

Your Witness

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Regulation of experts

Overleaf you will find a summary of the results of the regulation survey we conducted by e-mail during the first half of May. As you may appreciate, the limits imposed by time and the nature of the medium fixed the number of questions we could put and the amount of background information we could give. However, the debate that took place at last year's Bond Solon conference – at the close of which a show of hands revealed that two-thirds of the experts present were opposed to the idea of being accredited by any outside body – had already made it clear that many experts harbour strong views on the subject. This was reinforced by the comments accompanying the replies to our survey. To all who responded, many thanks.

One of the events that triggered my interest was the establishment last year of the Council for the Registration of Forensic Practitioners (CRFP), and I explained as much in the preamble to the questionnaire. My intention in conducting the survey was to look at the broad issues, not to focus in on the aims of one organisation. In any case, I felt that my brief account of the aims of the CRFP was factually correct and unexceptionable. However, the Council's Chief Executive, Alan Kershaw, thought otherwise, and in particular criticised some of the questions for seeming to suggest that the CRFP was out to exclude unregistered experts from the courts. I have, therefore, invited him to write an article for the next issue of *Your Witness*. In the meantime, I would be interested in hearing your views and hope to print some further contributions in issue 25.

New team, same old problem

So Lord Irvine has been re-appointed Lord Chancellor, albeit with a new team of ministers. To judge from the Queen's Speech, his Department's priority over the next year or so will be the reform of the criminal justice system, and the Government is also committed to reviewing the structure and privileges of the legal profession. We trust, however, that the Lord Chancellor does not see his overhaul of civil justice as finished business.

The Woolf reforms may be working, up to a point, but despite all the spin the Lord Chancellor's Department can muster, the last administration's assault on legal aid did nothing to improve access to justice – quite the reverse. While it is good news that in the run up to the election the Government abandoned some of its proposals for restricting aid still further – most notably that requiring contributions from

litigants with more than £3,000 equity in their homes – the overall capping of legal aid expenditure still remains.

How differently they arrange things in Scotland where legal aid continues to be demand-led. Last month the Justice Department in Edinburgh confirmed that it will fund everyone there who is eligible for help, even if the money has to be found from other parts of the budget. The Department's reasoning applies with equal force south of the Border, and we can only hope that it may yet influence the two Scots who, as Lord Chancellor and Chancellor of the Exchequer, have been most responsible for ditching that policy for England and Wales.

Criminal justice, too

The stand-off between the Law Society and the Legal Services Commission (LSC) over the latter's plans for the Criminal Defence Service was resolved with just days to go before the Service was due to be launched. Predictably both sides claimed credit for averting a crisis that could well have led to the criminal justice system seizing up completely, but for how long has it been averted?

True, the Society secured some concessions, but they hardly amount to much and, crucially, the LSC did not offer any more money. As one militant solicitor was candid enough to admit, most criminal law practitioners would have signed up right away rather than go out of business. As he explained, 'You may now be able to buy electricity from British Gas, but for criminal defence work the LSC is the only game in town.' The question is, whether solicitors will want to continue doing the work indefinitely when other, more lucrative, areas beckon.

This also goes some way to explaining the furious controversy that has surrounded the launch of the LSC's Public Defender Service. True, it has made only a modest start, with just four offices initially and two more due to open soon. However, the stated aim of the scheme is to provide the Commission with a 'benchmark' of cost and quality of service against which private practice criminal defence work can be assessed. The solicitors who are currently doing that work can be forgiven for fearing the worst.

New staff at J S Publications

Terri Kavanagh has joined our team as Customer Services Manager. If you have any queries about your entry in the *Register* and our services, or require help relating to your expert witness work, you can contact her on (01638) 561590.
Chris Pamplin

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Regulation of expert witnesses

To identify aspects of accreditation to which experts object

A couple of months ago I conducted a lightning survey of readers' views on the regulation of expert witnesses. The survey was prompted by an invitation to speak on the subject of accreditation to a group of chemists. However, I had also been intrigued by a debate that took place at last year's Bond Solon conference, at the close of which a show of hands revealed that two-thirds of the experts present were opposed to the idea of being accredited by *any* outside body.

I wanted to identify those aspects of accreditation to which experts object. In particular, I hoped to find out more about experts' views on such issues as how competence is to be measured; whether regulation of expert witnesses is necessary; and, if so, whether a recognised system of accreditation could provide the best means of achieving it.

Background

Broadly speaking, expert evidence is welcomed by the courts whenever it is capable of helping them decide cases justly. Instructing solicitors need to know that the experts possess:

- (i) appropriate professional qualifications
- (ii) experience relevant to the issue(s) on which their evidence is required, and
- (iii) an understanding of the requirements of their role as expert witnesses.

In recent decades there have been a number of high-profile miscarriages of justice in criminal cases resulting directly from faulty expert evidence led by the prosecution. They prompted calls for the establishment of an independent body to accredit practitioners who act as expert witnesses – and these were in due course acted upon by the Government. With its initial start-up costs of £265,000 met by the Home Office, the Council for the Registration of Forensic Practitioners (CRFP) was officially launched in October last year.

The Council's stated role is the promotion of high standards among experts testifying in criminal cases. Its eventual aim (to quote its Chief Executive, Alan Kershaw) is to produce 'a definitive register of professionals qualified to use science to produce reliable evidence in court'. At present, its activities do not cover medical doctors who give evidence in criminal cases, though that will come. The Council is also exploring whether to extend its registration system to expert witnesses in civil cases.

In the survey I hoped to find out what experts in the *UK Register of Expert Witnesses* thought of these developments.

The survey

The survey was conducted on-line, and because experts are busy people, it was restricted to just a dozen questions. The questions, though, were carefully phrased to elicit a response on the issues of greatest moment. Over 2,500 experts

were canvassed, and 330 responded. The remainder of this article is devoted to analysing their replies. The results are shown in Table 1.

One must be very conscious, of course, of the dangers of ascribing results obtained by these means to experts in general. It is always easier to secure a response from those who feel most strongly about an issue. Nevertheless, the replies received do convey a strong sense of scepticism about the value of accreditation, especially for expert witnesses practising in the civil courts. This article presents their views.

Judging competence

The first group of questions was designed to establish how experts thought their competence should be judged. It was no surprise to discover that almost 90% of respondents agreed with the proposition that for an area of expertise to be helpful to a court it had to be one governed by recognised standards and rules of conduct. On this, experts were clearly of the same mind as Mr Justice Evans-Lombe in the *Barings* case reported elsewhere in this issue. However, several of those who did not agree with the statement made some perfectly valid points about the difficulty of applying it to fringe disciplines and those at the leading edge of science and technology.

When asked whether competence to give expert evidence should be determined by professional qualifications and relevant experience alone, 60% of those responding agreed. Furthermore, almost exactly the same response was elicited when we asked whether competence to give expert evidence should also require membership of a self-regulating professional body.

Clearly, if you believe that a combination of professional qualifications, relevant experience and regulation by your professional organisation is sufficient to establish your competence to give expert evidence, you will be unlikely to see any point in being accredited by another body.

This is borne out by the answers to the final question in this section, with the great majority of respondents disagreeing with the proposition that competence to give expert evidence should necessitate accreditation by an independent body such as the CRFP.

In this context, though, what is of greater interest are the replies of the 90 experts who had said 'No' to both the previous questions. Only 31 of them thought that accreditation by a separate organisation should also be necessary, as against 56 who did not.

Incidentally, this question got us into hot water with several respondents who pointed out our implicit assumption that the CRFP was independent. As one of them put it, rather cynically, the CRFP is little more than an 'old boys club, set up by ex-staff of the Forensic Science Service in an attempt to keep "outsiders" away from the courts'!

Accredited does not mean competent

To recap, then, around 60% of the experts who took part in this survey felt that a combination of qualifications, experience and membership of a self-regulating professional body provided a sufficient guarantee of their competence to act as an expert witness. Those who considered that accreditation by another organisation was also necessary numbered less than 10%.

Criminal litigation

The main impetus for establishing a regulatory system for expert witnesses has come from miscarriages of justice in the criminal courts. So we posed the question: Whatever accreditation the criminal courts may come to expect of expert witnesses for the prosecution, should the same requirement apply to those giving evidence for the defence? Somewhat to our surprise, three-quarters of respondents agreed with this proposition. This will give no comfort to those who believe that the accused should be able to call whichever expert he or she pleases.

A similar proportion of respondents thought that the same requirements should apply to defence witnesses instructed by public defenders as those that apply to experts instructed by solicitors in private practice – although here one might have expected everyone to agree.

Civil litigation

The remaining questions ventured into a major area of controversy. When asked whether the conduct of civil litigation would benefit from the extension to it of the registration system offered by the CRFP for criminal litigation, only a third of respondents agreed. To understand why the majority did not agree, it is necessary to look at the reasons given for taking that view.

By far the most common reason put forward was the regime now imposed by the Civil Procedure Rules (CPR). Before the CPR came into force the lawyers in a case had full control of the expert evidence they presented to the court, and they could, and did, manipulate it to their own ends. The Woolf reforms stopped all that. It is now the court that controls the conduct of litigation, and the court that controls the use of expert evidence.

The other main point raised by experts in their comments on this question was that of scope, with many noting that the range of evidence used in civil cases was much wider than that commonly adduced in criminal cases.

The downside of mandatory accreditation

In the Final Report of his Inquiry into the civil justice system in England and Wales, Lord Woolf wrote that he could not recommend an exclusive system of accreditation for expert witnesses. He gave as his reasons:

'Such a system could exclude potentially competent experts who chose for good reason not to take it up. It might, in fact, narrow rather than widen the pool of available experts. It could foster an uncompetitive

monopoly and might encourage the development of "professional experts" who were out of touch with current practice in their field of expertise.'

We cited these comments and asked our interlocutors how they, as experts, now rated them. For brevity's sake, the questions all presupposed that mandatory accreditation in some form or another was on the cards.

The results show that whilst half of the respondents thought that mandatory accreditation in the civil courts would get rid of the cowboys and charlatans, almost three-quarters of respondents would be concerned by the narrowing of the pool of experts accreditation might bring about. Half of the respondents thought that such a move would be anti-competitive, and half thought that 'professional' experts are more likely to be out of touch with current practice than still-practising colleagues who undertake expert witness work only occasionally.

The 50/50 split in the replies to the last of these questions is especially interesting. The medical experts who are still in practice were quite adamant that retired medics should not be allowed to work as expert witnesses.

And what about you?

Despite the concerns many experts clearly have about the issues touched upon in the survey, it is pleasing to be able to end this summary on an upbeat note. The final question asked if the respondent would stop acting as an expert witness if accreditation were to become mandatory in the civil courts. Only 1 in 10 of the respondents said that they would. On that showing it would seem that while many experts expect that there would be a shrinkage in the pool of available experts, it would be other experts who would be driven away, not them!

Individual comments

We were quite taken aback by the wealth of additional comments this survey elicited, and the strength of the views expressed by many of the respondents. There is room to summarise here just a few of them.

Practicality

A number of respondents queried whether it is even possible to establish a comprehensive scheme of accreditation. As three of them wrote: *'In fields such as mine (cycling)... there are no professional qualifications and the number of cases is too small to make registration financially worthwhile.'*

'For those of us who are experts in obscure activities where no professional qualifications or body exist, it seems we would risk being excluded.'

'Anyway, how do you regulate a zip-fastener expert?'

Compulsion

It is clear from the answers already summarised that for many experts the idea of compulsory registration was anathema. In their comments

72% fear a narrowing of the pool of experts

Allowances must be made for obscure expertise

Who regulates the regulator?

they were particularly concerned that if it were to come about it was the occasional witnesses who would be the least likely to go through the hoops. As one respondent put it:

'Occasional experts will always be needed for matters which only rarely trouble the courts, and requiring registration would endanger justice by excluding those who have valid evidence to offer. Accreditation should go to the weight of the evidence, not whether it can be given at all.'

Quis custodiet?

The question 'Who regulates the regulator?' was raised many times, of which just one example will suffice:

'I think that the problem is that the regulation of experts will become the province of those who were in the political process at the commencement.'

Professional bodies

These got support and approbrium in about equal measure. While many expressed the opinion that it was up to their professional bodies to sort out such matters, others took a much more jaundiced view of their capabilities. Of the latter, the following comment is representative:

'I am sceptical of the real value of many professional institutions, including my own which is little more than a lunch club for old buffers of pensionable age.'

Lawyers and judges

Probably the overwhelming impression from the comments is that experts thought the present system was to be preferred. Litigation lawyers are well used to selecting experts, and indeed have a professional duty to choose ones that are appropriate to the case. And with their new powers, the civil courts can impose sanctions on those who fail in that duty. As two respondents commented:

'The best judge of an expert is an alert and intelligent lawyer who is prepared to really quiz one on one's CV and relevant experience.'

'It's my belief that the courts will always decide on the competence of an expert both from the report and oral evidence. Accreditation may suggest a "desired" level of knowledge/qualifications, but it does not necessarily follow that one who is accredited is competent.'

To be continued...

We sense that our coverage of this subject is far from finished! We anticipate including a piece by Alan Kershaw, Chief Executive of the CRFP, in the next issue, and I would be happy to consider other contributions on this subject from experts in the *Register*.

Chris Pamplin

	Yes	No	n/a
Criteria for judging competence			
Do you agree that for an area of expertise to be helpful to a court it has to be one governed by recognised standards and rules of conduct?	88.2%	9.7%	2.1%
Do you consider that competence to give expert evidence should be determined by professional qualifications and relevant experience alone?	59.8%	27.2%	13.0%
Do you consider that competence to give expert evidence should require also current membership of a self-regulating professional body?	60.4%	28.7%	10.9%
Do you consider that competence to give expert evidence should necessitate accreditation by an independent body such as the CRFP?	22.7%	58.9%	18.4%
Criminal litigation			
Whatever accreditation the criminal courts may come to expect of expert witnesses for the prosecution, should the same requirement apply to those giving evidence for the defence?	74.6%	9.1%	16.3%
In April, the Government launched a Public Defender Service, to operate alongside the existing service provided by solicitor firms. Do you consider that the same requirements should apply to the experts it instructs on behalf of clients as to those instructed by firms in private practice?	73.2%	5.1%	21.7%
Civil litigation			
Do you think that the conduct of civil litigation would benefit from the extension to it of the registration system currently offered by the CRFP for criminal litigation?	32.9%	51.1%	16.0%
If accreditation were to become mandatory in the civil courts, would you welcome it as a means of getting rid of the cowboys and charlatans?	49.5%	41.1%	9.4%
If accreditation were to become mandatory in the civil courts, would you be concerned by the potential narrowing of the pool of experts?	72.5%	23.0%	4.5%
If accreditation were to become mandatory in the civil courts, would you regard it as anti-competitive?	50.2%	42.0%	7.8%
If accreditation were to become mandatory in the civil courts, would you agree that 'professional' experts are less likely to be in touch with current practice than colleagues who only occasionally undertake expert witness work?	50.8%	42.6%	6.6%
If accreditation were to become mandatory in the civil courts, would you stop practising as an expert witness yourself?	10.6%	81.9%	7.5%

'The best judge of an expert is an alert, intelligent lawyer...'

Letters

As many readers will be aware, a prominent referrals agency has folded, owing money to several hundred experts. Synapse Medical Consultants Ltd was set up in 1998 to supply solicitors with medical reports, and the business took off when it acquired as a client a major firm in personal injury litigation, Irwin Mitchell. Unfortunately, though, delays in proceeding with cases following implementation of the Woolf reforms, together with the scrapping of legal aid for most claims for damages, wrecked Synapse's cashflow forecasts. On 30 March this year the company ceased trading. At that date its indebtedness amounted to more than £1.5 million, of which sum over £1.4 million was owed to non-preferential creditors. There are more than 900 of them, mostly experts.

Fortunately, perhaps, for these experts, 90% of the company's book debt is owed by Irwin Mitchell, and at the meeting of creditors held on 25 April this circumstance enabled the liquidator to forecast a dividend of close on 80 pence in the pound, subject to the costs of liquidation. He could give no time scale, though, for recovery of the book debts since that could depend on how long it took cases to settle or run their course.

Following Synapse's collapse, we received a letter from one of its creditors concerning the use and control of referral agencies. We believe the issues he raised deserve a wider airing, and so are reproducing his letter here.

Medico-legal referral agencies

From Mr Alan D Craxford FRCS, Consultant Orthopaedic Surgeon

I am writing in the wake of the Synapse Medical Consultants Ltd bankruptcy. Whilst that event in itself is dramatic and costly (not least to the creditors) and will no doubt unfold in the appropriate manner, it does raise the whole question of the nature, power and control of agencies in general.

Lessons from Synapse

It is truly staggering to learn that Synapse went down with debts in the order of £1.5 million and that 90% of the debt book was held by one well-known national firm of solicitors. It is clear now that Synapse promised its experts settlement of fees within a period of 6 months from the date of the report, but entered into much laxer terms and conditions with its major contract holder. This inevitably led to a cashflow crisis. Additional costs were also incurred by the use of a factoring agent.

I have heard from two sources that the current situation is that the debts are ruled by contract law. There is one contract between the originating solicitor and the agency, and another between the agency and the expert. This means that experts will have to join the line of the agency's creditors and have no direct means of applying pressure on the solicitors who originated the requests for their reports.

As experts, we do not have the time or skills to check out each new agency that starts sending us referrals. Yet often the referrals are made with the full knowledge and backing of the solicitors. It offends natural justice to be told that one has no direct claim for payment for an ongoing piece of work addressed to the court and originated by a solicitor who is still in charge of the case, because an agency used by that solicitor has gone out of business.

The power of agencies

I have been invited by another agency to register with them so that my name can be included in their directory and database. I have also been told that they will only instruct experts who have registered with them. Their annual registration fee is around £350. I note from at least 50% of referrals to date that the originating solicitors have asked for me as nominated expert by name (indeed the initial letter from the solicitor is often addressed to me). I have been told by a solicitor fee-earner who makes some referrals directly to me and some via the agency, that on occasions she has been told that a particular expert has been 'suspended' and cannot be used. It would seem that if I do not agree to pay the registration fee, instructions addressed to me will not be passed on. I question the legality of the agency wielding such power.

Although this particular agency professes itself to be dedicated to furthering the education of experts, registration with it costs nearly twice as much as membership of the Expert Witness Institute. At the very least this appears to be an example of a conflict of interests.

The accountability of agencies

I am also concerned that in many more subtle ways the activities of the agencies do not follow CPR guidelines.

There are agencies which state that their name should not be included in the report but that the instruction should be credited to the originating solicitor. (I understand this is because some jurisdictions have refused to allow the reclaiming of agency fees at the time the case has settled.)

There are agencies which state that no contact should be made with the originating solicitor and that all matters (additional questions, arrangements for investigations, etc.) are to be directed through them.

There are agencies which have instructed me as a single joint expert. (Surely it is the parties to the action who have instructed the agency to find them a single joint expert?)

There is even one agency that requires the name of the solicitor to be stated in the report and on the invoice but the whole package to be sent to the agency. The solicitors say in a covering letter to the agency that they are responsible for the 'reasonable' fee. I am confused about how contract law covers this.

Experts contract with the agency, not the lawyer

Agencies accused of not following CPR guidelines

I am also confused about how I am supposed to declare the substance of the referral in my report under CPR.

What can agencies charge?

I have known for a long time that there is considerable mark-up (as much as 100%) in the fee that the agency charges a solicitor and what I would have charged the solicitor had the request for a report come to me direct. I have had agencies that have tried to browbeat me into charging less for a report submitted through them than I would have charged for a direct referral.

I am also aware that there are agencies which take some form of commission for the handing on of claimants from claims bureaux and that lists of claimants can be bought or sold.

Conclusions

Agencies have become a fact of life. They have clearly sprung up in the wake of the Woolf reforms. They can be an advantage to a busy solicitor's office in co-ordinating the clerical work and obtaining case records. They can be an advantage to an expert if they stabilise the payment of invoices on a specified time scale. However, experts have no means of assessing the creditworthiness of agencies. The use of an agency is a 'one-way street'.

I believe that at the very least there should be a code of practice for referral agencies. Indeed, I would urge the Rules Committee to go further than that and issue a practice direction. After all, everyone else involved in civil litigation is now regulated in this way. Aspects to be covered include:

- When an agency may be used and whether its use should be explicit.
- A common format for the letter of instruction. (Just who has instructed the expert?)
- An agreement on what can and cannot be recovered in agency fees.
- The rights and obligations of agencies (e.g. whether they may charge experts a registration fee, claim to be able to train experts, prevent experts from contacting the solicitor/insurer direct, or refuse to pass on personalised instructions from solicitor to expert).

I would also like clarification on the issue of fees. Either agencies should have to be bonded (or take out insurance) against failure, or instructing solicitors using agencies should be held ultimately accountable for the fees owing to experts, hospital medical records departments, etc., in the event of such a failure. After all, if my travel agent goes bust, I will usually find that British Airways will honour the ticket I have bought to go on my vacation.

I trust these observations are helpful in formulating some response to an ever increasingly complex and tangled situation. At

the end of the day, it will be the claimant who suffers, and that is clearly contrary to the original ideals of Lord Woolf's reforms.

Usurping the role of the judge

From Dr Roger Ballard, Consultant Anthropologist
As Britain's South Asian minority population grows steadily in size, both the civil and criminal courts often find themselves hard-pressed to make sense of – let alone to draw equitable conclusions about – all manner of events which have taken place in contexts where South Asian cultural, religious, linguistic, familial and behavioural codes apply. As a result, I am frequently instructed to prepare expert reports which seek to place the events and behaviours in question in their appropriate cultural context.

Yet although there can be little doubt that such a context-setting process is essential if the evidence is to be appropriately interpreted and equitable decisions are to be reached, great confusion invariably reigns when such cases come to court – and especially when a jury is involved. Is such context-setting anthropological evidence admissible? And, if so, on what basis?

Although by its very nature my reports (and the evidence I give in court) seek to make sense of, and thus to interpret, factual evidence which has been put before the court, so potentially usurping the role of the judge, my experience of civil proceedings suggests that most judges welcome my input, above all because it enables them to make a much more informed judgement both about the evidence itself, and about the arguments advanced by counsel.

However, in criminal contexts my experience has, for the most part, been very different. Even though the charges brought can be extremely serious – such as murder, rape or money laundering – there is much concern as to whether my evidence is admissible on the grounds that it strays far too far into issues which it is for the jury alone to decide. Sometimes such reservations are explicitly expressed from the bench, but more usually counsel take the view that it would not be to their advantage even to test the matter out.

The outcome of all this is extremely paradoxical. Whilst well-educated judges sitting without juries are often (although by no means always) grateful to receive expert anthropological assistance, juries are frequently expected to rely wholly on their 'common sense' in reaching their verdict, even when virtually all the evidence whose credibility they are required to adjudge arose within a linguistic, cultural, religious and familial context with which they are entirely unfamiliar. Many defendants feel that judgements made on this basis are inherently inequitable – and I find it very difficult to disagree.

I would be most interested in your readers' views.

'Experts have no way of assessing creditworthiness of agencies'

Call for regulation of agencies

Court report

Protocol conundrum

When are agreed experts not joint experts?

Answer: When they have been chosen in accordance with a pre-action protocol. Or to put the matter more precisely, a defendant's non-objection to a nominated expert does not in itself transform that expert, once instructed, into a single joint expert whose report would automatically become available to both parties. That is the lesson to be learnt from a Court of Appeal ruling on a case this spring.

The Pre-action Protocol for Personal Injury Claims provides that before a party instructs an expert it should submit to the other party the names of one or more experts whom it considers suitable to instruct. This enables the other party to object to one or more of the suggested experts. The initiating party may then proceed to instruct an expert who is acceptable to both sides.

The parties in *Carlson -v- Townsend* followed this procedure, with the claimant nominating three consultant orthopaedic surgeons and the defendant objecting to one of them. The claimant thereupon instructed one of the others, a Mr Trevett. The chosen expert duly examined the claimant and reported back to the claimant's solicitors. For reasons which have not been revealed but can be well imagined, the claimant's solicitors decided not to make use of that report but instead commissioned another from a Dr Smith, who was not one of the experts originally nominated. It was his report that they subsequently disclosed to the defendant's solicitors.

The latter, being alive to the probable reasons for the switch, promptly applied to the district judge to have the earlier report disclosed as well. The district judge ruled that on a proper construction of the protocol, there was no distinction between 'joint selection' and 'joint instruction', and he duly ordered the disclosure of Mr Trevett's report, whereupon the claimant appealed to the circuit judge. He, for his part, concluded that because the claimant had alone instructed Mr Trevett, there had been no waiver of the litigation privilege that normally attaches to medical reports in personal injury litigation.

Now it was the turn of the defendant, or at any rate her insurers, to raise an appeal, which is how the Court of Appeal came to consider the matter. Delivering the lead judgment, Lord Justice Simon Brown focused on two issues presented by the case, namely: does refusal to disclose the report of a mutually acceptable expert constitute failure to comply with the protocol; and, even assuming it does, can a court then order the report's disclosure? He had little difficulty in answering both questions in the negative.

While the protocol plainly encourages the voluntary disclosure of medical reports, it does not specifically require this. Consequently, the withholding of Mr Trevett's report did not amount to non-compliance, although the

instruction of Dr Smith without first giving the defendant an opportunity to object clearly did so. Second, while the Practice Direction on Protocols provides the courts with ample sanctions for non-compliance, overriding a claimant's litigation privilege is not one of them. *Appeal dismissed.*

Privilege again reaffirmed

Litigation privilege in experts' reports was also the subject of an interesting application in the High Court.

A father had been charged with causing his child grievous bodily harm, and in the course of preparing his defence his solicitor had commissioned reports from two medical experts. The child, meanwhile, was the subject of interim care orders, and in connection with them the father's solicitor had obtained permission to instruct different experts. The child's guardian *ad litem* sought disclosure of the reports prepared for the criminal case and the names of the experts who had provided them.

The application in *S County Council -v- B* was founded on the premise that the court should have before it all the relevant material. As the reports commissioned for the criminal proceedings might well contain more information about the events resulting in the child's injuries, and some of it could be inconsistent with the findings of the experts instructed for the care proceedings, the guardian contended that they, too, should be made available to the court. In other words, he was on a fishing trip. The question Judge Charles had to decide was whether in the context of care proceedings the father could assert litigation privilege over reports prepared for a different, albeit related, case.

In Children Act cases the welfare of the child is paramount. Doing justice between the parties is of secondary importance. For this reason, the proceedings in such cases are essentially non-adversarial and litigation privilege over experts' reports does not arise. That, at any rate, was the conclusion reached by the House of Lords in *Re L*, a case decided in 1997. There is, however, equally binding authority to the effect that in criminal cases a client's right to litigation privilege is absolute.

Judge Charles resolved the impasse by pointing out that the expert report in *Re L* had been prepared from hospital case notes which had already been filed with the court. From that circumstance he concluded that the House of Lords ruling was only binding in respect of reports based on papers which had previously been disclosed in Children Act proceedings and which the court had given leave for an expert to see. In the instant case, neither of those preconditions applied.

As to the alternative application, the judge observed that the guardian *ad litem* could only

Experts appointed pre-action are not necessarily SJs

Privilege over reports does not arise in Children Act cases

Factsheet Update

The following new factsheet is now available:

ID Factsheet title

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Continued from page 7

want the names of the experts who had supplied reports for the criminal case to enable him to obtain evidence from them himself, either voluntarily or by means of a *sub poena*. The guardian had argued, in line with a celebrated apophthegm of Lord Denning's, that there was no property in a witness. But Judge Charles would have none of it. 'A witness or potential witness should not volunteer material which is covered by legal professional privilege and should not be compelled by a court to provide such material, unless of course the witness has the consent of the person who has the benefit of the privilege.' Accordingly, he dismissed this application as well.

Admissible or not?

The ongoing litigation resulting from the collapse of Barings Bank has produced an important ruling on the admissibility of expert evidence in civil cases. The bank's liquidators allege negligence on the part of its auditors and are seeking substantial damages. As part of their defence, the auditors have filed expert reports in support of the contention that various officers and employees of the bank ought to have discovered Nick Leeson's unauthorised trading for themselves and taken the necessary action to stop it.

In a preliminary hearing of *Barings plc -v- Coopers and Lybrand* and another related action, the liquidators failed in an attempt to have all or part of the expert reports struck out on the ground that they dealt with matters which were not properly the subject of expert evidence. Giving his reasons for dismissing the application, Mr Justice Evans-Lombe held that expert evidence is admissible under section 3 of the Civil Evidence Act 1972 in any case where the court accepts that there exists a recognised expertise, governed by recognised standards and rules of conduct, which is capable of influencing the court's decision on an issue before it, always provided the court is satisfied that the expert to be called has sufficient familiarity with, and knowledge of, the expertise in question for his opinion to be of value.

Expert evidence meeting this test might still be excluded if the court felt that calling it would not be helpful – as, for example, where the court could reach a fully informed decision without it, or the issue to be decided was one of law. But where the evidence was of potential help, the trial judge could safely and gratefully receive it, so long as he did not lose sight of the fact that the final decision as to what was or was not negligence was for him alone.

When the experts came to court to give their evidence they could be cross-examined on it. If their description of the background events were to be successfully challenged then, or their findings were shown to be overly tendentious or partisan, that would diminish the authority of

their opinions in the eyes of the court. However, the claimant's criticisms of the reports in the present case were not reasons for striking out any part of them at this preliminary stage.

Friend's evidence not inadmissible

Yet another application to exclude expert evidence has had an outcome of potential significance for all who are engaged in expert witness work. In *Liverpool Roman Catholic Archdiocesan Trustees Inc -v- Goldberg*, the claimant was suing a QC, alleging negligence in advice he had given on a tax matter.

At a case management conference the procedural judge gave both parties permission to call expert evidence from a tax barrister, and the defendant chose to instruct another QC from his own chambers. In his report the colleague clearly stated that the defendant was a friend whom he had known for 28 years.

Reports were exchanged in November 1999 and no question was raised about the admissibility of that prepared by the defendant's expert until January of this year, by which time the date fixed for trial was only 2 months away. At that stage the claimant applied to the High Court for a ruling that the report be excluded on the ground that its author could not be independent and that independence was necessary for an expert's evidence to be received.

In the first part of his judgment, Mr Justice Neuberger set out a number of factors that courts need to bear in mind when considering applications to exclude expert evidence. Most of these depended on when the applications were made. To save costs and assist case management it was desirable that they should be made as early as possible. If they were made late it might be better to leave the matter for the trial judge to decide.

His Lordship then turned to the arguments advanced on behalf of the claimant.

Long before the reforms initiated by Lord Woolf, the courts had been stressing the importance of expert witnesses being independent. However, the fact that the expert whose report was being questioned in this case had a close personal and professional relationship with the party calling him did not mean as a matter of law or fact that he was incapable of giving independent evidence. The contention that he was not independent confused the concept of lack of independence with the propensity or features that might give rise to it.

The closeness of the relationship between the defendant and his expert might prove fertile ground for the expert's cross-examination at trial. In any case, the trial judge should be able to assess whether his evidence was independent or whether, despite his best efforts, it was not. Accordingly, His Lordship made no order, leaving the matter to be decided at trial.