Your Witness

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

Coroner's Courts

We've had a run of calls to our Helpline centred on the Coroner's Court, which is a little removed from the usual court systems. By its very nature, medical doctors form the bulk of the experts who are called upon to assist this court. We have prepared a new factsheet (number 72 in our series!) that provides an in-depth look at the court and the important role experts can play. Starting on page 2 of this issue, we offer a summary of the guidance. Remember, all 72 factsheets are available to members in our on-line library. Just point your browser at *www.jspubs.com/library*.

A big issue – if our mailbox is anything to go by – is that of securing the expert's position with regard to fees. Because Coroners have broad powers, are somewhat removed from the usual judicial structure, and are subject to very limited means of challenge, expert witnesses should make it their priority to **ensure full terms of engagement have been agreed with the Coroner** – to include fees and the hearing date(s) – ***before formally accepting instructions***. In my view, once you agree to act, if you haven't tied down these practical matters, you will have a tough time preventing a Coroner imposing his or her will!

Role of experts in court delay

The eye-watering cost of medical negligence claims to the NHS has been hitting the headlines recently. Regular readers of *Your Witness* may recall that I have long been an advocate for involving expert witnesses as early as possible in litigation. This helps parties to identify the main areas of difference more quickly, and to focus everyone's attention on the areas of contention that require the court's assistance and ultimate judgment.

In the context of NHS litigation, the early involvement of expert witnesses is just as important. The adversarial nature of civil litigation, and in particular in relation to expert evidence within it, is a direct cause of claims being robustly pursued, only to be settled at the last minute. This behaviour might be taken to be a sign that lawyers are playing hard ball with the aim of running up their own fees. However, I see a big driver in the way the Civil Procedure Rules (CPR) operate.

The CPR's Pre-Action Protocol dealing with clinical disputes imposes no time limit on claimants amassing their expert evidence. However, the Protocol imposes a 4-month limit on defendants issuing their Letter of Response. That's not much time when we all know that a defence team will need to obtain its own expert evidence.

If the claimant and defendant experts agree on matters, then cases will tend to settle quickly. But it is those other cases, when the expert witnesses disagree, that seem to get locked into a cycle of litigation. Parties on both sides are seldom in a position to challenge expert opinion evidence directly. And while the court may ultimately prefer one expert's opinion over another, that is not an option open to the litigants. So the litigation grinds on.

If the expert witnesses for both sides come together under the powers of CPR Part 35.12 (Discussions between experts), one expert may come to recognise an important fact that causes a change of opinion. However, such meetings generally take place well into the litigation cycle, and often after a trial date has been set. If that does happen, and the case settles 'on the steps of the court', that is hardly the fault of the lawyers.

As has been shown time and again, there could be great benefit from having expert witnesses meeting and discussing their opinions much earlier in the litigation cycle. Earlier meetings would focus attention more quickly on the real issue(s) in a claim, leading to simpler, shorter cases and more rapid settlement. While this approach is not the answer to stemming the tide of NHS litigation costs – that perhaps needs a move to the same sort of open safety culture we see in the aviation industry – it should at least help to keep costs down.

If the government acted to create an alternative compensation protocol for the NHS, perhaps one that sees an open safety culture through no-fault compensation, I believe they should build in very early expert involvement.

Revalidation option

The GMC revalidation process underpins the medical licence to practice. But revalidation can be a bewildering and frustrating experience for retired consultants who are no longer connected to an NHS designated body.

If you are in this position, and want to continue being revalidated, there are companies that help retired doctors achieve revalidation. One such business is *Appraise* (*www.appraise.org.uk*). It is recognised and approved by the GMC and is a designated body in its own right.

While we do not endorse third party companies, we have negotiated a member discount with *Appraise* so that current *Register* members can receive a £100 discount off an appraisal in addition to any other discounts *Appraise* offer.

Chris Pamplin

Inside

Issue 99

The Coroner's Court and inquests

Coroners inquire into sudden or unexplained deaths

Uncovering the factors that led to someone's death is universally important. Indeed, all legal systems worldwide have their equivalent of our coroners. In the United States, coroner equivalents are sometimes referred to as medical examiners. Northern Ireland has a system similar to that of England and Wales, while in Scotland all accidental, unexpected, unexplained, sudden or suspicious deaths are investigated privately by the procurator fiscal, as Crown Agent. Only certain types of death in Scotland are investigated further at a Fatal Accident Inquiry.

In England and Wales, coroners are independent office holders appointed by local authorities. They are usually drawn from the professions of practising lawyer or doctor of at least 5 years' standing. In rare instances, they may be qualified as both. There are 92 separate coroners' jurisdictions in England and Wales, and these are funded by the respective local authorities. They are *not* administered by HM Courts and Tribunals Service.

Reporting requirements

All deaths that are violent, unnatural or sudden, or of unknown cause, must be reported to the coroner. This must be done promptly, and the General Medical Council (GMC) imposes a duty on doctors to volunteer information without having to be asked. Doctors should cooperate fully with coroners, and contribute relevant information when called upon to do so. All details of referral to the coroner should be recorded in the patient's records.

If there is any uncertainty about the cause of death after it has been reported, the coroner will arrange for an autopsy. In many cases, the autopsy will show death by natural causes, and the coroner will take the decision that no further investigation is necessary. In such cases, the coroner will issue the relevant certificate and the death can be duly registered. However, where doubts remain, the coroner will order that an inquest be held.

According to the Ministry of Justice Coroners Statistics for England and Wales 2018, 41% of all deaths in 2018 were reported to the coroner. Of the 220,600 deaths thus reported, the coroner ordered an autopsy in 85,600 cases (39%). Of all cases reported, 13% resulted in an inquest. It will be apparent, therefore, that although the majority of reported cases do not result in an inquest, the frequency with which an inquest is ordered is relatively, and perhaps surprisingly, high.

Experts can be called as professional or expert witnesses

Standard of proof

In the overwhelming majority of cases the standard of proof applied at an inquest is the civil standard – the coroner (or jury if there is one) must be sure that the facts supporting the verdict have been found proven on the balance of probabilities. However, there are important exceptions to this, and if the verdict is one of suicide or unlawful killing, the criminal standard will be applied requiring the facts to be proven beyond all reasonable doubt.

Types of witness

Witnesses can be called to give evidence in a professional or expert capacity. As with the civil and criminal courts, the range of expert evidence can be wide. Police and fire officers, accident investigators, engineers, chemists and toxicologists, and experts in other fields, might all have a role to play. But, given the nature of an inquest, the most frequently called expert witnesses are medical practitioners.

As in other courts, medical doctors appearing as witnesses fall into one of three categories:

- **ordinary witnesses**, called to give evidence in a capacity that is unrelated to their work as a medical doctor
- **professional witnesses**, who give medical evidence based on action taken in a professional capacity, including clinical information relating to the deceased person who was their patient, and
- **expert witnesses**, who have advanced knowledge of a specific field relevant to the case and whose evidence might assist the coroner.

Experts as professional witnesses

Medical doctors acting as professional witnesses might not need to attend court on the day of the hearing. The coroner will ask for a written report detailing their involvement with the patient. They might simply read out the report in court and not ask the doctor to appear.

The evidence of professional witnesses is concerned with the doctor's involvement with the treatment of the deceased whilst a patient. Accordingly, the witness should stick to the facts and not stray into providing opinion beyond the scope of their involvement.

When they do make a court appearance, the coroner will ask the witness to present a summary of their main findings. It is advised that the medical issues be expressed in simple terms that can be understood by the non-specialists in court, including the deceased's family. The witness can be questioned by the coroner and may also be asked questions by the family and other properly interested persons or their legal representatives. Nobody is 'on trial' at an inquest, and the coroner will act to prevent any aggressive cross-examination. Nevertheless, the guidelines issued to coroners require that the inquest should be 'full, frank and fearless' in uncovering the factors leading to a person's death. Consequently, where a death may have resulted in whole or in part from failings in medical treatment, some tough questions are likely to be asked.

Questions from family members can be hostile, and interested persons have the right to representation. A doctor's NHS Trust may arrange legal representation to protect the Trust's interests. They may also be able to

represent the doctor. Medical doctors who are self-employed, e.g. those in general practice, may have separate representation provided by their professional organisation, insurer or similar body. The same might be true in cases where there is a potential conflict between the expert's interests and those of an employing trust.

No witness at an inquest is obliged to answer any question tending to incriminate him or her. Where it appears to the coroner that a witness has been asked such a question, the coroner must inform the witness it may go unanswered. Witnesses who are asked something outside the scope of their knowledge or expertise should say so and the coroner should not expect them to answer such a question.

On the disclosure of confidential information, the GMC takes the view that a medical doctor's duty of professional confidence is not waived by being called to give evidence. Therefore medical experts should not give confidential information without the patient's express consent. If they are asked for such information, the expert should explain that they do not have the necessary consent to provide it and decline to answer. However, they must disclose the information if they are specifically ordered to do so by the court.

Experts as expert witnesses

The duties of expert witnesses in the Coroner's Court are broadly analogous to those prevailing in the civil and criminal courts. Expert witnesses are called to give an **independent opinion on the facts of a case, based on their own specialist knowledge and experience, but without any personal involvement with treatment in the case**.

It is for a coroner to decide how best to examine the central issues in an inquest, including the directions to be given to the jury, the verdicts to be left to them, and which witnesses, including expert witnesses, will be called.

However, while there is no absolute duty on a coroner to call specific expert evidence, or to admit expert evidence obtained by interested parties, there is an obvious need to consider expert opinion in a relevant specialist field. Although the coroner may be a qualified medical doctor, a coroner is not permitted to give expert evidence at an inquest he or she is conducting.

Expert evidence in the Coroner's Court can be just as important and influential as that given in the civil and criminal courts. Although the evidence should not directly address the ultimate issue, i.e. it should not seek to usurp the court's role in deciding the cause of death and other issues reserved to the coroner or jury, it can, nevertheless, be the most telling evidence upon which those decisions are made.

Practical considerations

In most cases, witnesses will be contacted directly or via their hospital's legal department to check their availability. The Coroner's Court should endeavour to list the inquest for hearing at a time when witnesses are able to attend and to inform witnesses by letter or email. It may happen, however, that in a case with several witnesses, the court is unable to accommodate the preferences of all witnesses and will simply require attendance on a particular date. In such circumstances, the court should give a good notice period. A request to attend an inquest is not mandatory unless a witness summons is issued; sometimes, to compel attendance, it is necessary for the court to do this (see section on *Witness summons*).

Witnesses who have not attended the Coroner's Court before should try to familiarise themselves with procedures beforehand. Some Coroner's Courts will arrange a familiarisation visit where witnesses can observe a case being heard.

Most Coroner's Courts will allow consultants and senior practitioners to bring junior doctors for professional experience, if they wish. A member of the doctor's Trust's legal department may also attend.

The report submitted to the coroner should be written in the first person singular and should be thorough but concise and free of ambiguity. This will be made easier if doctors called as professional witnesses have maintained good clinical practice in their work, particularly with regard to note taking.

Witnesses should arrive well before the time appointed for the giving of their evidence. Afterwards, it is a good idea to remain until the inquest has concluded so that they are aware of the verdict and final outcome.

Any medical doctor attending an inquest should prepare thoroughly and bring along relevant information, such as studies or clinical guidelines. Witnesses should dress smartly and address the coroner as sir or madam.

What witnesses should not do

A coroner has the power to call a person to give evidence at an inquest under Schedule 5 of the Coroners and Justice Act 2009. It is the same power that compels a person to produce evidence to a coroner if requested, and this is usually by way of a written statement or documents in the custody of a person.

It is an offence for a witness to do any of the following:

- to fail to attend an inquest when summoned (without a reasonable excuse)
- to give false evidence
- to distort, alter or prevent any evidence or document being provided for the purpose of a coronial investigation, and/or
- to intentionally suppress, conceal or destroy any document a person knows or believes to be relevant to such an investigation.

Such offences amount to contempt of court and under Schedule 6 of the Coroners and Justice Act 2009 are punishable by a fine of up to £1,000, imprisonment of up to 51 weeks, or both.

continues on page 4

Patient confidentiality still applies, so patient consent is required

A court can order a doctor to disclose confidential information

continued from page 3

Expert witnesses should agree terms before accepting instruction

A senior coroner, or (as the case may be) the Coroner for Treasure, may impose a fine not exceeding £1,000 on a person who fails without reasonable excuse to do anything required by a notice under paragraph 1 of Schedule 5. The Act does not remove or alter the powers of a senior coroner under the common law to summon witnesses, require evidence to be given and punish for contempt of court.

Witness summons

As we have seen, inquest hearings in the Coroner's Court are in a category of their own. The rules of evidence are more relaxed, and there are separate provisions in relation to witness summonses, privilege and disclosure.

Medical doctors who had treated the deceased in life can be called as professional witnesses, and expert witnesses can be instructed by the coroner, if needed. Medical experts who are asked to provide a report or give evidence as professional witnesses are under a professional duty to cooperate and comply with any request issued to them by the coroner, even if they are not paid to do so. Expert witnesses, of course, are permitted to decline instructions. However, once involved in a case, we take the view that they should consider themselves to be under the same constraints.

Experts should, therefore, make sure that their terms and fees are agreed with the Coroner's Office before accepting instructions. The Coroner's Office should try to accommodate a witness's commitments when fixing a date for the inquest hearing, but they are under strict time limits to complete the inquest within 6 months of notice of the death, so it is not always possible.

If a witness summons is issued to compel attendance at an inquest and there are good reasons why attendance on a particular date is not possible, the expert witness should notify the Coroner's Office immediately to see whether alternative provisions can be made. However, if not, there is very limited scope for appealing a decision of the coroner or making an application to set aside any summons.

Coroners' decisions are difficult to challenge

The GMC advice to doctors who are served with a witness summons is that they must attend at the specified time and for the set duration. They must comply with a witness summons, otherwise they risk being found in contempt of court, which is a criminal offence and might, in addition, be reported to the GMC.

Fees and expenses

Fees are governed by the *Coroners Allowances, Fees and Expenses Regulations 2013* which came into force on 25 July 2013. Part 3 of the Regulations make provision for allowances, fees and expenses to be paid to expert and professional witnesses.

Experts should agree their fee with the coroner before accepting instructions formally. The court will pay reasonable hourly rates for attendance, travel and preparation. Experts can claim fees and travel expenses using the Expert Witness Expenses form that should be supplied by the court. Alternatively, experts can usually submit their own invoice. In the latter case, experts should make sure that the invoice shows their hourly/daily rate and the duration of their attendance, plus itemised travel expenses. All relevant receipts should be attached.

A coroner may pay an expert witness who has carried out preparatory work directly related to the giving of evidence at an inquest at a fee the coroner considers reasonable, having regard to the nature and complexity of the preparatory work carried out.

BMA concerns over non-payment

The British Medical Association (BMA) has indicated that concerns have been raised by some doctors that they have not been paid for coroner reports or statements of fact which the doctor had been obliged to provide. Under the current system, the coroner pays then reclaims funds from the local authority.

Prior to 2008, the BMA held a national fee agreement with the Local Government Employers (LGE) for expert and professional witness fees in the Coroner's Court. However, this national agreement ended in March 2008, whereupon the LGE circulated guidance stating '*payment of fees to doctors would be for local determination*'. While the BMA understood this to mean fees would be negotiated locally between the doctor, coroner and local authority, the guidance has been interpreted by some local authorities to mean they were now able to determine whether or not to continue funding payment for this work!

According to the legal advice received by the BMA, there is nothing contained in the Coroners and Justice Act 2009 or the 2013 Regulations that clearly stipulates payments for reports or statements of fact. The BMA says that, therefore, it has no grounds to force a local authority or coroner to pay the fee. The BMA says that it has rigorously pursued the issue directly with the Chief Coroner, the Ministry of Justice and the Local Government Association, but with little success. However, where payment is not being offered, the BMA would advise doctors to nevertheless complete the report, otherwise they may face being summoned. We interpret this advice as applying to doctors called as professional witnesses because, if called as an expert witness, the matter of fees should be agreed between the coroner and the expert before the instruction is accepted formally.

Factsheet 72: The Coroner's Court and Inquests is a new resource for member expert witnesses of the *UK Register of Expert Witnesses*. It offers an in-depth look at the Coroner's Court. All Factsheets are free to members in the on-line library (go to *www.jspubs.com/library*).

Paying for inadmissible evidence

The provision of expert evidence can be an expensive business and may well be one of the most significant cost elements in a trial. For this reason, the courts have sought to assess, at an early stage, whether expert evidence is needed and, if so, how much of it should be permitted.

It sometimes happens, however, that, despite the best efforts of the trial judge, expert evidence is adduced that is wholly extraneous, irrelevant or just plain inadmissible. Under such circumstances, would it be fair to saddle the other party with the expense?

As a general rule, a costs order made by the court would state that the losing party pays the successful party's costs. However, this is not a hard and fast rule, and the court may exercise considerable discretion.

The exercise of this discretion can be difficult, particularly if some fault is attributable that has had the effect of lengthening a trial or increasing costs but was not caused directly by either party, or where a party had acted in good faith.

It often happens that a party might succeed in just part of its case. In such circumstances, the judge, when making an order for costs, might treat elements of a case as separate and distinct for the purposes of costs. This can result in each party being awarded a proportion of their costs to the extent that they have succeeded in relation to those distinct elements, or otherwise.

Is it possible for the court to extend this separation principle to the allowing or disallowing of costs of an individual expert witness whose evidence, for example, has been ruled inadmissible, or has not been upheld, or where other evidence has been preferred or followed in reaching a judgment? We suggest that this might require a considerable leap of faith, but it was one of the arguments advanced in the recent case of *AMT Coffee Ltd*[1].

Time for a coffee break

The case involved multiple parties. Following the main judgment, the court had determined that the third respondent was liable for a smaller proportion of the petitioners' costs due to her lesser involvement in the proceedings. The first and second respondents were found jointly and severally liable for the petitioners' costs. The petitioners applied for an interim payment on account of those costs.

The respondents submitted that because the court had deemed the parties' expert evidence inadmissible in the course of the trial, the costs of expert evidence should be excluded from the costs assessment. In support, the respondents argued that under CPR r.44.2(4)(b), the court should have regard to certain circumstances, including whether a party has succeeded on part of its case, even if that party has not been wholly unsuccessful. It was also submitted that under r.44.2(5)(c), the conduct of the parties, which is also to be taken into account, includes the manner in which a party has pursued or defended its case or a particular allegation or issue. It was argued, therefore, that because the petitioners put forward expert evidence ruled to be inadmissible, this was a sufficient basis for deciding that the court should make a different and separate costs order in relation to the expert evidence, and that the costs of that evidence should be excluded.

Considering the application, Judge Paul Matthews said that he was not aware of any authority that dealt with such a question. He allowed that, squarely on the facts of this case, the excluded expert evidence could be regarded as a discrete part of the case. This, however, was not enough, and he was required to look at the matter more broadly.

The judge was mindful that the court had given its permission for the expert evidence at an early stage. When the parties had made their decision to adduce the expert evidence, they did so in good faith and with the intention of advancing each of their clients' respective interests. Moreover, they did so because they thought that it would be admissible. The fact that it turned out not to be admissible meant that they did not have the cogent evidence they thought they would have, but they had, in any event, put it forward.

Judge Matthews did not think that the mere fact of its inadmissibility put the expert evidence into a category that enabled it to be ruled a discrete part of the case and one capable of attracting a separate and distinct costs order.

There would have to be some special circumstances to justify treating the expert evidence as discrete and separate. In this case, there were no such circumstances. The evidence was simply part of the preparation, in good faith, for the trial. The fact that it had not, at the end of the day, proved to be helpful to the court in reaching its decision did not detract from the propriety of putting it forward as part of the preparation for trial. Judge Matthews came to the view that **the court deplores the use of hindsight in the assessment of costs where the parties and their solicitors had otherwise acted reasonably and in good faith**.

There are, of course, plenty of circumstances in which the court may refuse or disallow the costs of an expert's evidence. What this case demonstrates is that it is not sufficient to merely demonstrate that an expert's evidence has been ruled inadmissible, or otherwise unhelpful, or has been found particularly weak in the face of another expert's evidence.

It's not about you!

Of course, what was being considered in this case was the costs that should be recoverable by one party from another. It does not follow that because a court decides your fees are not recoverable from some other party, the party with which you have a contract to provide your opinion can thereby avoid paying you!

Remember: costs orders touching on expert fees do not override contract!

References

[1] *In the matter of AMT Coffee Ltd* [2019] *EWHC 378 (Ch).*

Third party access to your evidence

CPR grant wide access to the 'records of the court'

The fine detail of the court rules is not something that often stirs the Public's imagination. But every now and then a case throws up such an obvious dilemma on a point of procedure that even the compilers of prime-time news broadcasts take a little interest. Such a case was *Cape Intermediate Holdings Ltd -v- Dring*[1].

The appellant in the case was a manufacturer of asbestos. There had been previous proceedings alleging negligence by the manufacturer. After the trial had ended, but before judgment was delivered, the claims were settled by a consent order. The Asbestos Victims Support Groups Forum UK (the *Forum*), who had not been a party to the proceedings, applied for access under Civil Procedure Rules (CPR) r.5.4c to the 'records of the court'. It wanted to preserve copies of all the documents used at or disclosed for the trial, including the trial bundles containing expert reports and the trial transcripts. The *Forum* believed that the documents would likely contain valuable information about such things as the knowledge within the asbestos industry of the dangers of asbestos, the research that the industry and industry-related bodies had carried out, and the influence that they'd had on the Factory Inspectorate and the Health and Safety Executive in setting standards. In the *Forum*'s view, the documents might assist both claimants and defendants and also the court in understanding the issues in future asbestos-related disease claims.

After a 3-day hearing of the application, the Master gave judgment, holding that she had jurisdiction, either under CPR r.5.4c or at common law, to order that a non-party be given access to all the material sought. Cape appealed.

The Court of Appeal allowed Cape's appeal and set aside the Master's order on the grounds that the 'records of the court' for the purpose of the discretion to allow access under CPR r.5.4c were much more limited than she had held. They would not normally include trial bundles, trial witness statements, trial expert reports, trial skeleton arguments, written submissions or trial transcripts.

The Court of Appeal ordered as follows:

Expert reports are not protected

(i) The court should provide the *Forum* with copies of all statements of case, including requests for further information and answers, so far as it was on the court file and for a fee, pursuant to the right of access granted by CPR r.5.4c.

(ii) Cape should provide the *Forum* with copies of the witness statements, expert reports and written submissions listed in an appendix to the order. It further ordered that the application be listed before a High Court Judge to decide whether any other document sought by the *Forum* fell within the scope of 'records of the court' and, if so, whether Cape should be ordered to provide copies.

In the event, no reference was made to a High Court Judge as both parties appealed the decision.

What constitutes a court record?

The issues arising in the case are by no means novel, and we reported in *Your Witness* 72 on the general principles to be applied in third-party access to expert reports and the somewhat hazy scope of CPR r.5.4c.

Of course, a court judgment or order is a matter of public record and, in theory, all court documents should be made available to any member of the public who wishes to see them. **But what exactly constitutes a court document and how are the interests of the parties and witnesses in a case to be balanced against the interests of third parties?** What principles should the court have regard to when deciding whether permission under CPR r.5.4c should be granted? For example, should this extend to a draft expert witness statement or an expert report that has not been heard or used in court? The wording of CPR r.5.4c does not make any of this clear.

At the Supreme Court

The Supreme Court, presided over by Lady Hale, considered the issues raised and gave a ruling that clarifies the third-party right to access and the principles to be engaged by the courts in deciding whether access should be granted. The ruling also highlighted the shortcomings in the CPR as drafted currently.

The Supreme Court had to decide on the scope of CPR r.5.4c(2). Does it give the court power to order access to all documents filed, lodged or held at court, as the Master ruled? Or is it more limited, as the Court of Appeal ruled? Furthermore, is access to court documents governed solely by the CPR, save in exceptional circumstances, as the appellant argued? Or does the court have an inherent power to order access outside the CPR? If there is such a power, how far does it extend and how should it be exercised?

It was identified that there were two distinct areas of law that could be applied, both of which could allow access to witness statements and expert reports.

1. The CPR

Under CPR r.5.4c, a non-party has a right of access to certain documents. At first sight, this looks like a broad power to allow a non-party to obtain copies of '*any other document filed by a party, or communication between the court and a party or other person*'. The copy is to be obtained '*from the records of the court*', but the CPR do not define those records nor set out what they are to contain. The 'records of the court' have to refer to those documents and records that the court keeps for its own purposes. However, current practice as to what is kept in the records

of the court cannot determine the scope of the court's power to order access to case materials in particular cases. The purposes for which records are kept are completely different from the purposes for which non-parties can be given access. The Supreme Court ruled that 'records of the court' must refer to those documents and records that the court itself keeps for its own purposes. It cannot refer to every single document generated in connection with a case and then filed, lodged or kept for the time being at court. Conversely, neither can it depend on how much of the material lodged at court happens still to be there when the request is made.

CPR r.32 deals with evidence. If a witness who has made a witness statement is called to give evidence, the witness statement shall stand as his evidence in chief. A witness statement that stands as evidence in chief is open to inspection, unless the court otherwise directs during the course of the trial. The considerations that might lead the court otherwise to direct are listed as the interests of justice, the public interest, the nature of expert medical evidence, the nature of confidential information, and the need to protect a child or protected person. CPR r.32.13 recognises that the modern practice of treating a witness statement as evidence in chief means that those observing the proceedings in court will not know the content of that evidence unless they can inspect the statement. The rule puts them back into the position they would have been in before that practice was adopted.

CPR r.32.13 is limited to access during the trial, but the Court said there was no reason why access to witness statements taken as evidence in chief should not be allowed under the inherent jurisdiction after the trial. The Court clarified that what applies to witness statements should also apply to expert reports treated as evidence in chief. This ruling did not, however, extend to documents exhibited to witness statements or expert reports unless it was not possible to understand the statement or report without sight of a particular document.

2. Open justice

Alongside this, there was the broader principle of open justice. Unless inconsistent with statute or rules of court, all courts and tribunals have an inherent jurisdiction to determine what the principle of open justice requires in terms of access to documents or information placed before the court. The default position must be that the Public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents placed before the court and referred to during the hearing, including expert reports. However, although the court has the power to allow access, an applicant has no right to be granted it (unless the rules granted such a right). It is for the applicant to explain why they seek access and how granting access might advance the open justice principle.

The court, therefore, must carry out a fact-specific balancing exercise. On the one hand would be the purpose of the open justice principle and the potential value of the information in advancing that purpose, and on the other would be any risk of harm that disclosure might cause to an effective judicial process or the legitimate interests of others.

The court must also have regard to the practicalities and the proportionality of granting such a request. It is highly desirable that where possible the application is made during the trial itself. The applicant would also be expected to pay the reasonable costs of access. Trial bundles, as compilations of copies of the relevant materials, are not the evidence or the documents in a case. Disclosure of a bundle marked up by someone involved in the case could not be ordered without the consent of the person holding it.

A balancing act

When exercising its CPR r.5.4c(2) discretion or the inherent jurisdiction, the court has to balance the non-party's reasons for seeking disclosure against the party's reasons for wanting to preserve confidentiality. The court would be likely to lean in favour of granting access if the principle of open justice is engaged and the applicant has a legitimate interest in inspecting the documents. If open justice is not engaged, then the court would be unlikely to grant access unless there were strong grounds for thinking it necessary in the interests of justice to do so.

Expert reports and third-party access

The case throws up some interesting points for expert witnesses. For example, to what extent can disclosure be ordered of materials used by an expert witness and referred to in the report or a report not actually used in court? If a third party is allowed access to an expert report and other expert documents, to what extent can that party legitimately make use of them in unrelated proceedings? Can expert witnesses be called to give evidence? If so, are they compellable? Do expert witnesses owe a duty of care to the third party if their use of the material is reasonably foreseeable?

As matters stand currently, the Supreme Court gave the best guidance that the rules could allow, but there is still much ambiguity and there are no definitive guidelines or practice directions governing application of the rules or the exercise of judicial discretion. In recognising this, the Supreme Court urged the bodies responsible for framing court rules in each part of the UK to consider the questions of principle and practice raised in the case. Clearly, the Supreme Court had it in mind that the CPR need some amendment to clarify the position. Whether this will happen remains to be seen.

Supreme Court judgment finds CPR wanting

References

[1] *Cape Intermediate Holdings Ltd -v- Dring (for & on behalf of Asbestos Victims Support Groups Forum UK)* [2019] *UKSC* 38.

Services for registered experts

Expert witness members of the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

Your Witness – FREE

First published in 1995 and now fast approaching 100 issues, *Your Witness* was the first newsletter dedicated to expert witnesses. All quarterly issues are freely available to members.

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 72). All are available and searchable on-line. Topics covered include expert evidence, terms and conditions, getting paid, training, etc.

E-wire – FREE

Now exceeding 100 issues, our regular condensed e-wire is our fast link to you. Containing shortened articles, as well as conference notices and details of urgent changes that could impact on your work, it is free to all members.

Little Books series – DISCOUNTED

Distilled from more than three decades of working with expert witnesses, our *Little Books* offer insights into different aspects of expert witness work. Point your browser at *www.jspubs.com/books* to find out more.

Court reports – FREE

Full access to the complete *ICLR.3 case law library* for Professional service level members (call us on 01638 561590 for access codes). Basic reports on some key cases available to all in our library.

LawyerLists

Based on the litigation lawyers on our Controlled Distribution List, *LawyerLists* enables you to buy recently validated mailing lists of UK litigators. A great way to get your marketing material directly onto the desks of key litigators.

Register logo – FREE

Vetted and current members may use our dated or undated logo to advertise their inclusion.

General helpline – FREE

We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for help, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas to both enhance your expert profile and give you access to our dated logo. The results of re-vetting are published in summary form in the printed *Register*, and in detail on line.

Profiles and CVs – FREE

Lawyers have free access to more detailed information about our member experts. At no charge, you may submit a **profile sheet** or a **CV**.

Extended entry

At a cost of 2p + VAT per character, an extended entry offers you the opportunity to provide lawyers with a more detailed summary of expertise, a brief career history, training, etc.

Photographs – FREE

Why not enhance your on-line entries with a head-and-shoulders portrait photo?

Company logo

If corporate branding is important to you, for a one-off fee you can badge your on-line entry with your business logo.

Multiple entries

Use multiple entries to offer improved geographical and expertise coverage. If your company has several offices combined with a wide range of expertise, call us to discuss.

Web integration – FREE

The on-line *Register* is also integrated into other legal websites, effectively placing your details on other sites that lawyers habitually visit.

Terminator – FREE

Terminator enables you to create personalised sets of terms of engagement based on the framework set out in Factsheet 15.

Surveys and consultations – FREE

Since 1995, we have tapped into the expert witness community to build up a body of statistics that reveal changes over time and to gather data on areas of topical interest. If you want a say in how systems develop, take part in the member surveys and consultations.

Professional advice helpline – FREE

If you opt for our Professional service level you can use our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment, etc.

Promo Badge – FREE

Use the *Promotional Badge* to add a clickable link to any email or web page and take customers direct to your entry on the *Web Register*.

Discounts – FREE

We represent the largest community of expert witnesses in the UK. As such, we have been able to negotiate with publishers and training providers to obtain discounts on books, conferences and training courses.

Expert Witness Year Book – FREE

Containing the current rules of court, practice directions and other guidance for civil, criminal and family courts, our *Expert Witness Year Book* offers ready access to a wealth of practical and background information, including how to address the judiciary, data protection principles, court structures and contact details for all UK courts.

Address
J S Publications
PO Box 505
Newmarket
Suffolk
CB8 7TF
UK

Telephone
+44 (0)1638 561590

Facsimile
+44 (0)1638 560924

e-mail
yw@jspubs.com

Website
www.jspubs.com

Editor
Dr Chris Pamplin

Staff writer
Philip Owen