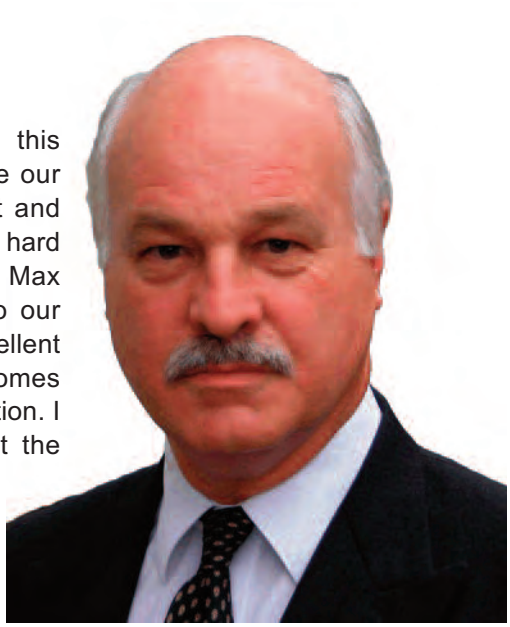
The Expert Witness Institute *Newsletter*

Spring 2008 EWIN Volume: 12 No: 1

From the desk of the Chairman



James Badenoch QC

It gives me great pleasure to contribute to this Newsletter, which is now in a new format. I hope our readership will think it an improvement in layout and appearance, and will appreciate its content, and the hard work and imagination which our editor Professor Max Sussman has put into its production. To him go our congratulations and thanks for his work and its excellent results. Please remember that he welcomes contributions from members with a view to publication. I hope that we will hear from more of you about the extraordinary variety of work members undertake.

I am pleased also to report briefly on the changes that have been made to the organisation of the Institute. The committee structure, and the detailed governance of the Institute have been the subject of a major and wholesale review and reshaping over the past 6 months, through the energetic and determined efforts of John Cowan, Deputy Chairman, and Janette Gulleford our Chief Executive, to whom go our very grateful thanks. They have worked with the Board of Governors to bring the Institute and its workings thoroughly into line with modern management principles, and so to make it a more effective organisation for its members as we face the many new challenges of expert witness work in the 21st century.

The Institute's new structure, which you will see set out on page 14, has been designed with new and detailed terms of reference, clear and specific objectives, and defined reporting lines to the Board. In addition the Board are meeting in April to update the Institute's strategy, and to provide a forward plan for improving its services, reinforcing and promulgating the highest standards for expert work, and promoting the interests of members.

It is an exciting time for all of us, and while it may take a little time to achieve all the objectives we have set for the Board and its committees and secretariat, members can be confident that the Institute is in better shape than ever, financially sound, and very well placed to serve both the interests of the membership and the wider interests of justice in the years to come.

Thank you for your continued support. I wish you all a successful and prosperous year.

JAMES BADENOCH Q.C.
Chairman

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Published once a quarter by the Expert Witness Institute.

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The Coroner - Part II

Roy Palmer
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Reform process:

The need to reform death certification and the coroner system has been recognised from time to time since the 1887 Act, and during the 20th Century three attempts at reform were made. The first public examination of coroner of the system since the passing of the Coroners Act 1887 was the Committee chaired by Sir Mackenzie Chalmers, which reported in 1910[i].

Another committee, chaired by Lord Justice Wright, reported in 1936[ii] and one chaired by Judge Norman Brodrick, reported in 1971[iii] . Known colloquially as The Brodrick Report, it was painstaking and comprehensive and made many recommendations for reform, most of which have been ignored by successive governments and it, too, continues to gather dust on ministerial shelves. There have been minor tinkerings, such as to remove the requirement for coroners or their juries to view the bodies and, in 1977, the removal of the ability of coroners or their juries at an inquest to indict for murder or manslaughter. None of the 20th century Reports was, however, acted upon in an effective way.

What then of the 21st Century? Many factors have driven the renewed desire for change but two things above all have renewed interest in reform: the retained organs issues of Alder Hey Children's Hospital and the concerns raised in the wake of the case of Dr Harold Shipman. In January 2001 Dame Janet Smith was appointed by the Secretary of State for Health to conduct an inquiry into the problems arising from the conviction of Dr Harold Shipman for the murder of 15 of his patients. In July 2001 the Home Office Minister, then Beverley Hughes, appointed a committee, chaired by Tom Luce, to review and report upon death certification and the coroner service. Dame Janet's inquiry ran in parallel with that of Tom Luce but seemingly with little or no cross-fertilisation of ideas or proposals, in part because the inquiries had different terms of reference.

The Home Office Committee that undertook a fundamental review of death certification and investigation in England, Wales and Northern Ireland reported in June 2003[iv]. A separate series of six reports were published by Dame Janet Smith, then a High Court Judge but now of the Court of Appeal. Her third report, *Death Certification and Investigation*, was published a month later, in July 2003[v] . It is a matter of regret to many of us that there was little if any apparent collaboration between the two committees, that deliberated simultaneously at considerable public expense. The two reports came up with rather different conclusions and recommendations. Those who have studied them will have reached their own opinions, but many thought that the Luce proposals were practical and pragmatic, providing sensible proposals for reform whereas the Smith proposals were, albeit most comprehensive, too complicated, bureaucratic and impractical. The terms of reference were different - Luce looked fundamentally at the system, including Northern Ireland, whereas Dame Janet Smith was concerned to investigate only those deaths in which Dr Shipman was implicated, almost none of which came to the attention of the coroner.

In the event, the government had a problem! They received two lengthy and detailed reports of considerable public importance that had arrived at radically different proposals for reform, one likely to be considerably more costly than the other but neither setting out the expected cost of their respective proposals. The government therefore re-engaged Mr Luce to study Dame Janet Smith's third report, compare it with his own and produce recommendations. The Home Office also undertook additional research, largely because there was no clear understanding of how the current system operates or, because it is so fragmented, what it costs.

The necessary work was undertaken and in March 2004 the Home Office published a position paper: *Reforming the Coroner and Death Certification Service*[vi] . This paper envisaged that a White Paper and a parliamentary Bill would be produced within a year, that is by March 2005.

In a foreword by the then Home Secretary, Mr David Blunkett, he stated:

> *"An effective death certification and investigation system is a vital component of a civil society ... I believe the best way forward is to continue to have a single, seamless, system ... I am committed to providing a world class system (note, no hyphen) ... The existing coroner and death certification arrangements have a long history. In general the system has served us well over the years and is widely respected. That is a tribute to the hard work of many dedicated individuals within the existing system who have kept it functioning as well as it has. But the law and practice no longer reflect our expectations for a modern public service. There is an irrefutable case for reform...."*

This position paper listed a number of guiding principles – but no detail - and we all know, the devil is in the detail. So, it is hard to argue with the stated principles, but until the detail is known we will never know whether the proposals are sound. The enunciated principles were:

Independent – free to judge circumstances without outside influence
Professional – staff better regulated and with CPD, training, etc.
Medically-skilled – staffed with qualified medical practitioners and with ready access to high level medical and public health advice
Modern – providing a high quality service
Consistent – uniform across England, Wales and Northern Ireland
Robust – able to prevent or detect foul play
Transparent – the public to understand the way it operates

In the event, a general election intervened and Anthony Blair PC MP was returned to govern us. He then reshuffled his cabinet and ministerial team. So it was that, later in 2005, at the stroke of a prime-ministerial pen, the responsibility for coroner reform was removed from the Home Office and transferred to the Department for Constitutional Affairs (DCA), with a new Minister, Harriet Harman, in charge. Unsurprisingly, this provided the excuse for further delay, whilst the new minister and her civil service team worked their way into the proposals and tried to ascertain the likely cost of their implementation.

In the meantime, in anticipation of a draft Coroners Bill within the year, the Parliamentary Select Committee of the DCA set aside time to give pre-legislative scrutiny to the draft Bill in the first half of 2006. Various expert advisers were appointed to assist and witnesses were lined up to give evidence. However, the draft Bill was delayed and thus the Select Committee had nothing specific to scrutinise! No doubt in part because of the mounting irritation by all those awaiting the Bill, the Minister of State, Harriet Harman, was prevailed upon to make a statement to the House of Commons on 6th February 2006[vii].

It proved to be a profoundly disappointing statement. To most observers it appeared to be driven by a requirement to keep costs to a minimum. There was to be no new national organisation and no requirement to report every death to the coroner. The funding was to be left with local authorities. Coroners Officers were to remain employed by the police service or by local authorities. There would be no duty on doctors or the police to report deaths to coroners. In short, the document was long on being mindful of the needs of the bereaved but very short on making commitments that would cost money.

In June 2006 the government finally and belatedly published its draft Bill[viii] , just as the Parliamentary Select Committee was coming to the end of the time it had set aside for pre-legislative scrutiny of the Bill. The Bill is, to most of those who have seen and commented on it, an extremely disappointing achievement. A great many of the proposals for reform made by Tom Luce's report and in Dame Janet Smith's third Shipman report have not been included in the Draft Bill. The Bill gives the impression that anything that will not cost significant sums of money was included, but anything that

requires significant expenditure was omitted.

The Draft Bill was much criticised across the whole spectrum of society. Perhaps most importantly, it was severely criticised by the House of Commons Constitutional Committee[ix] . For example, in paragraph 212 of their eighth report for the 2005-06 session they said:

> *The reforms proposed in the Home Office Position Paper of 2004 represented a good model for reform ... in particular we considered sensible the proposals for reform of death certification, including medical examiner scrutiny of all death certificates. It is disappointing that the Government has, in the draft Bill, retreated from its 2004 proposals, leaving out much of what was good.*

And in paragraph 214 they said:

> *"Among the issues we raise in this report, two are pervasive and limit the effectiveness of the entire death investigation system:*
> *• Funding – although the government has committed a certain amount of extra funding ... this is likely to fall considerably short of the financial commitment needed to rescue this seriously under resourced service from its current state of neglect.*
> *• Death certification, investigation and registration are processes which are inextricably linked. The Government's decision not to reform the death certification system leaves many fundamental problems unaddressed.*

And in paragraph 216:

> *"The reforms proposed in the draft Bill contain much that is praiseworthy but the Government is in danger of wasting a golden opportunity for substantial reform of the coroners system in England and Wales and the death registration system. The draft Bill does little more than tinker on the margins of the current system. Much of the improvement which might come about as a result of the proposals in the draft Bill will be threatened by the paucity of resources which are likely to be devoted to this important area.* ***We believe that this draft Bill falls well short of what is required to reform the system****"*

Some further conclusions and recommendations of the HC Constitutional Affairs Committee were set out in part 11 of their Eighth Report (*ibid*).

> *Coroners undertake their statutory function in a fragmented and localised system that has remained largely unchanged since the time of Queen Victoria. The current system is ill-equipped to deal with the modern expectations of Society and our formal and informal evidence has shown us that coroners are amongst the greatest proponents of change.*
>
> *There are 3 problems with death certification –*
>
> *the difference in certification procedures for burial and cremation is anomalous;*
>
> *the complexity in the current death certification system and lack of sufficient training for medical practitioners are partially responsible for the very high rate of referral of deaths to coroners;*
>
> *the problem of how the Shipman-style abuse of the system might be prevented remains unsolved*
>
> *There is no systematic and co-ordinated response to the serious issues raised in the 3rd Shipman Report and in the Luce review because neither the DCA nor the DoH is taking responsibility for death certification ... if anything is being done at all, it amounts to tinkering at the edges ...*
>
> *We strongly recommend that the Government revise its policy in order to address reform of death certification in tandem with reform of the coronial system ...*

They also made some comments about national versus local service, especially with regard to remote areas:

> *The Government should address the problems of under-resourcing in the existing coronial system ... reform the structure of the coronial system by creating a national service with centralised and adequate funding so that all coroners are able to work to the same high standards.*
>
> *We recommend that the Government change its policy on medical support for coroners and return to the 2004 Home Office proposals, with adequate resources being made available to coroners.*
>
> *We strongly recommend that the Government acknowledges the status and importance of coroners' officers ...*
>
> *The complex reforms contained in the Bill will require carefully planned transitional arrangements and serious efforts to ensure that the skills and experience are not lost to the new system."*

Such were some of the conclusions of the Parliamentary Select Committee.

During the early part of 2006 there was keen anticipation that a coroner reform Bill would be included in the Queen's speech in November 2006. When the draft Bill was published in June, there was widespread consternation and dismay. The Select

Committee's criticisms gave rise to hope that the government would amend the draft Bill to take account of the criticisms and shortcomings in time for the Queen's speech. In the event the necessary work could not be done in time and the Bill missed the Parliamentary timetable for the 2006-2007 session.

The Secretary of State for Health published three documents in February 2007, including her response to the Shipman Inquiry. There are to be changes to the death certification process including a scrutiny by a medical examiner attached to clinical governance teams of the NHS Trusts. So, after all this time, still broad-brush proposals from HMG but no details for us to scrutinise.

Gordon Brown said, soon after he became Prime Minister, that a revised Coroners Bill would be presented to Parliament in the 2007 Queen's speech . Over the summer of 2007 the Ministry of Justice and the Department of Health published draft consultation documents, inviting responses, about death certification and coroner reform, presumably with a view to incorporating the results into the revised Bill. It is a matter of concern that two different government departments are working on the reforms rather than, as recommended by Tom Luce and Dame Janet Smith, that the new system should be within the ambit of a single department.

In the event the 2007 Queen's speech was duly delivered– but in it there was no Coroners Bill mentioned. Instead, the responsible Minister, Bridget Prentice, sent out a letter[x] on 6th November 2007 that included these words:

> *"As you may be aware, the Coroners Reform Bill was not included in today's Queen's speech ... In spite of this, Government commitment to reform remains and we intend to bring the Bill before Parliament as soon as time allows*."

So, no-one knows whether or not there will be a Coroners Bill as promised, much less whether it will be radically different from the disappointing and heavily-criticised Bill published in June 2006. If a Bill is introduced but is not a substantial improvement on the previous draft Bill, a golden opportunity for reform will indeed have been wasted. If reform is to take place it will require a much more substantial injection of resources, both human and monetary, than government has, to date, been prepared to acknowledge.

The Coroners Society of England and Wales responded to the Ministerial statement by recording disappointment at the missed opportunity to enable coroners to deal with today's demands. The Society pointed out that in recent years coroners' services have become blighted because of the uncertainty. They highlighted several areas that are in need of reform.

- ability to transfer cases to other jurisdictions
- ability to move bodies for post-mortem examinations (esp. paediatric)
- facility to hear cases anywhere (not just in own district)

Will there ever be reform and if so how radical will it be? The fate of the three twentieth century reports of Mackenzie, Chalmers, Wright and Brodrick, do not encourage optimism! It is almost 5 years since Tom Luce and Dame Janet Smith reported. HMG has found their proposals too costly. The government cannot even now agree to implement their own reform proposals that they presented in their 2004 Position Paper.

How long will it be before a general election? And how far up the list of political imperatives will be the perceived need for Coroners Reform? One is left with the overwhelming impression that the government lacks serious commitment to radical change on grounds of cost – they want change on the cheap.

Sadly, there are no votes in the bereaved.

The fear is that Tom Luce and Dame Janet Smith's Reports may yet share the fate of the 3 major reports of the previous century. I hope that I am proved wrong and that we may yet see proposals for the extensive reform that is so necessary and so long overdue. But, will there ever be reform – and if there is, will it be worth the wait? I wonder.

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[i] Coroners' Committee: Second Report of the Departmental Committee appointed to inquire into the Law Relating to Coroners and Coroners' Inquests, and into the Practice in Coroners' Courts. Cd 5004 [1910]

[ii] Report of the Departmental Committee on Coroners, Cmd 5070 [1936]

[iii] Report of the Committee on Death Certification and Coroners, Cmnd 4810 [1971]

[iv] Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review; Cm 5831 [2003] TSO

[v] The Shipman Inquiry: Third Report. Death Certification and the investigation of deaths by Coroners; Cm 5854 [2003] TSO

[vi] Reforming the Coroner and Death Certification Service: A Position Paper; Cm 6159 [2004] TSO

[vii] Coroners Service Reform Briefing Note [February 2006] DCA Communications

[viii] Coroner Reform: The Government's Draft Bill; Improving death investigation in England and Wales; Cm 6849 [2006] TSO

[ix] Reform of the coroners' system and death certification; House of Commons Constitutional Affairs Committee Eighth Report of Session 2005-06 [1 August 2006] TSO

[x] Ministry of Justice, 6 November 2007; *Message from Bridget Prentice regarding coroner reform*

[xi] Coroners Society of England and Wales: *Response to the Queen's Speech 2007*

ARTICLE

“So, tell me Mr Robertson, what makes you an expert?”: On being a witness at UK Planning Inquiries

Lachlan Robertson MA, B.Sc.(Hons), Dip(UD), MRTPI

Nearly 25 years ago, as a young planner, and after giving evidence at my first Public Inquiry, my advocate, a self taught Council Solicitor with a remarkable resemblance to Colonel Sanders, offered me one of the best pieces of advice I ever received about being a Witness, “Stop trying to be funny, the Planning Inspectors don’t like it”

This advice has been uppermost in my mind ever since, with the result that, year after year, I have usually ignored it. It is, I suppose, a sort of personal defence against tense situations and in spite of the quasi-judicial feel of a planning inquiry, one is not going to be sent down to the cells for contempt. But, Inspectors are human too.

After listening for hours to a local landowner and his witnesses banging on about the quality of the land reclamation, top-soiling and greening of his land in preparation for a pet cemetery, a dead-pan and studiously professional Inspector walked onto the field and said: “As you know gentlemen, I am entirely impartial in this process and no further evidence will be taken during this site visit”. Then, carefully and with theatrical thoroughness, he proceeded to turn over with his foot, every half brick, piece of timber and fibre cement roofing shard he came across as he walked.

According to the Planning Inspectorate statistics, around 23,000 planning appeals are received each year in England, the vast majority of which are heard in informal ways. Only some 850 each year involve a formal Public Inquiry. The likelihood of appellants winning their cases rises from 33% to about 45% when taken to Public Inquiry. Though it is hard to tease out whether this is because planning inquiries are more expensive for appellants and that therefore only the more marginal refusals of planning permission are heard, or whether it is the quality of the testing of the evidence that makes the difference. It means, of course, that the services of advocates and professional witnesses are in steady demand. The latter are drawn from the technical professions, such as highway engineers, architects, ecologists and the like, but the more generic skills of the town planner will also be required.

Such witnesses are of two types. In the vast majority of Public Inquiries there are two protagonists, the local planning authority that has refused planning permission, and the appellant who wishes to develop the land. It is highly likely that the planning witness of the local authority will be the case officer who dealt with the original planning application. They are not always experienced at giving evidence, because they may only rarely become involved in public inquiries, perhaps with years between cases. Some of the larger authorities employ specialist Appeals Officers who more regularly attend inquiries and develop their skills accordingly, but not all will have been given specific professional training in providing expert evidence.

It has also become increasingly popular for local authorities to employ planners from the private planning consultancies to defend their cases. Particularly, Authorities that take the professionalism of their staff seriously would never require a case officer or even their Head of Planning to give evidence contrary to the advice given on the case. It should be remembered that Planning Authorities are elected bodies entitled to decide contrary to the advice they have received. Such Inquiries are a gift to counsel who can have lots of fun with wayward, often politically motivated, decisions!

The steady stream of Public Inquiries offers the private planning consultancies an excellent source of employment; particularly for the small firms that are often locally based. Here reputation is everything, if the business is to thrive and the quality of expert evidence given by such witnesses can be expected to be high. What, however, can a planning expert be expected to be expert in? They may not know the innermost machinations of a Traffic Model, nor can they be expected to wax lyrical on the aesthetic qualities of that particular modern office, nor are they likely to know much about the feeding habits of bats.

Such witnesses know how the increasingly complex planning legislation operates. They know how planning policy from national government to local planning interweaves to inform, either well or badly, the decision that has been taken. and how to interpret and weigh the myriad of technical considerations that tell whether or not a modern development will perform well or badly in the environment. The involvement of Local Authority planning witnesses in the process has five main landmarks. As we have noted, the witness is likely to be the case officer involved and will have been instrumental in the decision reached and they will be the principal author of the required Statement of Case. Although the Statement of Case is rarely full evidence, it sets out why the Authority made the decision. It is only a matter of weeks from the start of the

Appeal against the Authority's decision to the mandatory submission of the Statement of Case. The Statement is, therefore, often quickly drawn up without the guiding hand of the Council's advocate and occasionally it is in need of "repair" during the Planning Inquiry. The Inquiry Inspectors will often provide direct support to the advocate as third parties who enter into the fray on the day.

The role of the expert witness from the point of view of the appellant is slightly different. Such witnesses perform a more "purist" service, their main role being the creation of appropriate Planning evidence and its presentation. If they are not entirely divorced from the rest of the appellants' case, they are at least semi-detached from it and take on a more recognisably "expert" role than their Local Authority opposite number.

" In my mind, the ghost of "Colonel Sanders" wagged his finger "

At another level, however, a good Planning Witness of either kind will have something extra, such as an ability to recognise patterns in the complex inter-relationships between environment, people, vested interests, national aspirations, economic health and human nature. They believe that final objective is not to win a case, but rather to make a place better by virtue of a proper professional analysis. To that end, it is not unknown for two planners to come together during the early days of the hearing. They may be able to facilitate an agreement such that planning permission can be pursued without recourse to arbitration. Thus, the end result is avoidance of the need to be a Planning Witness at an Inquiry at all! Fortunately, for those who make a living from being a witness, such meetings are rare. I can offer the following example. It is, one might say, my equivalent to Rumpole's "Penge Bungalow Murders"; a case that might be recounted over a glass of Pomeroy's.

In the past, this particularly dishevelled industrial site on the banks of a beautiful river within a spectacular wooded valley had a contentious and fractious planning history. A previous Planning Inquiry had been dogged by hundreds of third party objectors, who were often able to field their own witnesses to the scheme offering often irrelevant or misjudged evidence. Even the professionals had not managed to get their evidence across properly. The result was that, though the appellant failed to obtain planning permission, this was only on a minor consideration of the industrial pollution on the site, rather than what many saw as more fundamental planning concerns. It was as if the Penge murderer had instead been convicted of a traffic offence.

With the appellant once more putting forward a similar scheme, and the prospect of another Planning Inquiry, both parties fielded their potential technical and planning witnesses at an early stage. Therefore, many of the basic evidence about traffic conditions was settled, even if the parties were not entirely in agreement. The relevant planning policy position could be discussed at an early stage and everyone could come to an agreement as to what was important, even though its weight remained in dispute. The land contamination experts could get together to agree completely what the problem was and how it was to be solved, and so on.

One of the most important preliminary activities was, however, freely given co-operation between the appellant's and the local authority's potential witnesses. This resulted in the provision of detailed information, often of a complex nature, in a way that could, more or less, be explained to the layperson. The local authority held an intensive, workshop-style meeting with the main third-party protagonists to explain the proposals. Though this did not result in fewer objections, it meant that there was a greater understanding of the important issues. At the Public Inquiry itself, this was translated into a greater focus and therefore, in my view, what might have been a three week Inquiry lasted only two weeks.

This illustrates how Planners and their associated technical experts, should never be seen as isolated experts parachuted into an issue to give their opinion and then leave it all behind. They used their expertise from the beginning to shape the issue, find solutions and then focus on the true areas of disagreement. The giving of evidence, however rigorous the testing of it must be, became only a small part of that process. You may well ask, "But what about the role of humour?"

I was once asked the question during the Inquiry that affords this article its title. My answer was, "I must be an expert witness… I'm sitting here and you're the one asking me questions?" In my mind, the ghost of "Colonel Sanders" wagged his finger.

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Casenotes

Camilla Macpherson and David Norman

Adducing statistical evidence

Jennifer Arden v Anthony Malcom [2007] EWHC 404 (QB)

In a recent appeal case, the High Court has provided helpful guidance on the method by which statistical evidence should be put before the court in situations where the parties have jointly appointed medical experts. In issue was the quantification of damages in a personal injury case in which liability had already been agreed.

Following a road traffic accident, the defendant had agreed to pay damages to the claimant, who had been left with severe injuries. Both parties had instructed medical experts, who had agreed, in a joint statement, that the claimant required ongoing care. The statement also noted that the claimant had suffered excessive weight gain following the accident, but concluded: "We believe that her life expectancy is normal".

During the case management conference, the defendant had attempted to adduce a report by a statistical expert (who had not seen the claimant). The report indicated that the claimant would be likely to experience a reduced life expectancy. This would have meant a reduction in damages because a shorter period would be required for care. The judge at first instance refused to allow the statistical evidence on several grounds, including that the matter had been addressed by the medical experts in their joint statement (they had said that there was no effect on life expectancy). The defendant appealed.

Since, by the time of the appeal, both parties agreed in principle that it was not too late to adduce additional expert evidence, the question before the court was therefore the method by which the statistical evidence should be brought forward. The judge framed the question as: "Should the court give permission to adduce a report by [the defendant's statistician] at this stage, or should the statistical material to which he refers first be raised in the form of a question or directions to the existing experts?"

In the event, the judge held that "the normal and primary route" for adducing statistical evidence that goes to life expectancy should be through the clinician experts. This follows the judgment in Royal Victoria Hospital v B (A Child) [2002] EWCA Civ 348, where it was held that: "it would be wrong to decide the expectation of life purely by reference to… statistics." Consequently, the statistician's report should not be adduced; rather the existing experts should be asked to consider the issue.

This case indicates that while a court might allow the use of statistical evidence in determining issues of life expectancy, there is a strong preference for such statistics to be presented by clinicians together with other medical evidence. A separate report from a statistical expert should only be required if there is a disagreement between the existing experts on a matter of statistical evidence.

Discussions with single joint experts

Childs v Vernon; Vernon v Butler [2007] EWCA Civ 305

The Court of Appeal has provided a useful reminder of the principles governing conferences with single joint experts. The court held that it was "wholly improper" for one party to have a discussion with a joint expert in the absence of the other party. The court did concede that it might be possible if the absent party gave its consent, but emphasised that this consent must be "fully informed". In the court's view, an unrepresented party (as was the case here) could not give fully informed consent without knowing his rights.

This case concerned a three-way boundary dispute. A property owner was in dispute with both his neighbours regarding the correct location of the boundary lines for his property.

The trial judge directed the parties to use a surveyor as a single joint expert. However, the expert's remit was not set out in the directions, and the parties failed to agree joint instructions. The expert reviewed the evidence provided to him, including Land Registry documents, and then produced a report setting out what he considered to be an "equitable arrangement" for the boundary.

The property owner appealed. One of the grounds for the appeal was that, in the course of the court hearing, the expert had taken part in a conference with the other parties from which the property owner was excluded and which materially affected the evidence given by the expert.

Although on the evidence it was difficult to ascertain what had actually taken place and, because the trial judge had relied on factual evidence rather than the expert's report when coming to his decision the issue did not have to be decided, the Court of Appeal was critical of the way in which the expert had been instructed, stating that the original court should have taken responsibility for defining his role and remit. It was considered also that the expert had gone "beyond his brief" in setting out where he thought the boundary ought equitably to be. The court also made it clear that it was improper for a joint expert to have any discussion with one party to the exclusion of another, unless the other party gave a fully informed consent.

Giving reasons for expert determinations

Halifax Life Ltd v Equitable Life Assurance Society [2007] EWHC 503 (Comm)

This case is of interest to any expert witnesses who also act in expert determinations. It has been held that the court has the power to order an expert acting as an umpire between parties in dispute to give further reasons for his expert determination.

Two insurance companies, H and E, entered into an agreement. A specific dispute arose between the parties. The agreement provided that, in default of agreement on this point between the parties, a binding determination was to be made by an expert who would be appointed as Umpire (not as arbitrator).

The parties agreed the Umpire's terms of reference, which included an obligation on the Umpire to include reasons with his decision. It was also agreed that, unless it contained a manifest error, the Umpire's decision would be binding on the parties.

Numerous hearings and meetings between the Umpire and the parties ensued. The Umpire then wrote to the parties with a draft of his decision. H responded to the effect that the Umpire had failed to set out reasons in accordance with his terms of reference and asked him to provide further reasons. The Umpire then wrote to the parties with his final decision. Although the Umpire had made amendments to the decision to provide further explanation, H nevertheless brought a claim seeking a declaration that the Umpire's decision was not final and binding on the parties. The stated grounds, among others, were that the Umpire had materially departed from the agreed terms of reference by failing to provide adequate reasons for his decision. E submitted that a failure to give adequate reasons did not mean that the decision was not binding.

The court held that, although there was no statutory power for it to intervene in the context of an expert determination (unlike in an arbitration), it nonetheless had the power to direct an Umpire (or any expert) to state (further) reasons for his decision. The court held that this power arose: (a) by way of remedy under the relevant contractual provisions, in this case the agreement between H and E and the terms of reference which required the Umpire to provide, with his decision, the reasons for that decision; and (b) under the inherent jurisdiction of the court. In addition, the court had the power under its case-management powers.

On the facts of this case, the court held that the Umpire was required to provide reasons which were "intelligible and adequate in the circumstances."

The court found that although reasons had been provided, they were not adequate. Accordingly, the Umpire was directed to state further reasons for his decision, following which, if H was still not satisfied, H was granted permission to restore the matter for a further hearing.

This case is of interest because it is the first time that the question of what a decision maker must do when required to provide reasons has been considered in relation to an expert making an expert determination. The ruling in this case brings expert determination into line with the principles governing decisions by judges, tribunals and arbitrators and is significant for any experts involved in expert determinations.

ARTICLE

WHAT I DO - The expert in clinical microbiology

Professor S J Eykyn

First, I must declare my hand - I do not belong to the EWI or to any other "expert" societies - I joined the EWI at its foundation but only for a year. Their aims are laudable and they offer an excellent service but it is not for me.

I was first instructed as a microbiology expert while still working as a consultant at St Thomas' Hospital, running the clinical infection service and doing much of the teaching. It was something of a baptism by fire as the case, which involved gentamicin toxicity, went to Court and, to make matters worse, it was a split trial. After this I was asked to do many more cases and, although I did the work in the evenings and at weekends, I found most of it very interesting and I learned a huge amount from other experts, particularly those in other specialities than microbiology and from barristers. After doing this for about five years I retired from St Thomas' but continued to teach on the course for the membership of the Royal College of Surgeons (MRCS). I had a huge backlog of medicolegal cases and thought that when I finally got through them the requests would dry up but this did not happen. Indeed, not only have instructions continued, but they have increased. In marked contrast to my NHS life, I conclude that I am instructed because I am a competent expert. I found it profoundly depressing that in the NHS it does not matter if you are incompetent or indeed absent, the remuneration is the same. I have been instructed by almost 300 different solicitors and my claimant/defendant split is about 60/40 but this varies from year to year. I have been a single joint expert, involved as an expert in a GMC and, later Home Office hearing and two murder cases. Speaking at medicolegal meetings resulted in an increase in enquiries; I suspect that solicitors write down my name as "useful".

Assessing the medical documents, and there may be many lever arch files, takes several hours and I make it an absolute rule to read every word on every page. Often important nuggets of information are hidden in a nursing care plan or other notes. On the day I can no longer be bothered to do this, I will stop at once. Then there is the report to prepare and I find that most take at least a day to write. In general medicolegal work is much more exacting than being a clinical microbiologist in the NHS.

My working life has been spent dealing with the problems of infection in patients. Though based in the laboratory, I have accumulated a mass of experience relevant to medicolegal work. Throughout my career I have kept detailed records of patients with a large variety of infections and all cases of bacteraemia and meningitis. These data were computerised many years ago and the practice continues to this day by my successors. Now it is extremely easy to keep abreast of new developments in microbiology with PubMed maintained by the US National Library of Medicine and the like, and reviews such as the expensive but excellent American UpToDate publication. Previously, I just kept a huge, and carefully catalogued, mass of literature references.

Administrative lessons learnt

Fees and all that

My career has been working for the NHS and a Medical School and, although I often advised colleagues on infections in their private patients, I never submitted accounts for my services. One cardiac surgeon, whose sternal and other infections I sorted out, used occasionally to give me lunch at the Garrick. This may sound incredibly naive and meant that when I entered the real world of writing expert reports and attending conferences with counsel, I had no idea that quite often the solicitors involved would not settle my accounts for many months. Had it not been for the excellent advice of a streetwise neurosurgeon, I would not have known how to address this problem - I do now! The question of appropriate fees is also interesting; bodies such as the MDU and BMA provide guidelines but I find it easier to check with other experts and I have received unfailingly helpful guidance from orthopaedic surgeons. As my fees have never been queried, my conclusion is that I am not at the greedy end of the spectrum.

Occasionally I am asked to provide an "overview" of a case for which only the "relevant pages" of the documents are sent. This might be termed a "cheap" overview, for that is the intention, and the case will usually be one with a conditional fee agreement (CFA). Whilst in such cases, I am reluctantly prepared to wait for payment, I never accept what I refer to as "filleted" documents.

As of May 2007 medicolegal experts have had to register for VAT, something I had tried not to think about. My husband, who was a chairman of the VAT tribunal, constantly nagged me but even though HM Customs and Excise have sent me several impenetrable brochures on the subject, it is quite beyond me to fill in the required forms. It is one more thing to do, so I turned to my accountant.

Availability

As a consultant, I never had a secretary but fortunately, by courtesy of the NHS, I became computer literate some years ago. Thus, I am self-sufficient and now employ no one save for the intermittent and expensive services of a computer geek.

Thanks to mobile phones and the ubiquitous e-mail, it is quite possible to keep in touch. Most recently, while living in a tent at 14,500ft on a horse-riding holiday in Peru, I was telephoned by a solicitor at 5am local time!

Recommending other experts

Solicitors sometimes asked me to recommend experts, and not only microbiology experts. To my cost, I have learned never to recommend anyone without having personally seen at least one of their medicolegal reports; it is not a good idea to recommend people who are very good doctors and nice people or even one's friends. I keep a list of all the "good" experts I encounter in a variety of specialities, not only microbiology, and also of those to avoid. Some solicitors have even asked which barristers they should to go to! Maybe I have a future as some sort of agent.

Trials

Legal colleagues tell me that only about 1% of medicolegal cases actually go to Court. It seems to me an expensive lottery and best avoided. This means that I have only been in Court on about eight occasions. However, trials are always booked and I am already getting bookings for 2009, for which I do not even have a diary. Much of 2008 is back to back trials, some running concurrently. I used to avoid trial dates when organising holidays but I now adopt a much more cavalier approach. One rarely is told until rather late in the day that a trial is going ahead and sometimes one is not even informed that it will not take place. Some years ago I went to the Court in Cardiff, only to find the Court door locked and a clerk told me that the case had settled; no one had bothered to let me know.

Range of cases

There is hardly a clinical specialty on which microbiology does not impinge, including general practice. I have been involved with orthopaedic surgeons, plastic surgeons, vascular surgeons, neurosurgeons, colorectal surgeons, general surgeons - do any of these remain? - ENT surgeons, ophthalmologists, gynaecologists and obstetricians and physicians of all varieties as well as paediatricians and neonatologists.

I am not enamoured of the personal injury lawyers and once made a fatal error of speaking at one of their meetings, which resulted in a rash of enquiries. Occasionally, however, they provide some interesting work, as when a client who has usually had some sort of major accident, appears to have deteriorated as a result of a sojourn in hospital.

The last few years have seen me instructed by solicitors who act for people who travel to sunny climes and get gastroenteritis. I used to think that diarrhoea was part of travel - travel broadens the mind but loosens the bowels - but now they sue the travel companies and sometimes in large numbers; a recent case involved 78 people who had an unfortunate experience in the Dominican Republic. Never in my wildest dreams did I imagine that last year I would spend a whole day in Court in Birmingham discussing Salmonella enteritidis in scrambled eggs served in a dodgy hotel in Corfu!

Some common microbiological themes

I have lost count of the huge number of cases of infection with Methicillin-resistant Staphylococcus aureus (MRSA) I have done, and I turn down many, especially those in which the solicitor's letter refers to the MRSA virus! The public, educated by the media, tend to think that if they acquire MRSA in hospital, compensation is virtually automatic. This is, of course, far from the case. Notwithstanding the MRSA case of an infected hip replacement that succeeded on the basis of contravention of the COSHH regulations (Kitty Cope v Bro Borgannwg NHS Trust), it is actually difficult to prove that the acquisition, as opposed to the management, of an MRSA infection has been negligent; in very few of the cases that I have done has this been the case. The most glaring example of negligent acquisition is when a patient is screened for MRSA before admission to hospital, is found positive, no none notices and an elective operation goes ahead with the inevitable consequences. When assessing the acquisition of MRSA, it is vital to obtain data on numbers of MRSA on the relevant ward(s) at the relevant time and also to obtain the Minutes of the Infection Control Committee meetings. The latter usually provide useful information - most recently an acknowledgement of a bed occupancy of over 100%! Post-operative MRSA infections were until recently the prerogative of NHS hospitals but now the private sector is not immune.

Methicillin-sensitive Staphylococcus aureus (MSSA)

There is a common misapprehension amongst some doctors that MSSA are much more benign microbes than MRSA. Whilst many strains of MRSA are undoubtedly very aggressive bacteria, MSSA can also be virulent pathogens and they cause numerous community and hospital-acquired infections. The essential difference, when considering acquisition, is that some 25-30% of normal healthy people in the community are carriers of MSSA, community carriage of MRSA is most unusual; it is still a hospital microbe. I was interested to note that many newspapers who recently reported the large award to Lesley Ash, referred to the MSSA that caused the infection as a variant of MRSA!

Clostridium difficile

Not until last year was I involved with a case of Clostridium difficile infection. Undoubtedly there has been a huge increase in such cases, some fatal, and a major factor has been the arrival of the hypervirulent O27 strain which can cause devastatingly severe infection. I have even had two cases of hapless patients who acquired not only C. difficile but MRSA as well.

EWI

The Expert Witness Institute *Events 2008*

EXPERT REPORT WRITING FOR COURT

Tuesday 18th June 2008
Holborn, London
£230

T: 0870 366 6367
W: www.ewi.org.uk
E: info@ewi.org.uk

This workshop has been designed for experts involved in preparing and writing reports and for those professionals wishing to develop their written com munication skills.

The workshop - core skills

This one-day workshop will combine presentations on clear communication, writing techniques and editing strategies, with group exercises in which delegates consider report extracts. There will also be individual advice for delegates, writing exercises and discussion time to clarify difficult areas.

The following subject areas will be included:

- CPR rules
- written communication
- principles of report structure
- perils and pitfalls - examining extracts from reports
- writing effective English - accuracy, brevity and clarity
- report analysis

The benefits

- understanding the legal rules
- how to prepare and write reports
- how to improve content and tone
- how to analyse reports for strengths and weaknesses

The training will be interactive with plenty of opportunities for delegates to participate. We aim to achieve a relaxed atmosphere in the training room to help delegates to participate fully in the day.

in association with PROFESSIONAL SOLUTIONS TRAINING & CONSULTANCY

New CPD for Expert Witnesses - via podcasts

Penny Cooper, Governor of EWI and Associate Dean, The City Law School, City University

A few weeks ago, walking on a beach with my nine-year-old son, we started talking about modern inventions and how some of these stand the test of time while others do not. I asked him if he had ever heard of a “Walkman” and it was not really a surprise when he said that he had not. Though he may not know about portable cassette players and cassettes, he certainly knows about “ipods” and “podcasts” – the very modern way of taking sounds with you wherever you go. Now podcasts are also the latest way for expert witnesses to stay up-to-date and gain valuable practise tips. City University’s City Law School has teamed up with EWI to launch 'lawinapod', a series of free CPD podcasts for expert witnesses. This is the first time that CPD for expert witnesses in this country has been made available via podcast. Some of us born before about 1990 may be asking “What exactly is a podcast?”

What does it all mean and how easy is it?

Podcasts are usually audio broadcasts, though some are videos, and these broadcasts are available via the internet to anyone who subscribes. For example, if you love the goings on at Ambridge, you need never miss another episode if you subscribe to 'The Archers' podcast. BBC Radio is now podcasting many of its shows.

Once subscribed to a particular podcast, your computer can automatically search for and download a new episode/s each time you are logged onto the internet. The downloaded podcasts can be played from your computer or you can transfer the podcast to a portable player, often referred to as an MP3 player. MP3 is the technical name for the format of the podcasts and ipod is the brand name given by Apple to the MP3 player it launched in 2001. The process of transferring your chosen podcasts onto your MP3 player is very straight forward.

Portable MP3 players are often no bigger than a packet of chewing gum and even basic models can hold thousands of hours worth of podcasts and music. In the last couple of years prices of players have come down and even brand name MP3 players can be purchased for under £50, though the higher specification models, especially those that play videos, are more expensive. Check with your accountant – the cost of your MP3 player may even be tax deductible if you use it for your work.

EWI and The City Law School first to launch CPD podcasting for experts

Learning via podcast is not new. Many universities, including the likes of Yale and Oxford, are recording lectures and making them available for students after the event via podcast. CPD podcasts especially for expert witnesses are new and EWI is the first expert witness membership body to bring CPD podcasts to its members.

EWI has teamed up with The City Law School in Gray’s Inn which, as it happens, is based just a few doors away from EWI offices. The podcasts are created by The City Law School’s CPD department.

As Director of City Law School’s CPD department and a barrister, I have long been involved in expert witness training and the study of expert evidence. Last year I carried out research into expert witness training and a major survey of expert witnesses. It became clear that expert witnesses were looking for something new in the way of CPD training. By creating these podcasts for expert witnesses and making them available with the help of EWI, I aim to do three things: to make CPD more accessible to expert witnesses, to draw on the expertise of lawyers and experts for training purposes, and to cover topics that expert witnesses say are not widely covered but which are of great practical significance.

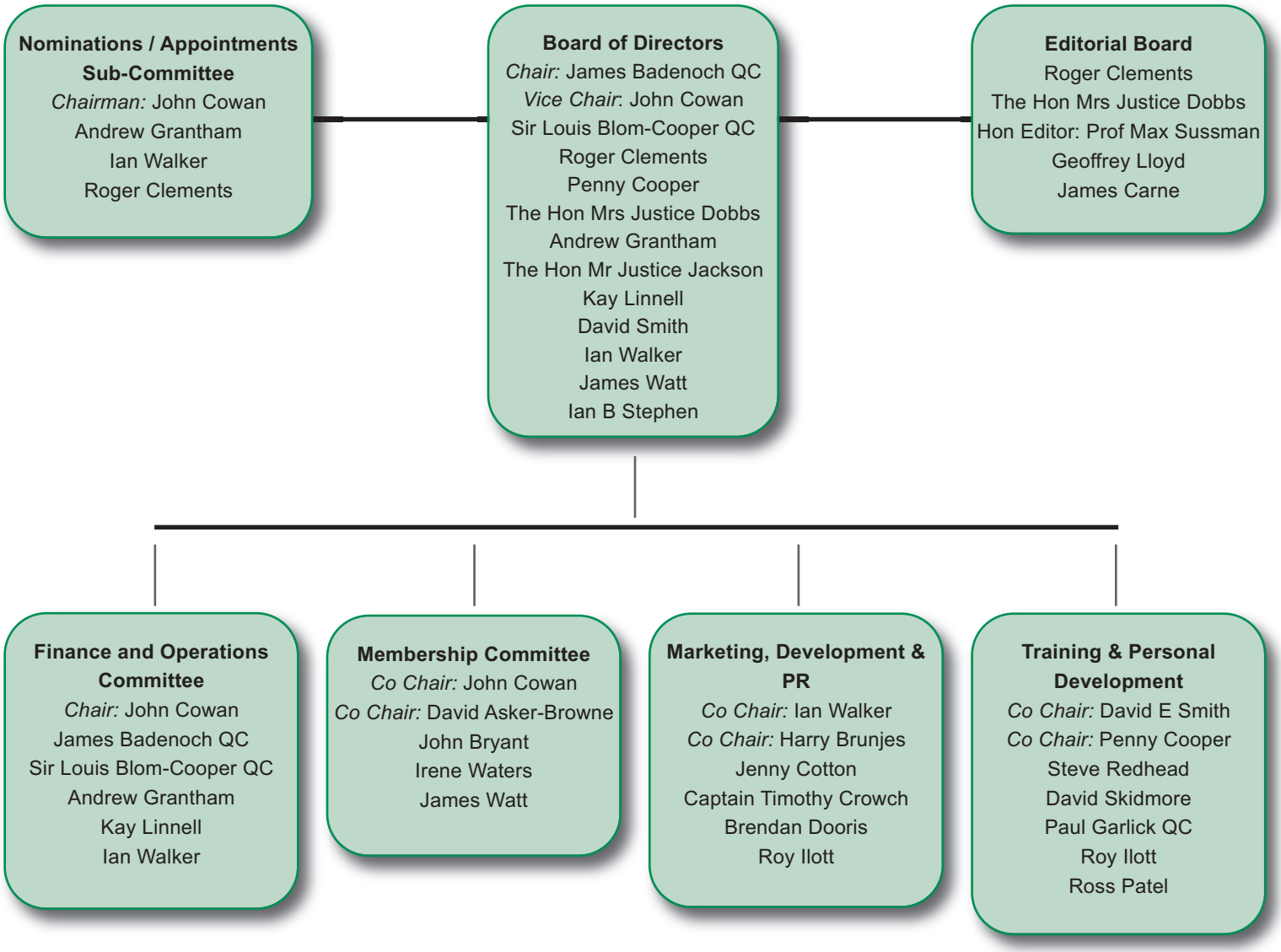
What you will learn

Each lawinapod program is about 25 minutes in length and looks at expert witness work and expert evidence. Each includes interviews with leading expert witnesses, judges, lawyers and professors. The programs are packed with recent news on current topics and practical advice. For example, how to keep your data secure when it is on your PC/laptop or when you are sending it out to solicitors in reports. The series will look at how in the last ten years the role of the expert has changed and the biggest challenges expert witnesses face today.

Will podcasting stand the test of time? Will MP3 players be gathering dust in twenty years, like our old friends the audio cassettes? We don’t know the answers but we do know that podcasts are hugely popular - and for good reason. Now you can stay up-to-date and get essential tips for expert witnesses by subscribing to lawinapod. You can listen almost anywhere: on a train, in the garden, on the beach - just don’t try it in court. The City Law School’s “lawinapod” podcasts for expert witnesses will be available from April 2008 and you can pre register via City University’s web site. Go to: http://www.city.ac.uk/law/cpd/lawinapod.html.

EWI Board and Committee structure

The functions and responsibilities of the main committees are set out below.



The Finance and Operation Committee reports to the Board of Directors (Governors) of the Institute. It oversees and reviews the finances and operations of the Institute, its committees and its secretariat.

The Membership Committee, which reports to the Board of Directors (Governors) of the Institute, sets standards and drafts regulations.

It determines the necessary standards required of applicants to the various grades of membership and how their attainment should be judged. The Committee also considers applications for membership and advises the Board of who, at various grades of membership, should be admitted.

The Marketing, Development and Public Relations Committee promotes the value of membership to experts and professional bodies and prepares marketing and publicity strategies to promote the purposes of the Institute and its members.

The Training and Personal Development Committee devises the training strategy and annual training programme for the personal development of the members of the Institute and the wider community of experts.

It develops closer working relationships with other institutes and conference organisations with the object of organising joint events. The Committee also develops courses to take account of changes in the law and its procedures.

BENEFITS OF MEMBERSHIP

- **Designatory Letters:** Members are entitled to use the designatory letters MEWI to indicate that they have met the technical, legal and quality standards for criteria for membership.
- **Representation:** The EWI makes representations, on behalf of experts, to Government and to professional bodies and associations wherever appropriate. Representations were made to the Lord Chancellor's Department in response to the Civil Procedure Rules Committee and the Code of Guidance on Expert Evidence. The Institute is represented on the Experts Committee of the Civil Justice Council.
- **Helpline:** Free and unlimited use of the EWI Helpline, offering support and advice to expert witnesses and solicitors Expert Referral Service: Free inclusion for corporate, individual and provisional members. Our Expert Referral Service, a continuously growing service, is used primarily by solicitors and others seeking experts to instruct.
- **Website:** Up-to-the-minute access to all the important expert witness documents, a Model Form of Expert's Report and Terms and Conditions of Engagement which experts can use when being instructed by solicitors. Information about forthcoming events, details on membership and the latest EWI news.
- **Advertise your services on the EWI website:** There is also the option for members to advertise their services on the EWI website. The EWI website's hit rate continues to grow and many visitors to the site are solicitors looking to instruct experts.
- **Training and Education:** There is an important role for the EWI to play in ensuring that the experts, who are recognised by the court under the new rules are competent and fully cognisant of their responsibilities.
- EWI regularly runs courses on 'Law for Experts' and seminars are held throughout the year on topical issues. The EWI Annual Conference is an opportunity for experts to discuss contemporaneous issues and meet with experts from many disciplines. Joint conferences with other leading organisations are held regularly. Members enjoy discounts to all events.
- Our events qualify for Individual CPD/CPE requirements with the Royal Colleges, the Bar Council, The Law Society and a range of other professional bodies. External course providers offer EWI members discount for expert and personal skills courses.
- **EWI Publications:** The EWI Newsletter, issued quarterly, is free to all members, is it contains the latest case notes, articles of interest designed to make sure experts have access to the most up-to-date information.
- Professional Indemnity Insurance Package: The EWI PI package for individual members provides £1million cover for all expert witness work at a cost of £100 per annum plus £5.00 IPT.
- **Discounts on External Publications**: "Experts in the Civil Courts" under the editorship of Sir Louis Blom-Cooper QC, published by Oxford University Press for EWI. It is expected to become the standard work on the subject. The book is now available to EWI members at a special discount of 25%.
- **Certification:** All members are issued with a certificate as proof of membership
- **Mentoring:** all Provisional Members are assigned a mentor from one of the Fellows of the Institute, to assist them in gaining full membership.

OTHER BENEFITS

- **Discounted Hotel Accommodation**: The EWI has organised discount up to 45% per night in 10 different hotels across London with the Grange Hotel Group. Best Western hotels are offering members a discount of 20% in their hotels UK wide. For booking forms for these offers please contact the office.
- **Home Insurance:** comprehensive packages
- **Stationery and Printer Cartridges:** Members receive discount from suppliers
- **Client Lunch in the Gray's Inn:** The EWI has organised for members and their clients to be able to dine in the historic Gray's Inn barristers' dining room. Please contact the office to book your lunch.
- **Members websites:** shortly to be introduced individual members websites, continuously updated, containing value information for clients and those wishing to instruct the individual member.
- **New Benefits for members:** The EWI will be adding additional benefits of membership as they are negotiated, our new website will give details www.ewi.org.uk

New Practice Direction for Experts in Family Proceedings Relating to Children

In July 2007 The Rt. Hon. Sir Mark Potter, President of the Family Division, spoke about the reasons for the introduction of The Public Law Outline (PLO), a new case management protocol for child care proceedings. He said “We have to recognise that the number and complexity of child care cases are increasing in a way that is straining resources to the limit.” The new system of case management has been trialled in ten pilot areas. The PLO is designed to improve the way in which child care proceedings are handled by local authorities, advocates, CAFCASS and the courts.

From 1 April 2008 the PLO will be rolled out nationally. To coincide with this, on the same date, the new Practice Direction for Experts in Family Proceedings Relating to Children will come into force. Guidance for experts can be found at http://www.hmcourts-service.gov.uk/cms/files/Experts-PD-flagB-final-version-14-01-08.pdf

APPOINTMENTS

David Leckie,

Partner Maclay Murray & Spens LLP

Solicitor Advocate specialising in commercial litigation, with particular expertise in regulatory law, including health and safety and environmental law. David qualified in Scotland in 1987 and was called to the English Bar in 1994. Based in London, he covers a wide range of commercial litigation in both the English and Scottish jurisdictions, as well as international arbitrations. He lectures part-time in the Post Graduate Diploma in Health & Safety at Heriot Watt University and has co-authored The Human Rights Act 1998 Explained. He is a contributor to Green's Employment Law, Tolleys Health & Safety and Butterworth's Corporate Liability.

Ian B. M. Stephen

An Independent Consultant Orthopaedic Foot and Ankle Surgeon at the Spencer Wing of the Queen Elizabeth The Queen Mother Hospital, Margate. He is a member of Private Practice Medical Advisory Committee and Past President of the Orthopaedic Section, Royal Society of Medicine. Ian is also a member of the History Section, Royal Society of Medicine and he is Chairman Elect, Academic Board, Royal Society of Medicine. He is a member of the Cases Committee, Medical Protection Society and also Archivist, British Orthopaedic Association. Amongst his special interests Ian Stephen counts, foot and ankle surgery, the surgery of rheumatoid arthritis, personal injury and medical negligence litigation and medical history.

WHAT'S NEXT FOR EXPERT OPINION

Thursday 02nd October 2008
Church House, London

The Expert Witness Institute Conference 2008

The principal theme is the development of the market for expert opinion and the pitfalls and rewards of the work our members do. It will cover many crucial areas, and will serve to counteract the misunderstanding and ignorance of the nature of specialised opinion evidence, and of the role of the expert witness, which is so often displayed by the media, and also sometimes by instructing solicitors.

CONFIRMED SPEAKERS

Dr Andrew Johns
Lord Owen
Joshua Rozenberg
Jacqueline Storey
James Badenoch

Events

May

Personal Skills for giving evidence in Court
08th May - Evening, London

AGM & Sir Michael Davies Lecture
by Andrew Rennison, Forensic Science Regulator
"Forensic science regulation; the past, the present and the future"
20th May - Evening, London

Challenging forensic evidence
TBC, London

June

Getting things done fast in an accelerating world
4th - Half day, London

Expert Report Writing for Court
18th - Full Day, London

September

Working with Medico-Legal Agencies
TBC, London

Law for Experts
TBC, London

October

Medico-Legal Report Writing
7th - Full day, London

Advanced Medico-legal Report Writing
8th - Full day, London

Managing and developing your practice
TBC - Half day, London

November

Communication & active listening skills for experts
12th - Evening, London

Presentations to Solicitors (experts give medico-legal presentations to solicitors)
TBC, November

Please contact us for further information: **0870 366 6367**