EWI

EXPERT WITNESS INSTITUTE

NEWSLETTER©

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Features

Court Management of Expert Witnesses

At the Joint Conference with the Royal Society of Medicine entitled "Beyond reasonable doubt" which was held at the Postgraduate Centre, Freeman Hospital, Newcastle upon Tyne, Judge John Milford QC gave a fascinating and important glimpse of what lies ahead for expert witnesses in criminal cases. Indeed the judges are already exercising case management powers in advance of the Criminal Procedure Rules which are expected next spring. We are grateful for his permission to reproduce his paper.

The end of the ambush defence

The Police and Criminal Evidence Act 1984 (PACE) provided for rules to be made which require a party to proceedings before the Crown Court to give advance notice of any expert evidence he proposes to adduce. The Crown Court (Advance Notice of Expert Evidence) Rules 1987 were made pursuant to s.81 of PACE, which provided, in practical terms, that the defence has to serve on the prosecution the report of the expert, if they intend to call him, in sufficient time for the prosecution to meet the evidence, so ending the ambush defence.

The case of R v Allen 1985 illustrates the position which applied hitherto. The driver of a train which came off the rails at the Morpeth curve was prosecuted for driving under the influence of alcohol. However, the defence at the last minute provided medical evidence which suggested that at certain times the driver might pass out and the prosecution not having prior knowledge of this were unable to rebut it. The driver was acquitted.

Measures introduced to speed up time between charge and trial

Custody Time Limits were introduced by regulations made under the Prosecution of Offences Act 1985. In indictable - only offences the maximum period between the defendant being sent for trial and the start of the trial shall be 182 days less any time spent in custody on remand to the Magistrates (112 days if committed). If the trial does not commence within the period the defendant is to be admitted to bail, subject to the right of the Crown to apply to the Court to extend the custody time limits. The time limit will be extended if, and only if, the prosecution has acted with all due diligence and expedition and there is a need for an extension due to some good and sufficient cause.

Such extensions are not granted on the nod, but if the criteria are met the defendant must be admitted to bail however heinous his crime and however dangerous he may be. So if a defendant is arrested for murdering his wife shortly after the killing and is charged, it is expected that he will be tried within 182 days, that is to say six months. The pressure is on both sides to be ready for trial and the pressure is on expert witnesses to have examined, reported and be available to give evidence within this time scale.

Narey Procedure

The Crime and Disorder Act 1998 introduced the so called Narey Procedure, whereby when a defendant is brought before the Justices for an indictable - only offence, the Magistrates must send him for trial to the Crown Court. In a custody case he then appears before the Crown Court within 8 days. This

procedure is to be contrasted with the old procedure where indictable offences were committed for trial and might stagnate for months in the lower court while the prosecution prepared the evidence upon which they would seek a committal. The defence then considered the evidence and whether they would seek to contest the committal, which could be done by arguing there was no case to answer and requesting witnesses to give oral evidence in the Magistrates Court.

Now, within days of charge of a serious offence the Crown Court conducts the preliminary "Narey" Hearing and the process of judicial management of the case commences. At this hearing a timetable is set – 6 weeks for the prosecution to serve their case papers on the defence, 2 weeks for the defence to serve the Defence Statement and then the Plea and Directions date will be fixed, a week after that. The Defence Statement should set out the defence and if the defence requires expert medical evidence then the defence should be in a position to set out the broad outlines of that evidence. In a murder it may go to causation of the death or diminished responsibility or, increasingly, provocation. Occasionally at the Narey Hearing the date of trial will be fixed provisionally, so there is a date set to work to. At the Plea and Directions Hearing (PDH) the date will be fixed in any event and a timetable may well be set in which the two sides are to serve their expert evidence. So be warned: Judicial Management of criminal cases is on the increase.

Criminal Case Management Framework

In July 2004 the Criminal Case Management Framework was published which foreshadows the Criminal Procedure Rules which are currently being drafted and should be in place in April 2005.

The Foreword by the Lord Chief Justice, who revolutionized civil procedure, makes interesting reading and gives an idea of what is coming.

What lies at the heart of it is that the Judges are going to be far more active in managing cases. A timetable for the preparation, trial and completion of the case must be set. The case will be expected to start on time without the need for counsel asking if they can have time with their opponents or, for that matter with their experts. Conferences will not be permitted to start at 10am and go on to 11am before the case gets started. The start will be at 10:30am prompt. The Judges, in setting the timetable, may set a timetable for the trial itself and limit the length of aspects of the proceedings – cross-examination, speeches etc. These are fairly revolutionary ideas in the criminal justice system, but so long as the defendant is not shown to have suffered injustice as a result, I have no doubt the Court of Appeal will support trial judges.

Such is the current enthusiasm for management that I recently attended a pilot residential seminar for Judges who undertake management responsibilities in other spheres of their work. Time was a Judge just tried cases, now they are managers – Presiding Judges, Resident Judges, Designated Civil and Family Judges, Liaison Judges to the Magistrates and new roles with the combining of the Crown Court and Magistrates Court. I am to chair the Area Judicial Forum.

Circuit Judges are trying more and more of the heavy, Class 1, cases – murder, manslaughter and because they are based firmly in one place will be able to monitor what is going on, unlike the High Court Judge who, after a PDH will be moving on to a new court with no intention of coming back to try the case. Between each hearing the participants must be prepared for the court to monitor the progress of case and to call for any party to account for any failure to comply with any order or direction.

Lord Woolf says in his foreword: "The participants must expect the court to actively manage the case and apply the relevant statutes, rules and practice directions."

The phrase "The participant must expect" occurs over and over again throughout the document:

The court is expected to:

a) Start the trial promptly
b) Ensure the defendants arrive in court on time
c) Investigate any failure to comply with pre-trial directions
d) Require, no later than the outset of the trial, the identification of the issues
e) Focus the conduct of the trial on the issues
f) Require a timetable for consideration by the court
g) Require prompt notification of any changes in the timetable
h) Make the participants adhere to the timetable and conduct the trial so that it concludes within the time allowed.
i) Require the provision of skeleton arguments before the hearing
j) Curtail any examination or cross-examination, submission or speech that is protracted or repetitive or oppressive.

A Case Progression Officer will be appointed by the court to monitor the progress of the case. The CPS will have appointed a case progression officer and someone on the defence team is expected to fulfil the same function. In fact, the case progression officer has already been appointed at Newcastle upon Tyne.

In other words if the court has ordered the prosecution or defence to serve their psychiatric report within 3 weeks of PDH, the court will check if it has been done. If it has not, then the court will re-list the case and find out why there had been a failure to do so.

Failure will be dealt with by "such sanction, cost order, or penalty as permitted by stature, rule or practice direction". We await with interest to see what our powers will be but you can bet that no solicitor will be very happy about having to pay the costs of a hearing personally because you have not provided your report when it was promised.

Once the timetable has been set, woe betide any expert who fails to comply. Experts who do not report in time have as great a capacity as any to derail the timetable. If they do so they can expect the court to come down on them heavily. Only last week I brought a case which I am trying in October back into court when I discovered, by chance, that an order which I made for service of the defence statement had not been complied with. The failure was caused by an expert who had written by the due date a qualified report, which it had been assumed would be a final report. She requested further tests to be carried out. I gave the defence a further 6 days to serve the defence statement, and I reassured myself that the case would be ready for trial on the date set for trial. What I did there will hitherto have been considered exceptional, but it will be the norm when the system slips into place after April next, when it is hoped that the Rules will be in place. The case progression officer at the Crown Court will have picked up the failure and drawn it to my attention.

Advantages

Timetabling will mean that the day for your evidence will be fixed in advance and must be kept. But it will help you to know exactly when you are to give evidence. It will permit the court to say Dr X's evidence will be heard on Wednesday afternoon and will be concluded that afternoon, come what may. There is now an appreciation that resources are not unlimited and there are other cases to be tried.

Presently the new system, a sea change in our attitude to criminal cases, is not widely appreciated. Indeed, it may amaze you to know that the copy I have of the Framework is the only one supplied to a judge in Newcastle upon Tyne. But it will come, sooner than later and eventually supported by IT, which is being developed.

Homicides of Infants

The report of the working group makes a number of recommendations which include those aimed at the way Judges try the cases. It always falls to the Judge to decide whether an expert is an expert and is thus permitted to give opinion evidence, which a lay witness is precluded from doing. Perhaps we will have to be more rigorous in our examinations of an expert's qualification to give evidence of a particular type, but unless one of the parties raises it as an issue, I think it is unlikely that judges of their own motion will be refusing to admit the evidence of a witness called by either side.

I can see that good case management may well involve requiring experts on opposite sides to meet and thrash out where they were at odds and set that out in writing.

Too often experts in criminal cases meet for the first time at the trial and well into it. Sometimes the prosecution can fail to have a conference with their own expert and discuss the defendant's expert's report. I recently saw a case where this happened and after cross-examination of the Crown's expert the Crown had to offer no further evidence. That was a case of manslaughter. I let it pass. Now I would not and I would be asking some pretty searching questions and looking at the possibility of orders for costs against the Crown.

Third Party Costs Orders

S.93 of the Courts Act 2003 inserts s.19B into the Prosecution of Offences Act 1985 which enables the making of regulations permitting a "Third Party Costs Order". Cost incurred by a party to proceedings may be ordered against a third party if that third party has been guilty of serious misconduct. The regulations are shortly to be laid before parliament. The regulations will specify types of misconduct in respect of which a third party costs order may not be made.

We wait with interest, but I can foresee that there might be the possibility for the making of such an order against an expert witness.

Do's and Don'ts

The Don'ts

Do not take on a case until you know what timetable is likely to be set and whether you can meet it.

Do not take on a case if you will be unable to give evidence in the trial because you are, for instance, off on a sabbatical in 3 months' time and will be in the USA.

Think ahead. For instance, if you are going to carry out a psychiatric examination of an adolescent, and have 6 weeks in which to produce the report, do not when writing the report 5 weeks down the line, say that you will need a number of psychological tests carried out before you can reach a firm conclusion. Ask for authority to commission the tests at the very outset.

Do not think that solicitors will be fobbed off by your secretary when the time has expired for producing the report and it is still not available. Your failure could well cost them money personally.

Do not think that anyone will be in the least interested in being told that you have been too busy to produce the report in time. That includes high-powered academics with international reputations. We are all busy.

The Do's

Keep your professional client informed of any difficulties as soon as they present. He can go back to the court for a variation of the timetable.

Do remember that the court is there to help and sometimes it can in practical ways which may speed up the process of examination, if difficulties are being experienced by experts, eg gaining access to a defendant in custody.

Above all do remember that the administration of justice is a team effort in which not only the judges and the lawyers but also the expert witnesses play their part.

From the Secretary's Desk.....

Conferences and yet more conferences
The conference season is in full flow and the Expert Witness Institute is getting more and more involved. Apart from our own annual conference, which was held most successfully on 15 October, and the Bond Solon conference which this year is on 26 November, we have been invited to contribute to or help organise at least another four. With the Royal Society of Medicine we ran a second 'Beyond Reasonable Doubt' conference, this time at the Freeman Hospital, Newcastle upon Tyne. We are including in this issue of the Newsletter a paper given by Judge John Milford QC in Newcastle which provides a foretaste of what is in store for Expert Witnesses in criminal cases. At the end of September we ran a half day-conference with Intrabank Expert Witness on dispute resolution in the City of London. Then on 12 October we participated in a seminar (actually a whole day event) organised by the Institution of Mechanical Engineers entitled 'Engineer in Court' where the opening address was given by EWI Governor, Lord Justice Jacob.

Upcoming is the Scottish Expert Witness conference where we are collaborating with Sweet & Maxwell, and on 15 December a joint conference is being held with the Institute of Psychiatry, King's College London, entitled 'The Expert Witness, Mental Health and the Judiciary'.

Plans are in hand to organise another joint conference with the Royal Society of Medicine following the Report of Baroness Kennedy QC on Sudden Unexpected Death in Infancy. The criticism of expert witnesses in recent criminal trials is now being answered by a recognition that the court needs to handle expert evidence more effectively and that expert witnesses need to be properly trained and fully cognisant of their duties to the court. There is clearly a scope for a major conference to follow up the Report, and we are planning such an event with the RSM for next year.

All this activity is reflective of the standing that EWI now has and we would welcome assistance from any member who would wish to contribute. Ideas for topics to be covered in our seminar programme for 2005 would also be very welcome. What matters do you think our Annual Conference 2005 should cover? Please let us know.

Marketing the Institute
An article has been contributed by David Asker-Browne to this issue reporting the establishment of a marketing sub-committee and indicating what it is we hope it will achieve. It might be felt that, with all the conference activity mentioned above, this might be somewhat superfluous. However, there is still a large pool of experts we need to tap into. At the I Mech E seminar some 80% of the 160 or so attending confirmed they had never been instructed as expert witnesses although they were obviously interested. And while the Council for Registration of Forensic Practitioners now has some 1700 experts on its register it does not provide education or training facilities to keep its registrants up to date. The interests of EWI are complementary to those of CRFP and we need to get the message across that today's competent expert witness is not only registered but also educated into the requirements of the courts, and is actively maintaining that competence.

Watch this space
More than ever expert witnesses have to be aware of developments in the judicial field. It is forecast that new criminal procedure rules will be produced in the Spring 2005. The Family Division is also developing its own procedure rules. On the civil litigation front the Master of the Rolls has indicated that he will be instructing a senior judge or judges to produce a single official Code of Guidance on Expert Evidence.

We will ensure that you are kept abreast of all new requirements that expert witnesses will have to observe and are actively looking to provide that our seminar programme is equally accessible to those outside London as those in the South East.

Fellows
Congratulations to Dr James Carne who has recently been elected a Fellow of the Institute. It is with regret that we have learned of the death of Peter Moon who was also a Fellow. Peter, who practised as an Employment Consultant, was a great supporter of EWI and a number of the Governors presented papers at his annual conference at Little Paxton. He will be much missed.

EWI Staff
Members will notice a change in personnel in the EWI Office. Both Brigid Lohrey, our membership secretary, and Ben de Halpert, the office assistant, have ambitions on the stage. They have both been successful in being offered parts in touring productions and are therefore leaving us. Brigid will probably be returning once her tour has finished but in the meantime we have been busy recruiting. We wish them well as they tread the boards and thank them for their contribution to EWI.

Membership List
Thanks to the generous sponsorship of Allianz Cornhill, who were one of our original founding sponsors, we have been able to issue an up-to-date membership list. This has elicited a number of responses where details have not been included as individual members would wish. We are sorry for any mistakes on our part but

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members should appreciate that we depend upon you for the details to include on our database. We send out update sheets with our subscription renewal requests each year, so if your details have changed please let us know as soon as possible. Thank you to all those who have returned the forms this year. This means, however, that some of the information in the membership list is already out of date, so we are planning to issue an updated list on CD-ROM shortly. If you would like a copy please let us know.

May I also correct a misconception that some members have? The membership list is just that – a membership list. It is not a directory that we give to solicitors so that they can contact members with possible instructions. For that purpose our Referral Service is a much more powerful tool. Solicitors seeking the names of experts in a given discipline contact us by telephone and the request is either e-mailed or faxed and we then interrogate the database to ascertain whether we have any experts who meet the requirements of the solicitors. The information held on the database may in most cases be more up-to-date than the information set out in the membership list and we are therefore able to be more precise in responding. So it is important to ensure that our database accurately reflects members' personal details.

To support this we are circulating all the leading solicitors with details of the Referral Service which is offered to them without charge – we consider this as a benefit of membership – and this exercise is already bearing fruit. Additionally, members can, for a modest charge, advertise their services on our website, and what you decide to include is entirely up to you. While the number of visitors to our website is pretty impressive (last year we recorded 1,041,466 hits) we obviously cannot monitor precisely the traffic from solicitors, but it is something that those members who have not taken a webpage yet should perhaps consider.

Brian Thompson
Secretary

Marketing Sub-Committee

The Membership and PR Committee under the Chairmanship of Alex Brown has established a Marketing Sub-Committee to provide some structure to the way that EWI seeks new members. David Asker-Browne outlines its ambitions.

Brian Thompson, Vicky Bartlett and Brigid Lohrey provide the input from the Secretariat, and other members include David Asker-Browne, John Pearn, Jenny Cotton and Dr. Harry Brünjes. Of course, if every existing member introduced just one new member, things would be a lot easier.

As it is, we intend to fish for new members in ponds where we believe we will be well received. Over the next two years, we will put most of our recruitment effort into six disciplines;

- Mechanical Engineers
- Veterinary Surgeons
- Paediatrics and Child Health
- Buildings Services Engineers
- Immigration issues
- Linguistics

The Education and Training Committee have been asked to skew the programme for the next two years so that the events we put on will appeal to these groups, but not to the exclusion of existing members. A balance has to be struck. We have already had one event with the Mechanical Engineers on 12 October, and look forward to developing links with them. It is quite likely that senior members of our target professions will be invited to EWI events, to help to forge the necessary links. We have also been invited to provide speakers for a joint conference with the Institute of Psychiatry at King's College, London.

We are also aware of the need for Position Papers. These give an EWI view of topical issues relevant to experts such as Medical Reporting Agencies or Conditional Fee Arrangements. The Secretariat is trying to identify some issues that we could adopt, and people who could write a sensible view on them. If you have a topic that you feel other experts should be briefed on, please tell Brian Thompson.

The EWI website is also under review, since it has been criticised for being a little dry. Once again, your views will be well received.

Membership numbers

Founding sponsors	10
Professional body / association members	12
Corporate members	22
Individual members	987
Retired	37
Sabbatical	3
Applicants	18
Total members	**1089**

Book Review

With Malice Aforethought

By Sir Louis Blom-Cooper and Professor Terence Morris
Published by Hart Publishing. Price £20.00

Sir Louis Blom-Cooper, immediate past Chairman of the Expert Witness Institute, and Professor Terence Morris, Professor Emeritus of Criminology and Criminal Justice in the University of London, have revisited the subject of crime and punishment for homicide some 40 years after their initial collaboration (A Calendar of Murder – Michael Joseph, 1964). The intervening years have demonstrated to the authors that, while capital punishment for murder has been abolished, the law, as it now stands, is a mess, a view shared by the Law Commission in its report 'Partial Defences for Murder' (Law Com No 290, 2004).

The authors point out that since the final ratification of the Murder (Abolition of the Death Penalty) Act in 1969 no serious consideration has been given to the definition of life imprisonment while the crime of manslaughter has resulted in some forms of homicide being accorded relatively minor penalties. This is a situation which relatives of victims frequently find it impossible to understand or accept. The authors argue powerfully and yet elegantly that the time is ripe for a root and branch overhaul so that the current distinction between murder, manslaughter and other specific categories of crime is abolished and the courts deal in future with the single crime of criminal homicide. If public confidence in criminal justice is to be maintained the citizen must be able to make sense of it by relating it to a world inhabited by real people.

The authors' explanation for the current state of affairs is encompassed by a fascinating trawl through the development of criminal justice from the Norman conquest to the present day, taking in along the way the contributions of such as Henry de Bracton and Sir Edward Coke, liberally supported by informative footnotes. In brief, however, their explanation for the present state of affairs is encapsulated in the memorable sentence:

> "Politicians are nothing if not ephemeral and the immediate attention span of the media seldom exceeds 24 hours."

Members of the Institute will find the chapter entitled "Expert evidence on trial" particularly interesting. Early on the authors quote from James Fitzjames Stephen who, writing in 1859, said:

> "Few spectacles, it may be said, can be more absurd and incongruous than that of a Jury composed of twelve persons who, without any previous scientific knowledge or training, are suddenly called upon to adjudicate in controversies in which the most eminent scientific men flatly contradict each other's assertions."

Almost 150 years later it cannot be said that the courts are any further forward in the way scientific or technical matters are handled in a criminal trial before a jury and this is illustrated with a detailed consideration of Sally Clark's appeal to the Court of Appeal, as well as the Angela Cannings and Trupti Patel cases. The authors put forward four practical proposals for change which in essence place responsibility for the effective handling of expert evidence in criminal cases onto the judge. These recommendations have to some extent now been echoed by Baroness Helena Kennedy QC in her report Sudden Unexpected Death in Infancy and seem to have been taken on board by the judiciary already with the publication of the Criminal Case Management Framework (see paper by Judge John Milford QC to the Joint conference at Newcastle upon Tyne). The hope is, as expressed by the authors, that these reforms will remove many of the pressures and expectations on the jury system without prejudicing the viability of trial by jury.

The authors go on to consider other associated matters including corporate killing and death on the road. So while they present criminal homicide in its social, historical and legal settings, the book does in fact go far beyond that. It is therefore far from being a polemic; it is a thoughtful and stylish addition to current thinking on criminal justice reform which even practitioners in civil litigation will find interesting and absorbing.

Brian Thompson

Christmas Closure

With Christmas falling on a weekend this year the office will be closed from 27 December 2004 re-opening on Tuesday, 4 January 2005. We wish all our members a happy Christmas and a prosperous New Year.

Correspondence

Following correspondence with a solicitor who has used (successfully) our referral service but did not wish experts who had been identified to him to approach him independently, we now advise all members, whose names are put forward under this service, to wait until they hear from the solicitor concerned. This provoked Charles Stimpson to write to us. His letter and the EWI reply are reproduced below. We hope that this will explain the Institute's policy in this matter, but if any members have views on this we would welcome hearing from you.

Charles Stimpson Associates
Chartered Surveyors and Valuers

For the attention of Brian Thompson, Company Secretary

Dear Mr Thompson

I am a member of the above Institute and recently received notification, dated 26 October, copy attached, of a referral.

The referral letter simply refers to 'Jarmans' and provides no information as to who or what these people are.

On telephoning Vicky Bartlett in your office, I understand that the EWI has now changed its policy and no longer provides contact details for persons to whom members' details are forwarded, thereby preventing the member from following up the enquiry, which would be a beneficial and useful process.

Vicky explained that the EWI has had a request from a solicitor that solicitors details should no longer be forwarded and I understand this is now general policy of the Institute. However, this represents a serious failing in the useful referral system because it prevents the member from showing a proactive and keen willingness to deal with the matter. Furthermore, it prevents us from forwarding any further details or contacting the enquirer to discuss the nature of their enquiry and the way that we may assist.

The EWI has therefore changed its policy in a way which is detrimental to its members and, in my opinion, unacceptable. Part of the reason for the payment of subscriptions to the EWI is obviously because it provides a useful marketing facility. I would therefore like to know the grounds on which a solicitor, not a member of the EWI, has been able to influence the way the EWI policy operates, especially in circumstances where I believe this change in policy is bad news.

A further disadvantage of this change in policy is that I am now prevented from passing on an enquiry to another surveyor who might be able to act, in circumstances where the enquiry is not appropriate to my own particular skills and experience.

Clearly the present situation is hopeless and unacceptable and I would be glad if you would let me know in detail why the change has been made and frankly I think that you should revise the system to the previous arrangement. I have had number of good instructions by being able to act quickly on an enquiry and contact the enquirer, who has been impressed by the swift and proactive response from my office. My opinion is that in preventing this, you are interfering with my reasonable desire to promote my company through membership of the Expert Witness Institute, and altered the service that we expected when we paid our subscription fee.

It is a great disappointment that the Institute did not even consider it necessary to inform the members of this important change and significant reduction in the service provided in exchange for the subscription.

I look forward to hearing from you.

Many thanks
Yours sincerely

Charles Stimpson Associates

Dear Mr Stimpson

Referral Service

Thank you for your letter of 2 November 2004. I should explain that when we receive a request from solicitors for the names of members in a particular specialism we generally aim to give them a reasonable selection, provided that we do have a group of members in that discipline. Where we have Chartered Surveyors, we will interrogate our database to identify those who match the required skill and then advise the solicitors of those who geographically are appropriate.

However, the final decision of whether or not to instruct any of those experts must rest with the solicitors and we have received complaints in the past where EWI members have, in the solicitor's view, attempted to pre-empt that choice. In the circumstances the Governors have decided that while it is appropriate to inform our members that their names have been put forward to solicitors, the solicitors must be allowed to take the matter forward themselves. Even though a member may not be ultimately instructed, his or her name has been supplied to the solicitor who will therefore be aware of the services offered by our member.

If you are approached by the solicitor and find that you are unable to accept instructions – it may be that you are committed elsewhere rather than the approach is inappropriate to your specialist skill – there is nothing to prevent you mentioning a colleague. We would hope that if you were to do this you would recommend someone who has attained the standard of competency we expect of our members.

I think your fears, as expressed, are unfounded as by the time you hear from us your name has already been put forward and you have received that publicity. The fact that solicitors appreciate the service, for which we make no charge (unlike other organisations), is borne out by the repeat requests we receive from them. We feel that it is in our members' best interests to provide a service to solicitors that they can trust. I hope that this will alleviate your concerns.

Yours sincerely

Brian Thompson
Company Secretary

IS THERE A NEED FOR MEDICO-LEGAL REPORTING ORGANISATIONS?

The existence and the role of medico-legal agencies is a topic which currently seems to generate a lot of interest, to say nothing of extreme views. This autumn the BMA and the Civil Justice Council will be conducting a debate into the part they play in the settlement of fast track personal injury claims and how the associated costs can be controlled.

Alexander MacLachlan puts the case for the agencies.

There is an accident. A solicitor is instructed to pursue a claim for personal injury. Liability is admitted. Now a medico-legal report is required, in order that both parties can quantify the extent of the personal injuries (hence 'quantum'). Why not instruct the relevant expert directly? Why go through an intermediary? Does this not just increase cost and delay?

The emergence of MROs

Historically, personal injury claims were dealt with locally by a local solicitor who knew the doctors in the local area. With the introduction of legal expenses insurance policies that were sold nationally, specialist personal injury lawyers rapidly found they had a national spread of claimants and the old methods of obtaining medical evidence would no longer do.

For a short time, claimant and defendant solicitors struggled to obtain medical evidence, utilising their own resources. Medico-legal reporting organisations (MROs) came into being about a decade ago in order to fulfil this task.

Instead of a highly atomised structure of individual fee-earners and claims managers obtaining medical evidence on an ad hoc basis, with myriad different procedures and methods of instruction, medico-legal reporting organisations developed uniform systems of best practice.

MROs are acting under instructions and do not choose the type of expert or the procedure to be followed. MROs contract independently as principals with the medical experts. Some experts are content to wait until the end of case for payment. Others, and more typically, now require to be paid promptly or to be paid in advance. Prices are adjusted accordingly.

The Association

Five years ago AMRO (The Association of Medical Reporting Organisations) was formed as a non-profit organisation to be a forum for those companies providing a nationwide coverage of all medical expertise. AMRO members must have filed three years' accounts and processed in excess of 12,000 instructions a year and they cannot be owned or controlled by a claimant or defendant organisation. AMRO estimate that their nine current members produce in excess of 400,000 reports per year. All of their accounts are in the public domain.

It is now standard practice for obtaining medical evidence, particularly in the fast track, to be outsourced to MROs, whose *raison d'être* is to fulfil this task.

As to cost, all AMRO members are substantially funded and are required by the AMRO constitution to abide by the contractual duties to the expert. Complaints should be addressed to AMRO, with the ultimate sanction of expulsion and the adverse publicity which that would entail. As the major producers of medico-legal reports, AMRO members are able to request discounts for volume instruction and early payment. For the insurers, who are the ultimate purchasers, there is a more uniform format (but not content), speed of turnaround and a centralised body with which to liaise. The cost is substantially less than if a solicitor had obtained the report directly and charged by way of profit cost.

Quality standards

MROs raise quality standards. The quality of reports is checked to ensure that they are complete and comply with the Civil Procedure Rules. Complaints and requests for amendments are logged. Organisations processing in excess of 12,000 reports a year are able to gain a comprehensive overview of the industry. Quality standards and service level agreements are constantly tested in the market with firms competing in open tender. Medical experts gain from knowing that AMRO members are substantially funded, that there is a professional body to whom they can appeal if there are problems, that there is better quality of instruction and a coherent and reliable medico-legal structure.

Reporting and costs

As a parallel issue with costs, the Civil Justice Council established a debate to agree a structure of predictable (fixed) costs initially for road traffic accidents predicted to settle below £10,000. This regime has now been instituted and, over time, it may be extended to cases of a higher value and cases of different types. An evaluation is currently under way as to whether it is possible to have predictable disbursements, as well as predictable legal costs. Currently there is a standard tariff for police reports and there is a capped limit in respect of the sourcing of medical records, under the Data Protection Act. There is a discussion under way as

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to whether the actual cost of obtaining categories of medical evidence could also be fixed. AMRO made a proposal to the Association of British Insurers and, following that, to the Civil Justice Council that there were a large number of cases within the predictable cost regime that would be suitable for settling with the benefit of a general practitioner's report, at a fixed cost. AMRO is open as to whether this should or should not be extended to accident and emergency and orthopaedic reports. It must be stressed that the decision as to which expert would be instructed would still remain with the instructing party.

As stated above, all members of AMRO contract individually with their medical experts and it is certainly not proposed that the medical experts should all be paid the same amount. Every medical expert will negotiate separately, taking into account the following variables:

- Reputation of the instructing party
- Service standard requirements
- Payment terms
- The potential volume of instructions.

Nature and purpose of reports

The final section of the opening paragraph of this article questions why instructing parties do not go directly to the claimant's own medical advisers and whether or not the MROs merely add to costs and delay. AMRO believes that the answer lies in the product being produced: namely, a medico-legal report. This report is to be produced for legal, as distinct from therapeutic, reasons. It covers a range of issues that are only quasi-medical, such as the Smith v Manchester principle, concerning the capacity of the claimant to go back to their previous occupation, or the extent to which they are prejudiced in the open job market. AMRO members conduct a wide degree of initial and continuing training to ensure that their medical experts will consistently produce reports on which cases can be settled. We must stress that at no time does AMRO make any judgment upon the clinical abilities of experts. However, AMRO members are extremely well qualified to decide whether the quality of the medico-legal reports meet service level agreements. We believe that utilising the claimant's own GP is confusing the therapeutic and the legal aspects and throws up insuperable conflicts of interest, unless all parties are happy for it to go ahead.

Payment

With regard to overall cost for the insurers, AMRO members are highly computerised and specialised in the production of medical evidence. They can demonstrate that they can obtain medical evidence far more quickly, and at a more consistent standard, than can be done internally by instructing parties. AMRO members also offer extended credit terms to those who need them and discount these rates for those who make prompt settlement. Typically, medical experts are paid months, if not years, prior to the AMRO member being paid. If there is any dispute on payment there is no recourse back to the doctor; any risk is borne by the AMRO member.

Conclusion

In conclusion, MROs fulfil a useful function in the obtaining of medical evidence in a speedy and cost-effective way whilst raising service level agreements. Over the last decade, hundreds of individual claimant firms and dozens of insurers have realised that this function should be outsourced. The numbers speak for themselves.

Alexander MacLachlan,
Chief Executive Officer,
Medico-Legal Reporting

Dates for your diary

EWI Events (in London unless specified)

15 Dec 2004	***Joint Conference :(*** *Institute of Psychiatry, King's College London and the EWI)* The Expert Witness at the Crossroads of Mental Health Science and the Judiciary
26 April 2005	AGM: Eighth Sir Michael Davies Lecture and Annual Dinner at Gray's Inn

We also intend to run some seminars outside London from March onwards

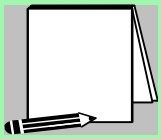
EWI Course Dates 2005

Basic Law for Expert Witnesses *(Cost to EWI members £225)*

- 9 May 2005
- 5 September 2005

Please contact the EWI office for details or booking forms for any of the events above

Case notes: Camilla MacPherson, Allen & Overy



Alan Jackson v Marley Davenport Limited [2004] EWCA Civ 1225

The claimant brought an action against the defendants for breach of duty after he was injured while working for them on a construction site.

The claimant's expert pathology witness, when giving his opinion in the report served on the defendants, included the words "*having now gained additional information in relation to this case*". This indicated to the defendants' solicitors that before gaining this additional information (whatever it might be), his opinion might have been different. For this reason they applied to court, and an order was made requiring the claimant to disclose the expert's first report (which he had produced for the purpose of a conference with lawyers). This was on the basis of CPR 35.10(3), which states that "*The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.*"

The claimant appealed on two grounds: (a) that earlier drafts of expert reports should not be disclosable and (b) that the report had in fact complied with CPR 35.10(3). The appeal was allowed - but the defendants were also given permission to appeal. Thus the matter came before the Court of Appeal.

The defendants argued that the court had a power to order the first report to be disclosed on the basis either of CPR 35.13 or generally pursuant to their case management powers. CPR 35.13 provides that:

> "*A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission*."

Longmore LJ, giving the lead judgment, said that this provision did *not* give the court the power to order disclosure of expert reports made earlier than the expert report ultimately disclosed at for the purposes of the trial. A report made "*for the purpose of a party's legal advisers being able to give legal advice to their client, or for discussion in a conference of a party's legal advisers*" would be subject to litigation privilege, and CPR Part 35 was not intended to override this privilege. Rather the reference to the expert's report in, for example, CPR 35.10, must be intended to refer to the expert report used at trial, not to earlier drafts or reports. Nor could it be argued that the report should be disclosed because it was part of the expert evidence as a whole, since it was clear that the report which had in fact been used at trial was not "*a partial or incomplete document*".

It was therefore held that the earlier draft of the expert's report was not disclosable.

Leche Pascual SA v Collin & Hobson Plc [2004] EWCA Civ 700

This case was the result of the breach of a contract entered into by Collin & Hobson (Collin) and a Spanish company, Leche Pascual (Leche), under the terms of which Leche would manufacture single-pot yoghurt for distribution by Collin in the UK. Leche would thereby replace Collin's existing supplier in Germany, with whom trading relations had deteriorated and then broken down.

Leche already supplied multi-pack yoghurt to Collin but was unable to meet its obligations under the new contract because of problems with the machinery it had bought to manufacture single pots. It admitted that it was in breach of contract, and it was held at first instance that the loss should be calculated on the basis of anticipated sales of 9.5m pots in total, reduced by 25% to reflect uncertainty and risk. Leche appealed on the grounds that the judge had wrongly assessed Collin's loss of profits by using, as a starting point for an estimate of anticipated sales (i.e. the sales that there would have been if the contract been fulfilled), Collin's sales figures for 1996 - rather than 1998, which was the time of the breach, and by which point sales and customer numbers had declined.

The judge had been assisted by expert evidence from both sides on accountancy issues. The experts had produced a joint report which listed the factors that the Court would find relevant in estimating the loss but reached differing conclusions as to the actual numbers involved. Both Collin and Collin's expert used the 1996 figures as a starting point for assessing quantum. Collin's expert went on to consider factors which might then have depressed sales. He also considered factors which might have improved sales, including a superior product and the success of the multi-pack yoghurt that Leche was already producing for Collin. Leche's expert demonstrated that customer numbers and sales had in fact fallen considerably between 1996 and 1998 and therefore arrived at a much lower figure for anticipated sales. The judge noted that any assessment of prospective sales would inevitably involve some guesswork but, on reviewing all the evidence, concluded that the claimant's market was capable of increasing and the claimant's expert's estimate was therefore realistic and achievable.

The task before the Court of Appeal was to consider whether the judge had correctly considered the uncertainties surrounding the evidence as to loss, the various contentions that had been made by the parties, and the relevant issues generally. Lord Justice Carnwath, giving the lead judgment in the Court of Appeal, concluded that, in accepting the evidence of Collin's expert, the judge's reasoning had

been clear and her approach in deciding the loss could not therefore be challenged. Nor could the 25% discount then applied be criticised.

The experts' joint report, incidentally, was described as being "*very clear and helpful*".

Owners of the ship Bow Spring v Owners of the ship Manzanillo II [2004] EWCA Civ 1007

Here is an expert witness case with an international dimension! The claimant brought an action against the defendant after the claimant's tanker, the *Bow Spring,* was damaged. The damage had been caused when the *Bow Spring's* captain had deliberately run the tanker aground just outside the Suez Canal in order to avoid the risk of a collision with the defendant's *Manzanillo II*, a dredger. At first instance, the claimant's case was accepted but the *Bow Spring* was held to be 50% to blame. The defendant appealed on the grounds that the judge should have held that the *Bow Spring* was entirely to blame.

The appeal was dismissed, but the interesting element for experts is that the judge at first instance sought expert advice from the Elder Brethren of Trinity House on issues including what the risk of a collision had been and what action the *Bow Spring* should have taken in the circumstances. The Elder Brethren have considerable knowledge of pilotage and collisions and were essentially acting as nautical assessors in accordance with CPR r.35.15, which allows the court to appoint a person "*to assist the court in dealing with a matter in which the assessor has skill and experience*". The judge accepted their advice.

The defendant argued that it should have been able to make submissions on the advice, and both parties asked the Court of Appeal to give guidance on this point. The Practice Direction to CPR Part 35 provides at PD.7 that "*the assessor will not give oral evidence or be open to cross-examination or questioning*", but, according to the Court of Appeal, the actual consultation with assessors should still take place openly as part of assembling the evidence. Furthermore, the parties should be given an opportunity to argue that the judge should or should not accept the advice he has been given. This is to ensure that the parties have a fair hearing, as is their entitlement under the European Convention on Human Rights. As Lord Justice Clarke noted in the judgment, the principle of fairness includes "*the need for the court to know, before it reaches a conclusion, what the parties have to say about the issues and the evidence which goes to* them". The questions to be put to assessors should also be discussed beforehand with counsel and the answers disclosed, in order to enable counsel to make appropriate submissions.

In this case, the judge had asked for assistance in formulating the questions to be put to the Elder Brethren but did not then put their answers to counsel for their input. However, since neither side had asked to be heard on the assessors' answers, either before they were given or when they received the draft judgment, nor was counsel for the defendant able to show any prejudice that could not have been remedied in the appeal, the issue did not affect the defendant's case or the decision of the court to dismiss the appeal.

Phillips and others v Symes and others [2004] EWHC 2330 (Ch)

In this important case, it was held that a court could make a costs order against an expert witness in appropriate circumstances, namely where an expert, by his evidence, had caused significant expense to be incurred in reckless disregard of his duties to the court. It should be noted that this hearing only considered the principle, and did not make any determination as to whether, and to what extent, the expert involved might in fact have breached his duties, nor whether there should be any financial consequences for him. These issues will be dealt with at a later stage.

The background of the case is complex but, in short, the expert involved gave evidence at an earlier hearing that Mr Symes, one of the defendants in the case, was not fit to provide evidence. The basis for this mental deficiency could only have derived from a stroke that Mr Symes had in 1980, and this was acknowledged by the expert. The expert was therefore saying that Mr Symes had been incapable of managing his affairs since this time. This, as Peter Smith J pointed out in this hearing, was "*a very serious opinion to express*" and one which had important consequences in the context of the case.

The court held at the earlier hearing that, contrary to this expert evidence, the defendant did not in fact lack mental capacity. Consequently, the claimants went on to join the expert as a respondent for the purposes of costs, on the grounds that he had acted recklessly and irresponsibly. Examples of recklessness put forward for the claimants included the expert's failure to examine Mr Symes adequately, his refusal to reconsider his opinion in the light of further material sent to him, his disregard, having adopted a certain position in his first report, of inconsistent material, and his assumption of a role as advocate for Mr Symes. It was further argued that, although there were several consequences where an expert breached his duties to the court (including being subject to proceedings for contempt of court, disallowance of his costs, and referral to the appropriate professional body), such sanctions were ineffective and it should therefore be open to the court to order an expert to pay compensation to the parties who had thereby suffered loss.

In his detailed judgment, Peter Smith J first considered the duties of experts and noted that where an expert had verified his report by way of a statement of truth (as the expert had done in this case), and that report contained false statements in the truth of which the expert

himself did not have honest belief, then it was clear from the CPR that proceedings might be brought against him for contempt of court (see CPR 35PD paragraph 2.5 which refers the expert to CPR rule 32.14 for this consequence).

He then went on to review the relevant case law and concluded from this review that, in certain circumstances, a third party costs order could be brought against a witness because of the way in which he had given evidence. It was his view that there was no need for an expert to be warned of this possible consequence because "*the only warning required to be given to an expert is the self evident one set out in the CPR and the declaration that he signs*" (since an expert must know that, by signing the declaration, he could be subject to contempt proceedings).

Peter Smith J also considered the case law relevant to the issue of witness immunity, the purpose of which is to encourage those taking part in court proceedings to speak freely. He concluded that the House of Lords believed that "*the possibility of a lawyer and an expert respectively being ordered to pay costs would not in their view operate as a deterrent to such person giving evidence*". This was on the grounds that an expert would only be ordered to pay costs if he had shown gross dereliction of duty or recklessness.

In summary he said that "*in the administration of justice, especially, in spite of the clearly defined duties now enshrined in CPR 35 and PD 35, it would be quite wrong of the Court to remove from itself the power to make a costs order….against an Expert who, by his evidence, causes significant expense to be incurred, and does so in flagrant disregard of his duties to the Court*". He went on to agree with the claimants that the other available sanctions were indeed ineffective, and the proper sanction was the ability to compensate a person who has suffered loss by reason of the evidence.

Before being unduly alarmed, experts should note in particular that Peter Smith J did not consider that an expert would be inhibited from fulfilling his duties because of the risk of a costs order being made against him. This was because of the high level of recklessness/disregard for his duties that he would need to have exhibited, and the high level of proof required to establish the breach.

Note: Interestingly, the issue of witness immunity of experts involved in criminal proceedings has recently been considered by the Scottish courts in the case of *Karling v Purdue* (2004) SLT 1067 in which the claimant (who had been convicted of murder but whose sentence had later been quashed after further scientific evidence had been adduced) sought damages from an expert witness for breach of contract and fault and negligence. The judge in this case considered both Scottish and English case law and concluded that in this instance the expert was immune from suit. However, one of the claimant's arguments calls for particular attention. This was the argument that the expert had failed in the advice he had given *at an early stage*, and witness immunity only covered evidence in court or work that was intimately connected with the evidence; the expert was not therefore protected in respect of his early advice. The judge concluded that this would generally be a non-point in criminal proceedings, where there is a relatively short period of time between engaging the witness and the trial, but in civil proceedings, where experts may be engaged before actions are even begun, and their role may be broadened as time goes on, the distinction would often be less clear cut. He went on to say that "*these considerations support the argument that, in relation to civil proceedings, the expert witness should no longer enjoy immunity from suit, except in relation to defamation proceedings*".

- When a witness comes to court to give evidence he has absolute immunity in respect of the evidence he gives in the witness box and is immune from a civil action brought against him on the grounds that anything said or done by him was said or done falsely and maliciously without proper cause or negligently.
- The reason behind witness immunity is to ensure that witnesses speak freely.

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