Your Witness

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Training doctors as expert witnesses

The General Medical Council's (GMC) ethical guidance to medical practitioners contains broad-brush guidance for those who give expert evidence in court. It makes clear that **medical expert witnesses should seek their own forensics training, if desired; it is not regarded as part of the essential medical education that all health professionals must undergo**. Recently, though, there has been some questioning of this stance. The loudest voice has been that of the Medical Protection Society (MPS) in its call for some formal training for medical expert witnesses.

Of course, many medics who intend to become expert witnesses attend courses run by individuals and organisations that specialise in training experts in report writing, the legal process and court appearances. Much of this training is perfectly good and provides the expert with the knowledge necessary to perform his or her expert witness duties. However, because there is no real system of accreditation or oversight, the nature of this training might vary in thoroughness and quality and may be poorly monitored for accuracy and relevance.

According to a spokesperson for the MPS, many medical doctors feel uncomfortable describing themselves as expert witnesses, such are the connotations seen to be attached to the description; indeed, many are actually discouraged from the role by the same. The MPS suggests that the situation might be improved if specific training in the skills and duties of an expert witness formed part of every medical doctor's formal training.

A role of the MPS is to actively campaign for regulatory and legal reforms to support safe practice in medicine and dentistry. As a defence organisation, it will be keen to minimise the number of professional claims against its members, and it suggests that some impact can perhaps be had by including expert witness training within formal medical training.

The MPS's proposed action plan has four recommendations, *viz*:

- that the role of expert witnesses should be looked at by the GMC as part of its drive to set up **new credentials for the medical register**
- that **GP and consultant training should include acquiring the skills to be an expert witness**
- that **NHS employers should make it easier for doctors to be relieved from their clinical duties so they can act as expert witnesses**. This, they said, might require **contractual reform** to give the expert witness role greater prominence, and greater certainty for those wishing to discharge the role.
- that **more doctors should be encouraged to consider putting themselves forward to perform expert witness duties**.

The medical director of MPS, Dr Hendry, explained the reasoning behind the recommendations:

> *'... the expert evidence of a doctor as to the expected standard of care can be pivotal in a tribunal hearing or in criminal trials concerning incidents that have occurred in a healthcare setting.'*

Consequently, the MPS wants to see a wider pool of doctors with the right experience able to act as expert witnesses. Dr Hendry believes that this is a vital role doctors can perform on behalf of, and in support of, their profession.

The MPS is apparently of the belief that there is a paucity of willing, trained medical expert witnesses and thus a danger that any doctor facing a tribunal or court will fail to have a fair assessment of their practice carried out by someone respected by their peers and who can present balanced evidence.

An additional problem seems to be the attitude of the NHS and other employers to medical professionals acting as expert witnesses. There is the suggestion that the expert's work is seen as something extraneous to their clinical work, and an unwelcome distraction or drain on resources. According to Dr Hendry, more doctors need to be freed up by their employer, and encouraged and trained to take on the role.

The proposals are undoubtedly interesting. However, the prospect of medical schools and teaching hospitals assuming the role of training expert witnesses seems to us to be remote. The time and resources it would take to perform the task to a meaningful standard would likely exceed any perceived benefits – particularly in relation to an already over-stretched NHS. That said, the call by the MPS for **employers to take a more reasonable approach in making time available and encouraging doctors in their medico-legal work** is one that should be welcomed.

As recent coverage in *Your Witness* has shown, though, it's not just forensic training that might impact on a doctor's willingness to act as an expert witness. There are also the problems with low remuneration in publicly funded cases and the clear difficulties in court timetabling!

Despite the calls from the MPS for formal forensic training, it is likely that, in the eyes of the GMC, it should remain the responsibility of the individual concerned.

Chris Pamplin

Inside

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Expert witness survey 2019

On average, 54% of workload is expert witness-related

Enclosed with our June 2019 issue of *Your Witness* was a survey questionnaire, the thirteenth of its kind over the past 20 years. By the end of August 2019, over 220 forms had been returned. A big thank you to all who took the trouble to take part and contribute data.

The experts

Of the 227 experts who responded by the end of August 2019, 96 were medical practitioners. Of the remaining experts, 37 were engineers, 18 were in professions ancillary to medicine, 15 were accountants or bankers, 19 had scientific, veterinary or agricultural qualifications, 7 were surveyors or valuers and 17 were architects or building experts. The small 'others' category totalled 18.

Work status and workload

Of the respondents, 45% undertake expert witness work full time, with 42% part time and 10% describing themselves as retired. Between 2003 and 2013 this split was fairly stable, with the full-time figure at around 50%. It dipped a little in 2015 and again in our 2017 survey. Increasingly we are looking at experts who are mixing their forensic work with other activities, or are undertaking forensic work in retirement.

Overall, expert witness work accounts for 54% of their workload. This figure was 37% in 2003 and rose to 45% in 2011. It is the third time that this figure has been over 50%.

It is clear, then, that those experts who responded are much involved in expert witness work but still have a strong commitment to their professions – exactly as it should be.

Experience and outlook

We also asked respondents to say for how long they have been undertaking expert witness work. From their answers it is apparent that they are a very experienced lot indeed. Of those who replied, 95% have been practising as expert witnesses for at least 5 years, and 86% have been undertaking this sort of work for more than 10 years. Eight years ago, well over half of the respondents (60%) saw expert witness work as an expanding part of their workload, despite the increasing pressures on expert witnesses and the then recent removal of expert witness immunity. But our 2019 survey supports the conclusion from our 2013, 2015 and 2017 surveys that this optimism is decreasing. Now we observe **48% of expert respondents expecting expert witness work to be a growth area** in their business.

48% expect expert witness workload to increase

Nature of the work

The way the workload of these experts is partitioned between the various courts is little changed from 2013. Our respondents state that, on average, they perform 83% of their expert witness work in civil courts, 5% in family courts and 12% in criminal courts. Near 65% of these experts undertake civil work exclusively. This dominance of civil matters over the other courts is a long-standing feature of the make up of the *Register*'s membership.

When we asked about publicly funded work in 2013, it was no surprise that with civil work dominating, 46% of our respondents undertook no publicly funded work. This time the majority – 56% – say they do no publicly funded work. Of those who do accept such work, it averages 31% of their workload, which is slightly down on 2 years ago. These **data show just how financially unattractive the Ministry of Justice is making publicly funded work** for expert witnesses.

When it comes to accepting instructions from litigants in person, 56% of our respondents do not agree to such instructions. Of those who are prepared to accept such instructions, the vast majority take just a handful each year. One of the difficulties that can arise with **litigants in person** is apparent in the **increase in the last 6 years in the percentage of experts who require payment on account in such cases** – from 38% to 58%.

Their work

Reports

In all of our surveys we have asked how many reports the experts have written during the preceding 12 months. The averages for the last six surveys are given in Table 1. The three types of report are advisory reports not for the court, court reports prepared for one party only and single joint expert (SJE) reports.

Single joint experts

A dramatic rise in the number of SJE instructions between 1999 and 2001 (a jump from 3 to 12 instructions a year as a result of the Woolf reforms) then levelled off. Now, **46% of experts have been instructed as SJEs in the past 2 years** (it was 73% in 2011), and on average each expert receives seven such instructions in the year – one-third of the average in our 2009 survey.

Since the removal of expert witness immunity in January 2011, the role of the SJE has become even more fraught. Working for both parties in a dispute may well lead to a disgruntled party, and either side (or both!) can sue the instructed expert! Indeed, we have heard from experts – even those who until now have been very supportive of the SJE approach – who say that they will no longer undertake such instructions. This is one metric we have been watching closely.

Court appearances

Another change over the years has been the reduction in the number of civil cases that reach court. It is now altogether exceptional for experts

Report type	2009	2011	2013	2015	2017	2019
Advisory	19	15	18	16	21	13
Single party	57	56	55	56	47	50
SJE	15	9	8	8	5	7

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

to have to appear in court in fast-track cases, and it is becoming less likely in the multi-track. In 1997 we found the average frequency of court appearances was five times a year; some 4 years later this had dropped to 3.8; it now stands at 1.9. This survey does not separate civil cases from criminal and family cases (in which most will reach court), so the number of civil cases reaching court will be much lower even than 1.9.

Variation by specialism

However, these averages hide a lot of variation by specialism (see Table 2). For example, the reporting rate for medics is much greater than in all other specialisms. Furthermore, SJE appointments are much more common in medical cases than in the other specialisms.

Their fees

Which brings us to the detail everyone wants to know. How much are fellow experts charging for their expert witness services? See Table 3!

For each professional group, the table offers average hourly rates for writing reports and full-day rates for attendance in court, with the 2017 data for ease of comparison. Given the small size of some of the groups, it would be unwise to read too much into the changes revealed by these pairs of figures.

In terms of annual income from their expert witness work, 28% of our respondents earn less than £20k per year, 20% earn between £20k and £50k per year and 46% earn over £50k per year.

Cancellation fees

Fees due as a result of cancelled trials continue to be a source of friction. The average percentage of the normal fee experts charge is generally controlled by the amount of notice they receive of the cancellation. In this survey, 48 respondents charge on average 36% of their fee if notice is given at least 28 days before the trial is due, 89 respondents charge 47% with 14 days' notice, 130 charge 74% on 7 days' notice and 151 charge 98% if just 1 day's notice is given.

The **right to cancellation fees is one that has to arise from the contract** between the expert and the lawyer, although the Ministry of Justice has made claiming them very difficult in publicly funded cases. This ought to act as yet another spur to all experts to put in place clear, written terms of engagement.

Speed of payment

In this survey, **36% of experts report that the promptness with which invoices are paid has not deteriorated – but that means 64% of experts are finding payments are taking longer to secure!** One measure of the problems experts have in securing prompt payment is the number of bills settled on time. In this survey, the number of experts reporting their bills are being paid on time in even half of their cases is 55% (up from 49% in 2017). On average, 41% of solicitors pay within 8 weeks, 27% pay between 9 and 12 weeks and 22% pay between 13 and 48 weeks.

Against this background, while **93% of experts say they stipulate terms**, still **only 56% use a written form of contract**. Mind you, that is a 10% point improvement on a decade ago, so the message must be getting through – slowly! **Without a solid contractual basis, experts are making their credit control much more complex than it need be**. All experts listed in the *UK Register of Expert Witnesses* have access to our *Terminator* service through our website (see page 8) to create personalised sets of terms, and our Little Book on *Expert Witness Fees*[1] has a chapter dedicated to terms.

Jackson Reforms

We have asked about the Jackson Reforms in our last four surveys. When it comes to the 'hot tub', 15% of our respondents have 'dipped their toe in the water', up from 8% in 2013 and 12% in 2017. But **only 59% of these think hot tubbing is an improvement** (80% in 2017).

In 2013, 40% of respondents had been asked to provide a costs budget. This had increased to 63% in 2017 but has fallen back to 47% now. **Experts continue to find it a challenge to generate accurate budgets at the outset of an instruction.**

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

Professional group (*n = number of respondents*)	Reports	Court appearances	Advisory reports	SJE instructions
Medicine (*n = 96*)	75.0	2.0	18.9	8.6
Paramedicine (*n = 18*)	48.6	1.1	7.3	17.3
Engineering (*n = 37*)	18.6	2.1	9.3	5.9
Accountancy (*n = 15*)	12.4	2.1	5.3	2.8
Science (*n = 19*)	29.9	3.2	9.6	1.9
Surveying (*n = 7*)	8.1	1.1	8.2	4.0
Building (*n = 17*)	23.8	1.1	5.`5	2.8
Others (*n = 18*)	13.7	1.0	9.9	3.1
Aggregate averages	45.2	1.9	12.9	6.8

Table 2. Average number of reports, trials, advisory reports and SJE instructions by specialism.

Professional group (*n = number of respondents*)	Average rate (£)			
	Writing reports (per hour)		Court appearances (per day)	
	2019	2017	2019	2017
Medicine (*n = 96*)	241	226	1,653	1,680
Paramedicine (*n = 18*)	161	150	1,098	1,091
Engineering (*n = 37*)	149	151	1,224	1,165
Accountancy (*n = 15*)	251	209	1,900	1,177
Science (*n = 19*)	141	149	993	1,271
Surveying (*n = 7*)	175	215	1,152	1,739
Building (*n = 17*)	180	157	1,602	1,580
Others (*n = 18*)	109	132	726	754
Aggregate averages	196	198	1,408	1,492

Table 3. Average charging rates for report writing and court appearances by specialism.

References

[1] *Pamplin, CF & White, SC* [2016] *Expert Witness Fees.* 3rd Edition J S Publications ISBN 1-905926-24-4 Order line 01638 561590

Civil court expert evidence by the ba

Not all expert evidence falls under CPR35

As a general rule, the permission of the court will always be needed to adduce expert evidence. In civil cases, once permission has been granted, the procedure governing how the expert evidence is presented, and the requirements that must be satisfied by the expert and the parties, is set out in Civil Procedure Rules (CPR) Part 35. **Failure to comply with the rules will usually render expert evidence inadmissible**.

There are, however, a number of ways in which expert evidence can be given outside the regulatory controls of CPR35.

Non-Part 35 expert evidence

In *Rogers -v- Hoyle*[1], one of the parties sought to rely on expert evidence contained in a report by the Air Accident Investigation Branch (AAIB). Neither party had instructed the authors of the report, and it was argued that the report should not be admitted as expert evidence. The report contained a mix of fact and opinion, and there were objections to the adducing of any opinion evidence by someone who had not been nominated formally as an expert witness in the proceedings.

The Court of Appeal held, however, **the statements of fact contained in the report were evidence the trial judge could take into account, as he could any other factual evidence. Its expressions of opinion were ones to which a court was entitled to have regard.** It was open to the expert to express an opinion based on the facts insofar as the conclusion was informed by her expertise. Importantly, the Court of Appeal found that the accident **report did not fall within CPR35 because its author was not instructed by, and indeed was wholly independent of, any of the parties**. It concluded that the report was *prima facie* admissible, and that permission was not required to adduce it.

While at first sight this decision might seem surprising, analysis of the judicial thinking does reveal a measure of good sense. CPR35.2 defines an expert witness as '*a person who has been instructed to give or prepare expert evidence for the purpose of proceedings*'. Although the authors of the report had not been instructed in the proceedings, the report was adjudged to be admissible evidence and of particular potential value on account of the AAIB's independence. The Court recognised that the **report was the product of an investigation by experts who were not concerned to attribute blame and had greater ability than anyone else to obtain and analyse relevant data**. Furthermore, many litigants would find it very difficult to otherwise access the relevant information contained in the report. The **exercise of discretion** was to be carried out in accordance with the overriding objective, which tended to favour the inclusion of evidence such as the report.

Some opinion evidence can be introduced via hearsay rules

The Court expanded some of these principles in the case of *Mondial Assistance (UK) Ltd -v- Bridgewater Properties Ltd*[2]. In this case, permission had been given by the court to instruct an expert valuer. The report was duly filed and served, but the instructing party had attached a number of findings the expert had obtained from other experts (various structural and engineering consultants). The opposition objected to their inclusion on the basis that it was expert evidence for which permission had been neither sought nor granted under CPR35. At first instance the judge granted the application on the basis that expert evidence for which permission had not been given was trying to be sneaked in 'by the back door'. Accordingly, he excluded it. The party seeking to adduce it appealed.

Following the decision in *Rogers*, the Court of Appeal said that the combined effect of the Civil Evidence Act 1972 s.3 and s.1(1) of the 1995 Act was that **the opinion of a properly qualified expert was *prima facie* admissible**. Such evidence was not affected by the provisions of CPR35 unless the evidence was that of '*a person who had been instructed to give or prepare expert evidence for the purpose of proceedings*' under r.35.2(1). **Opinion evidence that is not within CPR35 does not need permission of the court. It is *prima facie* admissible but subject to the discretion to exclude under r.32.1(2).**

Section 3 of the Civil Evidence Act 1972 provides that, '***subject to any rules of court made in pursuance of... this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.***' This is not inconsistent with CPR35, and thus expert opinion given outside the ambit of CPR35 can still be admissible.

Expert evidence adduced outside of CPR35 will commonly be in the form of learned or scientific texts. Such evidence will usually be adduced in written form and without any mechanism for questioning or cross-examining the original author. The **Court will retain the power to control such evidence by the provisions set out in CPR32.1**. It stipulates that:

> *(1) The court may control the evidence by giving directions as to –*
> *(a) the issues on which it requires evidence;*
> *(b) the nature of the evidence which it requires to decide those issues; and*
> *(c) the way in which the evidence is to be placed before the court.*
> *(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.*
> *(3) The court may limit cross-examination.*

The Court of Appeal in *Mondial Assistance* said that **the court should be slow to exclude relevant hearsay evidence** under r.32.1(2); if it was objected to, **the issue would be the weight that it should be given**.

The rules governing hearsay evidence, generally, are contained in r.33.2, and it is worth setting these out in full.

(1) *Where a party intends to rely on hearsay evidence at trial and either –*
(a) that evidence is to be given by a witness giving oral evidence; or
(b) that evidence is contained in a witness statement of a person who is not being called to give oral evidence;
that party complies with section 2(1)(a) of the Civil Evidence Act 1995 by serving a witness statement on the other parties in accordance with the court's order.

(2) *Where paragraph (1)(b) applies, the party intending to rely on the hearsay evidence must, when he serves the witness statement –*
(a) inform the other parties that the witness is not being called to give oral evidence; and
(b) give the reason why the witness will not be called.

(3) *In all other cases where a party intends to rely on hearsay evidence at trial, that party complies with section 2(1)(a) of the Civil Evidence Act 1995 by serving a notice on the other parties which –*
(a) identifies the hearsay evidence;
(b) states that the party serving the notice proposes to rely on the hearsay evidence at trial; and
(c) gives the reason why the witness will not be called.

(4) *The party proposing to rely on the hearsay evidence must –*
(a) serve the notice no later than the latest date for serving witness statements; and
(b) if the hearsay evidence is to be in a document, supply a copy to any party who requests him to do so.

So, **provided a party satisfies these requirements, expert opinion evidence may be given as hearsay upon filing the appropriate notices**. So long as the expert has not been instructed in the proceedings, permission will not be required and the evidence will not be governed by CPR35.

As mentioned, the type of evidence where such a procedure is envisaged is in, for example, the report of an official body or inquiry (such as in *Rogers*) or some similar expert authority given in a recognised body of scientific work.

How far can we go with this?

Given that the courts have expressed some reluctance to exclude such hearsay evidence, how far can this be extended? Take, for example, the report of an expert who has been instructed in previous proceedings but has not been instructed by a party in current proceedings. Can a copy of his or her report be adduced in evidence simply by serving a hearsay notice? This was precisely the question that came before the Patents Court recently in *Illumina Inc & Others -v- TDL Genetics Ltd & Others*[3].

The claimants in *Illumina Inc* alleged that the defendants had infringed their UK patent. The defendants denied infringement and counterclaimed for invalidity. The technical subject matter involved in the claim related to patents that had been the subject of earlier infringement claims against a number of defendants, including those in the instant claim. The claimants had obtained a copy of an expert's report that had been used in earlier proceedings. The expert had been instructed by a defendant in a case who was not one of the defendants in the current proceedings. The claimant served a hearsay notice seeking to rely in the current claim on part of that report. The defendants objected and contended that it was expert evidence and the claimants were required, under CPR35, to obtain the permission of the court to adduce it.

Henry Carr J, mindful of the decision in *Rogers*, ruled that the evidence did not fall within the ambit of r.35.2 because the expert was not '*a person who has been instructed to give or prepare expert evidence for the purpose of proceedings*'. The fact that the expert had been instructed in similar proceedings involving some of the same parties did not affect this.

He said, **CPR35 is forward looking. Its purpose is to regulate and control expert evidence that has not yet been adduced by a party to the proceedings**. Developing the principles identified in *Mondial Assistance*, he took the view that a party who sought to adduce evidence in respect of which permission had already been obtained previously under CPR35 and in which the expert had already been cross-examined should not be in a worse position than a party who sought to adduce such evidence in respect of which permission had not been obtained previously.

The **judgment does not give *carte blanche* to parties who wish to adduce expert evidence used in previous proceedings merely by serving a hearsay notice**. The court will, of course, **retain a general discretion and power to exclude it** under r.32.1. And the judge will still have **regard to the overriding objective, cost, relevance and other factors**.

Potential for some shenanigans

The judge said that he did not expect this ruling to result in a flood of hearsay notices in respect of expert reports in patent cases. The judgment does, though, give rise to some interesting conjectures. We will be reporting on *Cape Intermediate Holdings Ltd -v- Dring* [2019] *UKSC* 38 in the next issue of *Your Witness*. It concerns applications by non-parties to documents on the court file, including expert reports. It may be a bit fanciful but, in theory, there might be little to prevent a party from making application for an expert report in similar but unrelated proceedings under the guise of 'open justice', and then seeking to adduce that report as expert evidence in proceedings of his own. This would be outside the controls of CPR35 and would not require the express permission of the court. We suspect that **someone is bound to try it on as a way to obtain an expensive expert report without paying more than the court's fee for its disclosure!**

Could hearsay rules be used to draw in reports from earlier proceedings?

References

[1] *Rogers -v- Hoyle* [2014] *EWCA Civ* 257.

[2] *Mondial Assistance (UK) Ltd -v- Bridgewater Properties Ltd* [2016] *EWHC* 3494 (*Ch*).

[3] *Illumina Inc & Others -v- TDL Genetics Ltd & Others* [2019] *EWHC* 1159 (*Pat*).

Retrospective disclosure orders

Courts keen to prevent 'expert shopping'

For several years the courts have used their powers to order the disclosure of previously obtained expert reports as a means of discouraging 'expert shopping'. The principle was outlined in *Beck*[1] when Simon Brown LJ said that he found it **hard to envisage any circumstance where a party seeking to dispense with an existing expert report and rely on another should not be ordered to disclose the earlier report**.

There is a **caveat** to this, however, which was identified by the Court of Appeal in *Edwards-Tubb*[2]. For an appeal court to impose the condition retrospectively, it must **first consider whether there was any power to impose the condition and, where there was such a power, the authorities showed that the disclosure of the prior reports should generally be ordered once the parties had embarked on the relevant protocol processes**.

Earlier this year, this issue came before the court in the clinical negligence case of *Bowman -v- Thomson*[3]. In support of his claim, the claimant had obtained reports from three expert witnesses: a GP, a consultant neurosurgeon and an advisory report from a consultant urological surgeon. The letter of claim was supported by, but not accompanied by and did not mention, the expert opinions of these three.

Following conference with counsel, the claimant lost faith in the evidence of the urologist, which had, it appears, been based on incomplete photocopies of medical records. The particulars of claim were served, supported by the expert evidence of the other two experts. Some 3 or 4 months later, the claimant sought to adduce a new urology report. At the subsequent case management hearing, the Master granted permission for the claimant to rely on the first two expert reports and also on the report of the new urologist. No consideration had been given to the earlier urology report for the simple reason that it had not been mentioned and the defendant was unaware of its existence.

Subsequently the defendant became aware of the first urology report and requested that it should be disclosed. The response of the claimant's solicitors was that it was privileged, and thus they declined to disclose it. Accordingly, the defendant made application to the High Court, appealing the Master's order and seeking a ruling that the first urology report be disclosed. For the purposes of the application only, the claimant disclosed the first report but disclosure was stated to be on a without-prejudice basis and without waiver of privileges. The question for the High Court was whether or not it could or should make an order that the report be fully disclosed in the action.

The issue that exercised the court was the point made by the Court of Appeal in *Edwards-Tubb* which required a 'vehicle' upon which the court could impose such a condition. The Court came to the view that **there is a need to balance the legal privilege available to a party in an expert report with the court's interest in preventing expert shopping**. It requires that, if there was a principled way in which a 'vehicle' could be identified to order disclosure of a prior privileged report, disclosure should be ordered.

The judge in the lower court had allowed the second urology report without imposing any preconditions. There was, therefore, no 'vehicle' for the imposition of a condition relating to the first urology report under the existing orders.

Giving his judgment on the appeal, Mr Justice Dingemans said that he doubted that he had the power to exercise a discretion on appeal which was not directly addressed because it wasn't directly raised. However, he could confirm that he had considered whether, if he had the power, it would be appropriate to exercise his discretion to order variation of the order made by the judge in the lower court. In his judgment, it would not be an appropriate exercise of his powers to vary that order.

The judge pointed out that the defendant had not sought confirmation before the hearing in the lower court that the claimant had not obtained prior expert evidence from any other expert. As no such inquiry had been made of the claimant, there was no saying what his response might have been. But it is likely that the claimant would have sought similar confirmation from the defendant. It appeared to the judge that both parties would be naturally reluctant to encourage any routine questioning of parties about whether they had obtained such prior expert evidence at case management conferences because that would likely lead to greater costs and complication for very little gain. He accepted that such an outcome would be undesirable. However, if there was to be such questioning, the time for asking was before the order was made.

The judge dismissed the suggestion that the report should be disclosed in full now because it was disclosed on a without-prejudice basis as part of the current application, and this provided the necessary 'vehicle'.

Conclusion

Accordingly, the defendant's application failed and the claimant was not obliged to make formal disclosure of the report in the main action.

The case makes it clear that the **courts will be reluctant to make retrospective orders after the matter has been dealt with as part of case management unless there are clear circumstances that would permit this. The time for the parties to make enquiries and investigations is before relevant orders are made.** If a party suspects that there may be a previous expert report that might assist its case or undermine the opponent's, enquiries should be made at an early stage and, perhaps, as a matter of routine.

References

[1] *Beck -v- Ministry of Defence* [2003] *EWCA Civ* 1043; [2005] 1 *WLR* 2206.

[2] *Edwards-Tubb -v- JD Wetherspoon plc* [2011] *EWCA Civ* 136; [2011] 1 *WLR* 1373.

[3] *Bowman -v- Thomson* [2019] *EWHC* 269 (*QB*).

Expert witness 'gold standard'?

In May 2019 *The Times* reported on the case of Andrew Ager. He was instructed by the Crown in a fraud case involving the sale of carbon credits. Carbon credits are permits, which can be traded, that allow companies or countries to emit a certain amount of carbon dioxide gas. During questioning, Ager was found to have no academic qualifications and, indeed, said he could not remember if he had passed his A-levels. The press gleefully reported his admission that he had never read a book on the subject of carbon credits but had once watched a documentary about them!

Unsurprisingly, these revelations caused the trial to collapse. But more than this, Ager had been involved in 20 previous trials and up to 50 police investigations into allegations of fraudulent selling of carbon credits, all of which may now be called into question.

One wonders, perhaps, what the CPS was thinking. Its competence in selecting a suitably qualified expert in this case must be seriously questioned. The defence team had little difficulty in exposing Ager's deficiencies, and this rather suggests that the CPS made little or no effort to establish his qualifications and credentials before blithely giving him the gig.

Of course, as always seems to happen, the blame falls on expert witnesses in general and prompts calls – by those who would run them – for better accreditation schemes.

Following what the *Law Society Gazette* trumpeted as 'a growing public row', there was the announcement of yet another certification scheme for expert witnesses. The scheme, run by the Expert Witness Institute (EWI) in conjunction with the Judicial Institute at University College London, aims to create a 'gold-standard' register of experts. It will consist of '*an intensive assessment process to assess experts' competency as witnesses*' and was launched in June 2019. The EWI said that successful applicants will receive a certificate of competency that will last for 5 years.

What the architects of this and similar schemes fail to see is that justice is rarely served by limiting the availability of expert witnesses to an ever-smaller pool of certificated professional experts. Effective litigation surely requires the best expert for each case, and that is not necessarily the one who will be top of the CPS's 'no worries' tick-list. In novel or narrow areas of science there may be very few persons suitably qualified to give expert evidence. Such people may have never acted as an expert witness previously.

It is all very well selecting an expert from a prestigious list of accredited individuals, but the **selector must still exercise sound judgment** in:

- **appointing an expert suited to the case** and
- **assessing any other factors the court is likely to weigh** when evaluating that expert's evidence.

There is a real danger that consulting the 'prestigious list' will become a proxy for the proper scrutiny of potential expert witnesses on a case-by-case basis.

In any event, the best qualified experts in the world are not immune from criticism, justified or otherwise – just ask Dr Meadow or Dr Squier!

'Gold-standard' lists are not the answer

How hard can it be to read a CV?

Notwithstanding the comments of the judge in the case, Ager's shortcomings did not, we suggest, lie in his lack of knowledge. He had worked, for a number of years, as a carbon trader for a subsidiary of a global investment banking firm. He was, however, woefully ignorant of his duties as an expert witness. The real problem with Ager's evidence was his **lack of meaningful formal credentials**. He had started working as a trainee trader at the age of 18 but had **received no formal training and attended no courses** on carbon trading. He had **no telling status in the field** and his **work had never been peer reviewed**. These were all shortcomings surely ascertainable by scrutiny of his CV.

Of course, it is desirable that experts should receive training and should make themselves familiar with their expert witness duties. However, the best expert for a case is not necessarily the expert witness with the most expert witness training. The two are not synonymous, and it would be foolish to limit the pool of experts to only those who are trained as expert witnesses and able to brandish a certificate of competency.

While a 'gold-standard' register might serve to relieve the CPS from having to do any thinking and save them the onerous task of exercising reasonable judgment when selecting suitable experts, it would be unlikely to reduce significantly the number of cases where experts are criticised for their lack of credibility in niche or narrow areas of expertise.

It is only a short time ago that the case of *R -v- Pabon*[1] highlighted shortcomings in the way the Serious Fraud Office (SFO) selected suitable expert witnesses. In a letter to the Chair of the Justice Select Committee, the Director of the SFO confirmed the intention to front-load certain due diligence checks prior to formal evaluation of prospective expert witnesses. The process would require such individuals to confirm an understanding of their legal duties and disclosure obligations at an early stage. The SFO proposed to formally evaluate prospective expert witnesses by scoring them against standardised criteria (together with other case-specific requirements) to assess their suitability and expertise.

It's really not that hard!

What's needed is the proper scrutiny of potential expert witnesses by the client(s) and lawyers, guided by the specifics of the case in terms of the calibre of expert witness required. Attempts to build 'gold-standard' lists are a potentially dangerous distraction from a more proper case-by-case scrutiny.

References

[1] *R -v- Pabon* [2018] *EWCA Crim* 420.

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