than had been available to him previously as to the reason for the experts' unavailability, refused permission and did not list the matter for hearing. The defendant then applied to the Court of Appeal for permission to appeal.

The central issue was the proper approach to be adopted by the parties under the CPR to assist the court to list cases for trial. Lord Woolf made it clear in his judgment that the CPR had signalled a fundamental change in how the courts would deal with such matters. It was no longer sufficient to simply supply the court with a list of an expert witness's unavailable dates.

Reasons for unavailability must be given

Under the new regime of the CPR, it was essential that parties cooperated with each other and the court at every stage. Cases had to be fixed for hearing as early as possible if parties wished them to be heard in accordance with their convenient dates. Where agreement was not achieved between the parties, it would fall to the court to fix a hearing date. It was **incumbent on the parties to ensure that all relevant material, including the reason(s) for the unavailability of witnesses on particular dates, was made available to the court**.

Any suggestion that all the court required was to be told the dates that were inconvenient for the experts and it would thereupon find a date to suit was no longer valid (if, indeed, it ever had been). This approach, said Lord Woolf, caused inordinate delay and was inconsistent with the due administration of justice. He added that expert medical doctors who held themselves out as practising in the medico-legal field had to be prepared, so far as was practical, to arrange their diaries to meet the commitments of the court. Where court hearings conflicted, real efforts should be made to see whether the time for the expert to give evidence in one court could be made to fit with the other court. Where holiday dates were jeopardised, efforts should be made to see whether holiday dates could be changed. In this case, the defendant had attempted none of the options.

Refusing permission to appeal, Lord Woolf said that the defendant in this case had totally failed to recognise the spirit behind CPR Part 1... that the parties should help the court to further the overriding objective. The defendant's problems were entirely attributable to its delay in seeking to fix a date and then failing to place before the court the full facts. Lawyers for the parties had always to be in a position to give the reasons why certain dates were not convenient to the experts.

This case made it abundantly clear that **a party must take all practical steps to make their witnesses, including expert medical doctors, available for the trial date. If there were unavoidable difficulties, then the party must make the full reasons and information available to the court or risk the matter being listed in any event**.

The court must, however, balance the requirements of the court procedural rules with

the need to ensure a fair trial and the old legal doctrine of equality of arms. In *Matthews*, Lord Woolf did not specifically address this but did say that it would be for the trial judge to ensure that the defendant would not be prejudiced if either of his experts was unable to attend and no other expert appeared in their place.

Helpful finesse of the rules

Matthews can be contrasted with the recent decision in *R -v- Sunderland Magistrates' Court*[2]. The case was a judicial review of the decision of a magistrates' court to refuse an application to vacate a trial that had been fixed for a date on which an expert witness could not attend. Although there are some differences in how trial dates are fixed in the civil and criminal jurisdictions there are, nevertheless, common factors to be considered when dealing with the availability of expert witnesses to attend trial.

Here are the facts. The defendant applicant had crashed his car into a parked vehicle in February 2018. A subsequent breath test showed that he was more than three times over the legal alcohol limit. He was charged with the offence of driving with excess alcohol and released on bail. He pleaded not guilty, and in May 2018 (in good time) an expert report was served on the prosecution. The trial was set for June 2018. However, the prosecution had been less prompt than the defendant and had failed to serve all its evidence and the trial was re-listed for 9 November 2018. The defence informed the court that the new trial date was unsuitable for the defendant's expert because he was already engaged to attend another trial on that date. Accordingly, they applied on 10 October to vacate the trial date, asking for an oral hearing of that application. The court refused the application on paper. It stated that there had already been delay and that the expert report could be admitted as hearsay. On 11 October, the prosecution served a report of its own expert, who was available to attend the 9 November trial date.

The defendant applied for judicial review of the magistrates' court's refusal to vacate. The application was unusual because, generally, the High Court will not entertain an interlocutory challenge to proceedings in the magistrates' court, unless there is a powerful reason for doing so. An application for judicial review might in principle be an appropriate means by which to challenge a decision of a magistrates' court as to an adjournment, though only in exceptional circumstances. Lord Justice Bean identified that such exceptional circumstances might include situations where:

- it was properly arguable that the ability of the defendant to present his defence was so seriously compromised by the decision under challenge that an unfair trial was inevitable
- an important point of principle was raised, likely to affect other cases, or
- the case had some other exceptional feature that justified the intervention of the High Court.

Bean LJ recognised that it could only be in rare cases that the High Court would consider an interlocutory challenge once the trial was under way. The decision under scrutiny was not a refusal to grant an adjournment but a refusal to vacate a trial date, and he considered that the threshold of exceptionality was less high in such a case.

Dealing with the substance of the application, Bean LJ ruled that the magistrates' court's decision was unsustainable. If the trial had proceeded on the date fixed by the magistrates, the court would have had to decide between the evidence of two experts, one of whom was present and one of whom was not. It would have been particularly unfair when the date suited the prosecution expert, whose report had been served 5 months later than the defence expert. The defence, in this case, was not at fault at all. Indeed, it was the prosecution that had caused the difficulty by instructing an expert very late in the day and after having raised no objection to the defence expert's report being admitted. The prosecution should have either supported the defence application for the trial to be on a date on which both experts could attend, or indicated that it would not pursue the application to adduce its own expert's evidence. The decision to fix a date for a trial at which the prosecution expert could attend and the defence expert, whose report had been served in good time, could not, was clearly wrong. If the trial had proceeded on that basis, the trial would have been unfair. This, said the court, was an exceptional case where the High Court was justified in intervening by way of judicial review at the pre-trial stage. The defendant's application was granted and the hearing date was vacated.

The essential difference in these two cases is as follows. In the first, the appellant had failed to notify the court of any good reason for the expert's unavailability and had otherwise acted in a way that did not comply with the parties' duty to assist the court. In the second case, the applicant had acted promptly and properly in informing the court of good reason why its expert could not attend on the proposed date, had filed the expert's report in good time and was not at fault in any other performance of its duty.

Conclusion

It is likely that any expert witnesses who directs the attention of instructing solicitors to *R -v- Sunderland Magistrates' Court* in similar circumstances will not only have an easier time managing their diary, but will also have enhanced their reputation with the solicitors concerned!

Vacating trial date possible if other party's action caused delay

References

[1] *Simon Andrew Matthews -v- Tarmac Bricks & Tiles Ltd* [1999] *CPLR* 463.

[2] *R (on the application of Yogesh Parashar) (Claimant) -v- Sunderland Magistrates' Court (Defendant) & Crown Prosecution Service (Interested Party)* [2019] *EWHC* 514 (*Admin*).

Court of Appeal gives guidance on se

Expert witnesses have always been open to contempt proceedings

Ever since expert witness immunity from suit was removed by *Jones -v- Kaney*[1], the role of an expert witness has become more exposed. However, experts have always faced the prospect of disciplinary action for serious breaches and, like everyone else, been subject to prosecution for behaviour that amounts to a contempt of court. Accordingly, experts who lie or conceal information from the court run the serious risk of criminal proceedings for contempt. Indeed, since *Kaney*, any reluctance on the court's part to pursue such a drastic course has lessened considerably.

5,000 reports a year GP comes a cropper

A recent example can be found in *Liverpool Victoria Insurance Co Ltd -v- Zafar*[2]. The case is important because the Court of Appeal has taken the opportunity, for the first time, to set out some guidelines for the sentencing of expert witnesses convicted of contempt of court.

The case involved a claim for damages for a personal injury that had resulted from an alleged road traffic accident. The claimant was a taxi driver. The claimant's solicitors had instructed a registered GP to write a medico-legal report, which was duly provided. The report contained the required declaration of compliance with the Civil Procedure Rules (CPR) Part 35. It also included a statement of truth and the assertion that the report was the expert's own independent opinion. However, upon receipt of the expert report, the claimant complained to his solicitors that the report did not accurately reflect the extent of his symptoms. Consequently, the solicitors sent an email to the expert requesting that he review his notes and, if necessary, amend the report.

In response, the expert provided the solicitors with a second report that differed substantially from the first. He had made no additional examination of the claimant and neither did he possess any significant notes relating to the original examination. As with the first report, there was a declaration of compliance and statement of truth. Nowhere in the report was there anything to suggest that it was a revised report, or that there had been a prior report.

Making a false statement verified by a statement of truth usually ends in prison

As happens occasionally, however, the expert's original report was included inadvertently in the court bundle in readiness for trial. As a consequence, the judge gave a direction that the expert file a witness statement with an explanation as to why there were two reports. In response, the expert made a statement saying that the original report was the correct version, and that the amended version had been made without his permission. The implication was that his report had been tampered with and altered without his knowledge. The statement was verified with a declaration of truth. However, he later admitted to an enquiry agent instructed by the insurers that he *had* amended the report and a further witness statement was made to that effect. As a result, application was made by the insurance company seeking the expert's committal for contempt of court.

Sixteen grounds of contempt were alleged. Each asserted that the expert had made, or caused to be made, a false statement in a document verified by a statement of truth. The trial judge found ten of the grounds to be sustained. He made a finding that the expert had lied about altering his original report and had revised a prognosis in his medical report by simply adopting his instructing solicitor's suggestion to do so. The expert had not re-examined the client nor exercised professional judgment, and there was no clinical justification for the amendment. The judge held that the expert had been reckless as to the truth of the revisions and whether they would mislead the court. He sentenced the expert to be committed to prison for 6 months, suspended for 6 months.

The insurers appealed the ruling on the ground that the sentence was too lenient. Permission was granted on the basis that there was no authority on the appropriate sentence for an expert witness whose approach to expert reports was in contempt of court. The Court of Appeal resolved this deficiency by offering such guidance.

Court of Appeal on sentencing experts

Contempt involving false statements verified by a statement of truth is a serious offence, whether the person acts dishonestly or recklessly. Given this, it is necessary for a court to consider the person's culpability and the harm caused, intended to be caused or likely to be caused by the contempt. Having determined the seriousness, the court must then consider if a fine would be a sufficient penalty. If a fine is considered sufficient, then committal to prison could not be justified, regardless of the person's means.

A deliberate or recklessly made false statement verified by a statement of truth is, however, usually so inherently serious as to require committal to prison. This is the case, irrespective of who makes the statement and when in proceedings it comes to light.

An expert witness who acts corruptly and makes a false statement for reward (e.g. if the expert witness acts from an indirect financial motive, such as a desire to obtain more work from a particular solicitor or claims manager) will make matters even more serious. This is so because of the reliance placed on expert witnesses by the court, and because of the corresponding importance of the overriding duty experts owe to the court.

Culpability will depend on the individual circumstances of each case. An expert who recklessly makes a false statement will usually be as culpable as one who does so intentionally.

In assessing an expert witness's culpability, the extent to which the expert persists in the false statement or engages in other forms of

ntencing of experts for contempt

misconduct to hide the making of the false statement is a relevant consideration.

In determining the length of any prison sentence, the 2-year range available to the court must be applied to cover a range of conduct. However, a period 'well in excess of 12 months' has been taken previously as a starting point (*Liverpool Victoria Insurance Co -v- Bashir*[3]). The court must consider any relevant mitigation, such as early admission, particularly if made before proceedings commence or before any allegation of misconduct. The earlier the admission is made, the greater the reduction in sentence that might be appropriate. Genuine remorse is valid mitigation, as are serious ill-health, previous good character and a previously unblemished professional record. It was recognised, however, that factors such as previous good character are precisely the qualities that enable experts to be in the position to make such false statements in the first place. Hence, any breach of trust must still be expected to result in a severe sanction.

Expert witnesses can expect very tough sanctions if found to have acted corruptly, or to have made a false statement in a report, whether intentionally or recklessly

The fact such expert witnesses have brought ruin upon themselves, and may face proceedings by a professional body, will not be reasons to fail to impose a significant term of committal. The court must, however, consider and give proper weight to the impact of committal on other persons. This is particularly important where the expert is the sole or principal carer for children or vulnerable adults. In borderline cases, such considerations might justify the court in giving a non-custodial or suspended sentence.

Dealing with the questions of a reduction in sentence for admissions and whether sentences should be suspended, the Court of Appeal said that the earlier the admission, the greater the potential reduction. A maximum reduction of one third (after the consideration of aggravating and mitigating features) would be appropriate only where an admission was made upon the issue of proceedings. Thereafter, any reduction would be on a sliding scale down to around 10% for an admission at trial. Custodial terms, said the court, should be served immediately. Powerful factors justifying suspension would be needed in addition to those already considered as mitigation. The fact that an expert had acted recklessly rather than deliberately was deemed no reason to order suspension.

Longer custodial sentence justified

Applying its own guidelines, the Court of Appeal held that, given the number of aggravating factors in *Zafar*, the custodial term should have been significantly longer than 6 months and been served immediately, not suspended. The judge had given disproportionate weight to the recklessness finding and to the passage of time resulting from the respondent's choice to contest the proceedings. The judge's sentence was, therefore, unduly lenient and outside the range of sentences reasonably available to him. The Court of Appeal also considered that the judge had failed to identify any 'powerful factor or combination of factors' sufficient to justify suspension of the sentence.

The Court of Appeal did recognise, however, that in making these guidelines it was doing so for the future; these guidelines would not have been available to the trial judge. Accordingly, the Court declared that the original sentence was unduly lenient but declined to impose the more severe sentence the new guidelines would have imposed on the grounds that this would be unfair to the respondent.

The new guidelines will, undoubtedly, lead to **very tough sanctions against any expert who is found to have acted corruptly, or to have made a false statement in a report, whether intentionally or recklessly**. The guidelines suggest that in most cases a **tough custodial sentence** is likely to be imposed, for which the starting point will be a minimum of 12 months.

Life in the 'sausage machine'

It is worth noting the circumstances in which the expert in this case operated.

He was employed by the NHS as a registered medical general practitioner, but he also had a private practice in medico-legal work, which he conducted through a company, Med-Admin Limited, at a number of different locations. In his private practice he frequently examined claimants in low-value personal injury claims, and had developed a software-based system for the speedy production of medical reports in such cases.

In his evidence he confirmed that he was able to both examine a patient and produce a report within about 15 minutes. He charged a fixed fee for the preparation of such reports, and no further charge was made if it later emerged that an amendment to a report was necessary (e.g. because a factual detail was inaccurate). In such circumstances, the expert would often delegate to one of his staff the work of making the necessary amendment to the report.

The Court heard that on the days he devoted to his private practice, the expert worked to a tight schedule and saw many claimants. In all, he produced about 5,000 reports a year, with an annual gross income from this work of some £350,000.

The Court's view of his methods of working is not recorded in the judgment given by the Court of Appeal.

New guidelines will lead to tough sanctions against errant experts

References

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

[2] *Liverpool Victoria Insurance Co Ltd -v- Zafar* [2019] *EWCA Civ* 392.

[3] *Liverpool Victoria Insurance Co -v- Bashir* [2012] *EWHC* 895 (*Admin*).

Declining quality of legal services

Criticism of poor quality work is not restricted to expert witnesses

The reporting media enjoys publishing horror stories about incompetent, poorly qualified or biased expert witnesses. We have covered some in these pages because they serve as salient reminders to all experts regarding their duties to the court. Furthermore, such cases often result in important guidance being offered by the court.

The uninformed reader might be forgiven for assuming that much expert evidence is riddled with pseudo-science, bias and inaccuracy, and that there are cohorts of unskilled experts prolonging court hearings and inflating costs. This is certainly not the case. The vast majority of expert evidence is of the highest quality and given by very skilled, conscientious (and often underpaid) professionals, pre-eminent in their field. So perhaps it is time for a little payback!

Quality of legal services in decline

Most expert witnesses will have experienced poor instructions from legal professionals. Those who have spent any length of time working in litigation will also have observed that there has been a general decrease in the quality of legal services. As so often, this decline has its roots in actions aimed at cutting costs and overheads. But there are other reasons too. The barrier to entry into the legal profession has been lowered, with Law Society exams not the tough hurdle they once were. Neither are articles of clerkship taken so seriously by those involved, and the training offered to newly qualified entrants to the profession is very hit and miss.

Furthermore, specialisation has now increased to the point that there are few solicitors who can rightly claim to be general legal practitioners skilled in diverse aspects of the law. So most property lawyers will know little about how to conduct litigation, and most personal injury lawyers will have scant knowledge of contract or consumer law. It is particularly true in large law firms where departments operate almost independently of each other. When a matter becomes litigious, the solicitor who originally had conduct of the matter will usually hand it on to the firm's litigation department. In smaller firms, however, a solicitor with little or no experience of litigation might decide, often unwisely, to 'have a go'. In such cases, the expert witness might be more knowledgeable about the procedural rules of court than the instructing lawyer!

McKenzie Friend – sometimes the kind of friend your mother should have warned you about!

It is a fact not as well known as it deserves that many who work for law firms and are responsible for day to day case management have no formal legal training. There have always been legal 'managing clerks' who, for one reason or another, have never qualified as solicitors. Their skills have been honed by many years of experience and they are sometimes better informed in their field of law than those employing them. Fellows of the Institute of Legal Executives, too, have long performed a useful and important function and, in many cases, are indistinguishable from the solicitors who employ them.

However, in a trend that can be traced back to the late 1980s, firms have appointed increasing numbers of unqualified paralegal staff to deal with many aspects of the legal work they undertake. The reasons for this are manifold. As firms moved away from typewritten documents to word processors and then computers, the role of many employees changed fundamentally. Documents such as pleadings, applications, draft orders and instructions to experts no longer had to be dictated or written out by hand. Secretaries and typists could, instead, be directed to the appropriate template document with instructions for filling in the blanks with relevant case details. Drafting became something of a cut and paste operation. Rather than making the brightest secretaries redundant, many firms simply 'promoted' them to the role of paralegal.

Increased automisation makes it possible for precedents and pleadings to be computerised and for the whole progress of a typical case to be mapped out in a form that needs only the input of relevant case details. This does not require any drafting of documents, and the operator will be prompted to follow a pre-planned path to ensure that all relevant notices and applications are filed and deadlines met. That, at least, is the theory. In practice, though, few are the cases that proceed entirely in this way. Even the most sophisticated case management programme can rarely function without skilled intervention from an experienced litigator with wide knowledge of the court rules.

Unqualified staff in legal firms common

Employing paralegals is cheaper than employing solicitors, and employing unqualified support staff is cheaper than employing qualified paralegals. With a general driving down of legal costs and the revenue per lawyer flat-lining or even decreasing, profit margins have been squeezed. It is reported that solicitors' staff costs as a percentage of fee income now stand at just below 40%, and the rising trend shows no sign of reversing. Little wonder, then, that many law firms have been at pains to try and cut this overhead by replacing their qualified paralegals with unqualified support staff.

The trend towards unqualified legal staff has continued, particularly in the 'sausage machine' firms that deal with high volumes of low-value cases in a given area of law, e.g. road traffic accident claims or pension and insurance mis-selling cases. Although the Law Society requires that all non-qualified staff be supervised, there are many instances where supervision is cursory at best. Some firms operating on a near-industrial scale have only one qualified solicitor ostensibly supervising the work of dozens of unqualified case managers. How can that lead to effective and meaningful supervision? It's a good question!

Rise of the McKenzie Friend

If this were not bad enough, the rising cost of legal representation has led to a situation where

the legal profession is simply not providing the service to litigants that it should. It is no longer true that there is access to justice for all. Indeed, all too often access to justice is only for those who can afford it. This has given rise to the more widespread use of unqualified legal advisors and the oddly named *McKenzie Friend* – sometimes the kind of friend your mother should have warned you about!

Earlier this year, the courts were required to deal with a particularly atrocious example of this. In *Paul Wright -v- Troy Lucas (a firm) & George Rusz*[1], the claimant in a clinical negligence case had engaged George Rusz as a legal advisor. Mr Rusz was the sole trader of his litigation firm, Troy Lucas & Co. The adviser had a law degree, but no legal qualifications. He had, however, held himself out as having the skills of a competent legal professional.

The case in which he had been engaged related to a claim of negligence against a hospital. The claimant had been given no reason to doubt the credentials of Mr Rusz, who used headed paper stating that the firm was regulated by the Ministry of Justice and the Solicitors Regulation Authority. It gave the impression that it was a bona-fide law firm with several members of staff. In addition, Mr Rusz (falsely) claimed to be a member of the Association of Personal Injury Lawyers.

Mr Rusz provided legal services and advice to the claimant and assisted with the conduct of the case. This included informing the claimant of his litigation strategy, drafting court documents, instructing an expert witness, conducting settlement negotiations, and ghost writing letters on behalf of the claimant.

The course pursued by Mr Rusz was, however, somewhat bizarre. The particulars of claim drafted by him initially sought damages of just over £1 million. He later amended this to £3 million, but produced no evidence in support of this change. He told the claimant that the hospital trust was more likely to settle the claim if he drafted menacing witness statements, and he proceeded to do just that.

The hospital trust made successful application to strike out large parts of the claim on the grounds that no cogent evidence had been offered in support. They admitted liability on a limited basis and agreed to settle the claim for £20,000. However, due to the way in which the litigation had been conducted, the claimant was ordered to pay the defendant's costs in the sum of £75,000.

The claimant then commenced proceedings seeking damages and indemnity against Mr Rusz. This was in the nature of a quasi-professional negligence claim alleging that he had conducted the matter incompetently and had thereby caused the claimant to have to settle his claim for less than he could have received had he been properly advised. It was also alleged that Mr Rusz had caused the claimant to have an adverse costs order made against him.

The defendant argued that there had been no contract between himself and the claimant and that no duty of care had been owed. Mr Rusz alleged that the claimant had exaggerated his claim against the hospital but that he himself had, nevertheless, taken all proper and reasonable steps to advise the claimant. In doing so, Mr Rusz believed he had exercised reasonable skill and care. The court, however, was satisfied that there was a contract to provide legal services and that it went beyond being a McKenzie Friend. Although the court acknowledged that Mr Rusz had never expressly stated that he was a solicitor, he had held himself out as being an experienced professional.

At no time had the defendant advised the claimant of any problems that could arise from their terms of engagement nor given proper advice about insurance and funding arrangements. Neither had Mr Rusz offered any indication of his own limited ability to act as a legal advisor.

In the course of the litigation, Mr Rusz had drafted particulars of claim seeking fantastical sums. These were unsupported by evidence. He had made misconceived applications for disclosure and had failed to comply with the directions given by the court. Furthermore, Mr Rusz had made no effort to obtain advice from a barrister nor had he made any attempt to consider with the claimant the use of alternative dispute resolution. What's more, there was no evidence that any attendance notes had been taken. Mr Rusz had adopted an obstructive approach to the question of settlement and he had not discussed the settlement sum with the claimant before making a Part 36 order.

The court held that the defendant had been negligent. As a result, the claimant had lost the opportunity to settle his claim against the hospital on more favourable terms. Had he been able to do so, it was likely that he would have recovered general and special damages of around £300,000. The claimant, of course, bore some responsibility for the conduct of his own case. So the sum the defendant had to pay was reduced by 35%. The defendant was ordered to pay £263,759 in damages to the claimant and £73,000 in costs.

Solicitors need to put their house in order

Mr Rusz was not a solicitor and neither was he regulated by the Law Society. Nevertheless, the legal profession must accept some responsibility for the existence of people like him. As a whole, the legal profession needs to take steps to address declining standards in the provision of legal services. It has been quick to highlight instances where expert witnesses have fallen below expected standards and, at times, it has been quite vocal in its criticism of experts generally. Perhaps it is time for lawyers to put their own house in order.

Legal profession needs to address its own declining standards

References

[1] *Paul Wright -v- Troy Lucas & Co & George Rusz* [2019] *QBD* (Judge Eady) 15/03/2019.

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