

Sir Michael Davies



The death on 5 September 2006 of Sir Michael Davies, the founding Chairman of the Expert Witness Institute, has been widely mourned by those concerned with the provision of effective expert evidence in the courts. Happily, Sir Michael was able to attend the Tenth Anniversary Dinner held in London in June. Lord Justice Jacob, himself a founding Governor of the Institute, was a speaker at the dinner and elsewhere in this number of the Newsletter we feature the remarks he made about Sir Michael on that occasion.



Contents

Sir Michael Davies	1
10 th Anniversary Celebrations	2
New Appointments	3
Liability for VAT	4
News and Views	5
Schedule of Events	6
Correct Advice	7
Expert at being Expert	8
Fault lines remain after Meadow	9
Membership Benefit Update	10
Case Notes	11

Sir Michael Davies

An appreciation by the Rt. Hon Sir Robin Jacob

In June this year EWI celebrated its 10th birthday with a dinner at which I had the honour of making the speech proposing its health. I was fortunate enough to be seated next to Michael Davies. He was unwell but mentally as lively and chirpy as ever. He had made an enormous effort to get up to London – and faced a three hour trip home. He came because he was proud of what he had done for EWI. And rightly so. His obituary in *The Daily Telegraph* does not even mention EWI or his part in its creation. He would have said that was typical of journalists – missing the most important point.

Indeed, the foundation of EWI as a non-profit making, independent body to educate and represent those who give expert evidence was an important step towards better justice. It is an achievement of Michael's that will long outlast the more ephemeral interest of his major trials as a judge. EWI would not have existed if Michael, at the behest of Catherine Bond, had not used his immense energy at the age of 74 to create EWI and become its first Chairman. At the dinner I said that none of us would have been there but for "this bloke", pointing at Michael. And that is true.

Once he agreed to help, Michael positively drove the project forward. It was Michael who found and picked if not all at least most of the original Board Members – and he twisted their arms to agree to do the job. It was Michael who found a junior barrister to write the memorandum and articles of association. It was Michael who successfully entered battle with Companies House to persuade them that EWI should be a company limited by guarantee, which was to be a major factor in its later defeat of the Customs' contention that it should be VAT registered and that VAT was payable on members' subscriptions. It was Michael who on an almost daily basis received and sent faxes about EWI business and problems. It was Michael who was present at every important and quite a few less important EWI events. It was Michael who chaired all our meetings - I don't think he missed one. It was Michael who, when the time came for him to give up - he was about 80 at the time - suggested and got Louis Blom-Cooper QC to succeed him. It was all done with energy and humour. We were very, very lucky to have him.

The First Ten Years of the EWI

*An edited and shortened version of the address
Sir Robin Jacob's made at the EWI Tenth Anniversary Dinner*

When I was a new judge, I had a small room up in the chilly attic regions of the Royal Courts of Justice. Nearby was a room in which they housed a couple of retired judges who returned to sit part time. One of these was Michael Davies, who had been there on and off since I arrived. I came to know him. It was a pretty lonely place in the attic corridor and he took me under his wing – providing invaluable advice.

Here is an example. He said "Don't try to understand all the evidence as it comes out." In his words "let it just wash all over you." This turned out to be true – a judge who follows every detail forgets that it is his job to see the wood for the trees. Just let the force be with you – the important bits will come to the surface – and that is what counsel are paid for.

As I say I got to know Michael Davies, to like him and to trust him. One day he came into my room. He said he had a proposal. A thing called the Expert Witness Institute was being formed. It was to be a non-profit making company; independent, educational – openly accountable (he would never have said "transparent"). Would I, he asked, become a Governor? It would not involve much – at the most four short meetings a year.

I trusted him. I said yes. What a roller coaster I joined. In the early days the governors met in offices borrowed from solicitors and other well-wishers. We had no money, no members and no staff. Four short meetings a year turned into rather longer, almost monthly meetings. I am pleased to see that we still have some of that group with us tonight – Michael Renshall, Sue Lloyd, Roger Clements, and of course Michael Davies himself, who brought us all together.

A major driving force from the beginning was Catherine Bond, but when she stood down we struck out for fierce independence as soon as we could – notwithstanding our Treasurer saying it was risky – which it was. Initially, we grew steadily and, after some years, achieved 1000 members. But disappointingly there we have stuck. To be secure, we need 2000 members. I am sure it is doable. We would get there if every member introduced one more. Of course, there is an incentive - it would help to reduce annual subscriptions.

I believe EWI has done lots of good. Standards are up. Experts understand better what is required of them and judges are more alert to the rare bad experts. I believe the way we now use expert witnesses is unique. Our system has much to offer in the way it insists on independence and objectivity in experts.

I admit that I wish there was one British expert witness body rather than several. I hope that one day we will see them combine to produce a dynamic force for good.

Back to being a governor. They work hard, for little thanks or notice, and absolutely no pay. Their efforts bear fruit in the Newsletter, the website – which, by the way, scores an

extraordinary number of hits - basic law courses, evening seminars, and major conferences. EWI's work makes an important contribution to the administration of justice.

It would be wrong to minimise the problems EWI faces. The need to act as a responsible and effective representative body, the problems of discipline – albeit fortunately rare – the introduction of 'continuing professional development' (CPD) and the ongoing struggle to establish membership of EWI as a badge of competence and quality.

I must not omit to mention the Woolf reforms, which have had a valuable impact on expert evidence. The Experts' Declaration alone may be said to have changed the whole approach to expert testimony. And the increasing use of expert meetings to remove and reduce disputed matters has been very effective. The introduction of single joint experts affects – as predicted - mainly small cases but it is an important innovation.

Ten years as a governor of EWI taught me a great deal, about experts, about what they do, how they do it and a great many other things about how to conduct a small but ambitious professional body. I'm very sad to have had to give it up, but other duties call – I'm proud to be the Treasurer of Gray's Inn next year - and my judicial duties take me further from the coalface.

How would I sum up the first 10 years? I believe that EWI has firmly established itself as a significant professional force. It has made a major contribution to the recognition of expert testimony in the British courts. It is something unique in the Common law world and others will follow abroad I am sure.

What of the future?

- (1) We must continue to work for wider membership.
- (2) We must earn and encourage increasing recognition by the authorities. We need to strengthen our links with the academic world, with Europe and globally.
- (3) We must work patiently towards a single representative body which shares our professional beliefs.
- (4) We must participate actively in the continuing debate about the function of experts in our courts and tribunals – and, indeed, their contribution to our society in the wider field.

I ask you to join me in the toast to – The Expert Witness Institute.

Anniversary Conference

A few comments

"... Having an elegant dining room to be seated was much easier than standing and balancing food whilst trying to converse. Seating us at the Fellows table was so much appreciated. Lord Woolf was impressive as ever and we loved his touching tribute to dear Sir Michael. We were delighted to chat with him during break and share fond memories of Sir Michael. All speakers were compelling and

James set his usual fine example of eloquence from the outset to Brigid's brilliant show of Thespian prowess as the finale! We loved it when her erudite adult audience participated like eager children – some, I think, feared she might invite them to repeat voice training on stage! James and Kike joined in the action with vigour. Brigid is a natural comedienne and her act was a good note to end an exemplary conference – befitting

the 'Tenth Anniversary' of an admirable Institute..." Maureen Ward-Gandy & Mike Gandy

"... The conference was excellent!!!..." Gordana Pelevic

"... Yes I did enjoy the conference. I thought it was even better than last year..." Michael Jeffreys

"... It was very well organised. Speakers were well chosen across the field and all had good things to say..." Jenny Cotton

"... My first conference and a very enjoyable one. Well presented and interesting. I learnt a lot. Many thanks..." Mark Penston

Manchester Dinner

*Robert Jewell, FCII, MAE
Chartered Insurance Practitioner*

A balmy summer evening in Manchester, supping aperitifs in the futuristic and peaceful waterfront surroundings of the Northwest's Lowry Museum, - sounds unbelievable doesn't it! As a prospective member I felt the initiative taken to use the 10th anniversary of the establishment of the Institute to make itself better known here by hosting an excellent dinner was very constructive and I welcomed the chance to meet the leadership of the EWI and other members.

Manchester is the major legal centre in the northwest and but a stone's throw from Leeds the important centre for the

northeast. It is absolutely right that the EWI should be better known in the North of England and the evening was a splendid way of making a mark. We were formally welcomed by James Badenoch QC and later well entertained by the remarks of Mr Justice Peter Smith whose handling of the Da Vinci Code trial was still fresh in mind. I enjoyed meeting other guests in such a friendly social atmosphere and look forward to the EWI's next northern dinner for a strengthened membership here.

New Appointments

Editor-in-Chief

Professor Max Sussman

The Governors have asked me to take on the challenging task of Editor-in-Chief of the EWI Newsletter. This is a considerable honour and I have accepted the invitation, though not without a measure of trepidation.

I am a microbiologist with mainly medical interests, a founding member of the Institute and in 2001 was accorded the privilege to be one of the first group of Fellows elected under the 'grandfather' rules.

My objective as Editor will be to develop the Newsletter not only as a vehicle for news but also to as an increasingly valuable resource of information and reference that will be used to by members of the Institute and, in due course, by other experts and members of the legal and related professions. I shall be seeking contributions within and outside the institute but I hope that members of the Institute will also send me contributions, including significant news items and news about themselves and other members. Most types of contributions will, of course, be subject to review. Comments by members, including critical ones, and suggestions for the development of what is in reality their own newsletter will be most welcome.

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Chief Executive

Mrs Janette Gulleford MA FCIS DMS

The Institute has recently announced the appointment of Janette Gulleford to the post of Chief Executive.

The main emphasis of Janette Gulleford's career has been in change management, professional development and training. She has been Technical Director of the Chartered Institute of Management Accountants, Chief Executive of Pump Court Chambers, Director of Administration for a large firm of solicitors and Director of Finance and Administration at the Royal College of Midwives. Janette's management accounting skills were developed during seven years as a management accountant with local authorities and five years working for small companies in the midlands and the north of England. Since 1993 she has been a director of Professional Solutions a training and Consultancy company where she has specialised in making the law more accessible to other professions by way of interactive legal-based, personal and professional training.

Commenting on the appointment, James Badenoch QC, Chairman of the Governors of the Institute said, "We are very fortunate to have the wealth of experience that Janette will bring to the Institute and we look forward to an exciting period of growth, with increased benefits to members and a higher profile for the Institute amongst the professions".

LIABILITY FOR VALUE ADDED TAX AND MEDICAL EXPERT WITNESSES

Dr David Thomas, Barrister-at-Law
Rougemont Chambers, Exeter

As a general principle persons or bodies that provide a service attract a liability in respect of Value Added Tax (VAT). The Sixth VAT Council Directive (77/388/EEC; article 13 (A) (1) (c)) provides that those who provide medical services in the exercise of medical and paramedical professions are exempt. This is also provided for in Value Added Tax Act 1994 (Schedule 9).

The important consideration is in the originating European legislation. The Council Directive states;

“Without prejudice to other Community provisions, member states shall exempt the following under conditions which shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse...

(c) the provision of medical care in the exercise of medical paramedical professions as defined by the member states concerned...”

In the reported case of *d’Ambrumeil & Another v Customs and Excise Commissioners (case C-307/01) [2004] 3 WLR 174*, the Courts of England and Wales sought clarification of the meaning of “...*the provision of medical care...*” for the implementation of the domestic VAT legislation.

The facts of the case are not of importance in the consideration of the issue except that no evasion or avoidance of any tax liability involved in this matter. Indeed, the Appellant’s case that there may well be a liability For VAT that had not been properly considered by the then Customs and Excise.

MEDICAL TREATMENT

While the phrase under consideration appears at first glance to be simple, it is worth looking at it in some detail. The European Court of Justice was at pains to point out that a full understanding of the importance of medical services and the intention behind the legislation was essential for the correct application of the Directive, and so for the appropriate domestic legislation).

The “...*provision of medical care...*” is in the vast majority of cases in UK undertaken within the National Health Service. Consultants and others who also undertake any form of private medical practice are also generating a income. The development of treatment centres and service providers in competition with or in parallel to the NHS, represent such opportunities for medical and paramedical professions.

The approach taken by the European Court was to consider what is meant or implied by the term “...*provision of medical care...*”. The Court took a fair and reasonable view to read the word “treatment” into the provision.

EFFECT OF ‘TREATMENT’

With the indication provided by the European Court and the existing legislation it is now possible to consider what represents a potential liability in any situation relating to the medical and paramedical professions. As matters stand, all work that constitutes treatment (and further, as again applied in the *d’Ambrumeil* case, “therapeutic effect”) would not attract a liability in VAT. Other work, however, that has no treatment value or therapeutic effect will now be liable to consideration for VAT.

Such work will include the provision of medical reports. Though assessing and examining a person for the purpose of a medical report may be no different from taking a history and examining a patient preliminary to or as part of treatment, the report and the purpose for which it is prepared, have no treatment effect. Sometimes a specialist in a report may recommend an investigation and/or an intervention to improve the circumstances of the person involved in the litigation process, the treatment or therapeutic effect will not be a direct result of the actions of the expert.

The provisions of the Civil Procedure Rules, and in particular Part 35, make it clear that the duty of the expert is to the Court. It is, therefore, necessary to consider whether, in such circumstances, any recommendations can be construed as being equivalent to treatment or as having a therapeutic effect. The implication of the *d’Ambrumeil* decision is such that it cannot. It follows that all work done by experts from the medical profession must be potentially liable to VAT.

Other areas are, therefore, also liable and these were considered in the *d’Ambrumeil* decision. These include work undertaken in relation to insurance, occupational medicals and regulatory work. No indication was given to those who undertake occupational medicals and regulatory work and offer treatment – the inference being that such work is exempt.

VALUE ADDED TAX

The liability to VAT does not automatically apply to all earnings. A practitioner may elect voluntarily to register for VAT. If the earnings from that area of practice exceed £60,000 (the figure for 2006 – 2007), the practitioner, in any event, has a mandatory duty to register.

It is, therefore, suggested that those involved in the medical and paramedical professions who practice in an area that does not have an exemption, should seek expert financial advice as to their own particular situation.

HM Revenue and Customs will be more that fully briefed on the implications of this case and there will be a move to close any loophole as soon as possible.

News & Views

Death of Sir Michael Davies

The death of Sir Michael Davies, which is reported elsewhere, has removed yet another link with the original establishment of the EWI. Founding members of the Institute (those who joined in year one) will recall Sir Michael's indefatigable efforts on behalf of the Institute which included persuading the founding sponsors to contribute the essential initial capital so that the EWI could hit the ground running; and his inimitable, if not idiosyncratic, style as conference chairman complete with stopwatch and red card to ensure speakers did not overrun their allotted time. It was indeed Sir Michael who was responsible for obtaining the Institute's name: when Companies House rejected the initial application on the grounds that "institute" was not an approved designation he went into battle and secured such high powered support that Companies House withdrew their objection. It was also Sir Michael who secured the support of Lord Woolf for the fledgling Institute to the extent that it was Lord Woolf who officially launched the Institute at the 1966 Bond Solon conference and agreed to become the Institute's first President (and subsequently Patron). When Sir Michael retired from the Board of Governors it was agreed to mark the occasion by electing him as the Institute's first Honorary Fellow.

EWI's tenth anniversary

The EWI is ten years old and the annual conference held on 10 November was specially designated as the Tenth Anniversary Conference. As the Institute becomes a teenager there are many signs that the early growing pains have been left behind and as befits a successful developing organisation the original movers and shakers have handed the baton on to the next generation. Apart from the death of Sir Michael Davies, his initial collaborator, Catherine Bond has departed London for rural life in Suffolk; Sir Michael's successor as chairman, Sir Louis Blom-Cooper QC, has stood down in favour of James Badenoch QC. There are only a few of the original Governors left, which after ten years is in accordance with modern corporate governance standards so the Institute enters its second decade with largely a new team with fresh ideas, although the original objective of facilitating the speedy resolution of disputes through fair and objective expert evidence remains as true today as it was ten years ago.

Expert Evidence in the Civil Courts

The EWI commissioned a new book on the role and responsibilities of expert witnesses in civil litigation, which has been recently published by Oxford University Press. Edited by Sir Louis Blom-Cooper QC, it brings together contributions from a wide variety of practitioners, with a notable forward by the Master of the Rolls, Sir Anthony Clarke. The book was officially launched at the Royal Courts of Justice on 4 October 2006 and can be purchased by members of the EWI at the special price of £48.50 (£60 to non-members). At the time of the launch OUP advised that over 300 copies had already been sold. This is a volume which should be on every expert's bookshelf, as well as those who instruct them, combining as it does in a very readable format the development of expert evidence since the introduction of the Woolf reforms, the extensive case law that has been spawned by the new regime and practical advice for experts in complying with the requirements of the courts. It is not insignificant that reference has been made to this publication in the court of appeal judgement in the GMC and Professor Sir Roy Meadow case.

Professor Sir Roy Meadow

As will be well known, the General Medical Council appealed against the judgment of Mr Justice Collins which appeared to extend the immunity from suit applicable to expert witnesses so that the experts' own professional bodies would be unable to discipline them. In the court of appeal, the Attorney General, Lord Goldsmith, argued that it was not appropriate for the judges to act as "unpaid gatekeepers" as that was more properly the province of the expert's professional body. However, Lord Justice Thorpe felt that the guidelines proposed by the Chief Medical Officer, which Lord Goldsmith supported did not tackle the disincentives, which prevented experts from offering their services to the court, while Lord Justice Auld saw that the expert's duty to the court and to his, or her professional body created an overlap, which needed to be resolved. Judgement was reserved to be handed down in the autumn and was handed down on 26 October. In what may be perceived as a typical British compromise the court of appeal allowed the appeal by the GMC against what they described as an unprincipled extension of common law that expert witnesses should be immune from disciplining by their regulatory body while on the other hand deciding (by two to one) that the GMC's fitness to practice panel was wrong to convict him of serious professional misconduct. Quite where this leaves regulatory bodies will have to be determined. While they clearly have authority to discipline their members, where the alleged offence relates to their services to the court it will be necessary for them to take into account the circumstances in which the alleged offence took place and in this the views of the judge cannot be ignored. It would seem that the "overlap" to which Lord Justice Auld referred has still to be resolved.

Consultation

The Home Office has produced a consultation document entitled "Standard setting and quality regulation in forensic science". While not specifically referring to the Meadow case it talks about the need to maintain public confidence in forensic science and the criminal justice system and also suggests that recent cases have raised concerns regarding the competence and integrity of expert witnesses. It claims that there has been no strategic oversight of the existing arrangements for giving expert testimony to ensure that individuals called to assist the court are fit for purpose. The consultation period ran from 1 September to 24 November 2006 and views were invited from those with an interest. The consultation document can be viewed on the Home Office website: www.homeoffice.org.uk.

Restriction on oral evidence?

The trend today, particularly in civil litigation, seems to be increasingly that cases are decided on the experts' reports and the number of times that an expert may be called to give evidence in person is becoming less and less. It may, therefore, come as something of a surprise to read the guidance of the court of appeal in the Bank of England and BCCI litigation as to what was an appropriate length of time for the cross examination of witnesses. In the case of one witness it was agreed that 27½ days or seven weeks was acceptable, while in the case of another witness the judge said: "I would look askance at any conclusion that a case could not be done without a cross-examination in excess of 40 days". Given that the criminal procedure rules have imported much of the philosophy of the Woolf reforms one wonders whether the concept of expedition is the same in the criminal courts.

Will or won't I be paid?

Members who are instructed as expert witnesses in criminal cases which are subject to legal aid should take note of a recent court of appeal decision. In R v Bowman [2006] EWCA Crim 1077 the court indicated that legal aid may be refused if either the interests of justice or a means test is not satisfied. The following guidelines were laid down where funding was sought for expert witnesses in relation to appeal cases:-

1. Counsel should prepare written advice for the registrar in advance of the appeal setting out why expert evidence was needed.
2. It is a matter for the registrar to decide whether funding should be granted.

3. If funding is refused an application can be made to the court for directions.
4. The advice should particularise the name of the expert and the nature of the evidence to be called.
5. If funding is refused it should be made clear to experts that they attend court without the benefit of public funding.
6. An application for funding can be granted at the hearing, but it should not be assumed that it will be granted and all parties should be aware that they bear the financial risks of appearing.

Forewarned is forearmed!

2007 Schedule of Events

Date	Event	Topic	Venue	CPD Points
01/02/07	Seminar	Working with Solicitors <ul style="list-style-type: none"> • <i>Terms of Engagements</i> • <i>Experts' Discussions</i> • <i>Experts' Declarations</i> • <i>Fees</i> • <i>Are you happy with your instructions?</i> 	Maclay Murray & Spens LLP	3 Hours
05/02/07	Course	Basic Law for Expert Witnesses	Diskus, London	5 Hours
01/03/07	Joint Conference (EWO & IOP)	Expert Witness Skills Workshop	The Honourable Society of Gray's Inn	5 Hours
08/03/07	Seminar	Case Law Update	Maclay Murray & Spens LLP	2 hours
22/03/07	Workshop	Workshop on interviewing techniques	Maclay Murray & Spens LLP	2 hours
19/04/07	Seminar	Establishing your practice	Maclay Murray & Spens LLP	2 hours
17/05/07	Seminar	Beating the Asset Recovery Agency	Maclay Murray & Spens LLP	3 hours
07/06/07	Seminar	Establishing your practice (medically Based)	Manchester	2 hours
12/06/07	Course	Basic Law for Expert Witnesses	Diskus, London	5 Hours
28/09/07	Annual Conference		Institution of Civil Engineers	5 Hours

Correct Advice – Intuitive or Counter-Intuitive

Margaret Borwick,
Independent Financial Adviser

My accreditation as an Expert Witness in the past year has been an eye-opener. I now realise that little bits of information, which I *previously took for granted*, can in a different context, become "expert evidence". As an independent financial adviser my work is governed by a great many statutes, not least the Financial Services and Markets Act 2000. However, much of what is good practice is not clearly written down or cannot, without expert guidance, easily be placed into the context of a particular matter under discussion.

In financial services the Financial Ombudsman has jurisdiction over almost all complaints, although under normal circumstances he does not award damages in excess of £100,000 to a claimant. There has been much recent discussion about raising this limit, first set in 2001, in line with inflation but it has not yet happened. The Ombudsman has the power to award professional fees incurred by employing professional advisers but he rarely does so, thus limiting claimants to their own knowledge and experience. Given the subtlety and sophistication of some of our major financial institutions, this seems unfair and, against this scenario, the number of cases in which claimants resort to the courts seems set to increase.

It can be difficult to find an expert witness in financial services matters. Advisers are of two types: the tied agent and the independent financial adviser (IFA), a categorisation that arose in the Financial Services Act 1986. Since October 2004 there has been a third type, the multi-tie, who either does not choose his products from the whole of the market or does not offer fee option in his terms of remuneration. It is too soon to tell whether this type of adviser will behave more like the tied agent or like an IFA, or whether advisers with a new class of characteristics will develop.

Tied agents are employees or full-time agents of one company and owe their loyalty to the company. A client who believes that he has a claim against such an adviser will usually sue his company, since they are responsible for everything their agent says or does.

An independent financial adviser is the agent of the client and can be sued directly, though if he an employee one would tend to sue the company. Independent financial advisers must carry professional indemnity insurance so as to meet the cost of claims against them for professional negligence.

There is no clearly defined training for financial advisers. Such programmes are still evolving and there is a mishmash of training courses and qualifications in existence. Most of these

are sponsored by insurance companies and their degree of impartiality is a subject for discussion.

Over the years the regulatory bodies, the FSA and its predecessors, have codified many elements of good practice. This has the twin objective of protecting the consumer and making clear to the adviser the required standard of good practice. The financial services market is, however, dynamic and evolving and new products appear for which at the time there are no rules. Examples, particularly in the early stages, were Shared Appreciation Mortgages and structured investment products. Many consumers were adversely caught by these products and though the Financial Ombudsman has not been helpful in the former, he has been more helpful in the case of the latter. In relation to Shared Appreciation Mortgages, clients have had to resort to the courts for recompense and many have been successful.

Many arguments can be won on the grounds that "If it isn't written down it didn't happen". I have not discovered where this is written down, but during a recent hospital visit I found the advice writ large on notice boards as advice to staff.

An interesting example occurred some years ago in my specialist field – advising the elderly. A client wishes to consider a specialist care fees annuity, which is underwritten on an individual life. The client is already in care at a cost of £1,000 per week. In under a fortnight the adviser produces a price and the deal goes ahead. The family later appear and accuse the adviser of bad advice, because he "didn't shop around". A fairly obvious case, you would think. When the facts were 'unpicked', the following was revealed. The company selected by the adviser has a reputation for being far quicker and cheaper than the competition and it attracts 85-90% of all such business. Competitor companies can take as long as ten weeks to produce a quote, at a cost of £10,000 in care fees to the client. Competing quotes would, therefore, have had to be as much as £10,000 cheaper to produce the most competitive deal. This could only have occurred at one time, it could not happen now, and it demonstrates the need for, and the value of, independent expert advice. Only a practitioner in the field could have understood the case correctly. The correct advice is counter intuitive to the layman who does not have the necessary information.

There is a growing market for expert advice in financial services cases and the next stage of development will be very exciting.

Margaret Borwick is the principal of her own practice. She was formerly a partner in a City investment bank.

Expert at being expert?

Ian Walker, Solicitor, Russell Jones and Walker

The courts recognise that in this country we have trial by Judge, not trial by expert. When Part 35 of the Civil Procedure Rules was introduced, many practitioners felt the system would change and that experts, particularly when appointed as a Single Joint Expert, would effectively decide most cases before they ever reached court.

Course reliance on expert testimony

The reality has been different. Despite the proper re-emphasis in the Civil Procedure Rules of the independence of expert witnesses, the courts do not necessarily feel bound to decide cases on the basis of that evidence. The most recent examples of this have been in personal injury cases where the defendants have alleged that the speed of the impact was so low that physical injury could not possibly have been sustained, but where the Judges have quite happily preferred the evidence of the lay claimant and witnesses over highly qualified and experienced experts.

There have been a number of high profile cases where it has been alleged that the experts' testimonies were so flawed that wrongful criminal convictions resulted. The case involving Professor Sir Roy Meadow is, of course, a good example of this. However, he is not the only expert who has been pilloried where hindsight has provided ammunition for criticism of his testimony.

The Expert Witness Institute is so concerned about this matter that it devoted its 10th anniversary conference, which took place in London on the 10th November, to the subject *Communicating your Expertise*. It is also working hard to address the question of whether there should be some sort of accreditation or quality standards, for those giving expert testimony.

Standards and experience in court

Lawyers should ensure the experts they instruct have appropriate professional qualifications, have a good track record in their fields of expert witness work, and that they can put across their views efficiently and clearly. Expert witnesses often forget, because they have to address their reports to the court, that the most important person who will read their report is the lay client; often expert reports are littered with jargon and over-complex technical explanations.

The public and the legal profession would benefit from a system where those seeking to give expert testimony to the courts could proclaim both their professional expertise within their own discipline, and their experience and expertise at being an expert witness.

Many systems exist which provide some very vague quality standards: the Expert Witness Institute and the Academy of Experts have senior ranks for those who are experienced in the field, while the Council for the Registration of Forensic Practitioners provides a similar system for those seeking to give expert testimony before the criminal courts. How can the debate be moved forward?

Case management

The courts have to accept that they cannot, except in the most extreme cases, prevent any party to litigation from calling the expert of their choice. In case management hearings courts limit

expert testimony to that which is really necessary, and never investigate the quality or expertise of the witnesses the parties propose to call. In the US the case management Judge provides a more stringent gate keeping function through the medium of 'Daubert' hearings, where the science on which the expert testimony is based is subjected to rigorous scrutiny. There is no suggestion that such a system should be introduced in the UK; although, it does seem to me that in novel or complex cases there might be something to commend preliminary hearings to test the science, and the vast costs in multi-party actions might be minimised as a result.

Quality assurance

What practitioners need is a system which tells them how experienced expert witnesses are, how many times they have given evidence in court and how they are regarded by instructing lawyers. The Association of Personal Injury Lawyers (APIL) has maintained a database of expert witnesses, which only those experts APIL members recommend. The stringent requirements of the Data Protection Act 1998 mean that those maintaining such a list have to be extremely careful about the comments that they record. However, any quality assurance system ought to ensure that those who are seeking to make a career out of expert witness testimony are required to provide the names of those who have instructed them, who can comment on their most recent performances.

Another option is for expert witnesses to progress through any system of quality assurance according to their experience. In the system by which personal injury lawyers are graded by APIL, there are different grades through which practitioners can rise as their experience and expertise grows.

The problem with applying that sort of system to expert witnesses is that it condemns to the lower regions those who possess highly specific and technical expertise which is only required a very few times year. There would have to be some system through which those who provide such highly technical expertise could be "grandfathered" through the system.

Training

Any quality assurance system should contain a commitment to continuous training. Many expert witnesses believe the experiences they have of court work is enough training in itself, and this is probably true. However, there are many expert witnesses who never see the inside of a courtroom, but who ought to keep up to date with the law and the practice, to improve their expert witness skills. It should therefore, be a condition of continuing membership of any quality assurance scheme that training or experience 'points' are clocked up on an annual basis.

Objective standards

It should not be assumed that expert witnesses automatically know what they are doing: the system should allow skill, expertise and experience to be measured by objective standards. The courts seem to want it, and certainly those purchasing expert witness skills will find such a system of immense value. The institute hopes that it can move the debate forward in a positive way and devise a system under which everybody wins.

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Fault Lines remain after Meadow

Sir Louis Blom-Cooper QC

No one – not even perhaps Mr Justice Collins – can have been surprised that the ancient common law immunity for witnesses in civil or criminal proceedings does not extend to protect the defaulting expert witness from disciplinary proceedings before professional regulatory bodies. What is a little surprising is that the Court of Appeal in *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2006] All ER (D) 315 (Oct) left intact the expert immunity from any civil proceedings for professional negligence. Lord Hoffmann in his analysis of the immunity in *Arthur J S Hall & Co (a firm) -v- Simons* [2002] 1 AC 615 [2000] 3 All ER 673 said:

“...there seems to me no analogy with the position of a lawyer who owes a duty of care to his client. The fact that the advocate is the only person involved in the trial process who is liable to be sued for negligence is because he is the only person who has undertaken a duty of care to his client.”

This seems doubtful in the light of CPR Part 35.3 which specifically provides that the expert witness has a duty to assist the court, which overrides their duty to the client.

What is altogether most surprising is that the Court of Appeal was divided on the separate issue of whether Professor Sir Roy Meadow, in giving an erroneous interpretation of the statistical probabilities of otherwise unexplained deaths of two infants, was guilty of serious professional misconduct. All three appeal court judges thought there had been professional misconduct, but only the Master of the Rolls thought it was sufficiently ‘serious’ to uphold the verdict of the GMC’s Fitness to Practise Panel (FPP). All three thought the penalty of erasure from the medical register was too harsh; indeed the GMC no longer sought to support that draconian sanction, which would have deprived the courts of the pre-eminent expert and prime advocate for Munchausen’s Syndrome by Proxy, which identifies abuse of children as part of attention-seeking conduct by the abuser.

There were other surprises in the judgment of the Court of Appeal in its assessment of the proceedings of Sally Clark’s criminal trial in November 1999, and her subsequent two appeals to the Court of Appeal, Criminal Division, and on a reference by the Criminal Cases Review Commission.

The first of these two appeals was presided over by Lord Justice Henry, who delivered a judgment 274 paragraphs long (approximately 40,000 words) dealing in detail with the impact and effect of Sir Roy Meadow’s statistical error.

The Henry LJ’s judgment concluded that in a case which essentially focused on the ascertainment or, indeed, the ascertainability of the causes of sudden death in the two infants, Sir Roy’s professional misconduct was a “side-show” and did not, on analysis of the expert and non-expert evidence, render the jury’s guilty verdict unsafe.

In the second appeal, *R v Clark* [2003] EWCA Crim 1020, [2003] All ER (D) 223 (Apr), presided over by Lord Justice Kay, the court allowed the appeal on the simple point that the forensic pathologist who conducted both post-mortems had failed, fatally

to the prosecution’s case, to disclose a microbiological test conducted on one of the two Clark boys. Two-thirds of Kay LJ’s judgment rehearsed the welter of expert evidence from 14 medical witnesses. The expert evidence in the early stages of the trial, during which Sir Roy gave his evidence, concentrated on Sudden Infant Death Syndrome (SIDS), but later Sally Clark’s defence was centred exclusively on natural unexplained deaths, and not on SIDS.

Towards the end of the Kay LJ’s judgment, the Court said that it had heard only brief argument, and “certainly had heard none of the evidence” (para 172) relating to the statistical probabilities of single and multiple infant deaths in one family. Yet eight paragraphs later the Kay judgment said:

“It seems likely that if this matter had been fully argued before us we would, in all probability, have considered that the statistical evidence provided a quite distinct basis upon which the appeal had to be allowed” (para 180).

The Master of the Rolls thought this pronouncement in the Kay judgment was a “provisional” verdict upon the Meadow statistical evidence; Lords Justices Auld and Thorpe thought that the verdict was only “tentative”. Whatever is the appropriate epithet, there is a sound legal maxim that courts should deal only with matters that call for adjudication between the parties to the legal proceedings. Judges should avoid spraying their judgments with *obiter dicta*. The Kay judgment had no need to speculate on what it might have done, had it been part of its function to adjudicate on the statistical evidence; that had been done exclusively and definitively by the Henry judgment.

One further surprise occurred in the proceedings before the FPP in July 2005. Counsel for Sir Roy Meadow, Ms Nicola Davies QC, wanted the Panel to consider the Henry judgment for it downgraded the statistical evidence, but not to take on board the Kay judgment which appeared to be more critical of Sir Roy’s evidence. Counsel for the GMC, Mr Robert Seabrook QC, pressed for the reverse. Faced with this disagreement, the Panel took the unwise course of not reading either the Henry or Kay judgments. Hence the Panel’s failure to view an expert’s alleged professional misconduct in the context of the forensic process in which he was involved. As Lord Justice Auld observed:

“I believe the respective insights of the two Court of Appeal judges would have been helpful to the FPP it did not take or have the opportunity to consider them. In consequence it appears, in my view, to have misunderstood or mistaken certain aspects of Professor Meadow’s evidence and the circumstances in which he came to give it, and to have wrongly exaggerated the heinous effect, as it saw it, of what he said and its possible effect on the integrity and outcome of the trial”. (para 208)

When one assesses the Sally Clark case – from the time of the two infants’ deaths, through the criminal trial and the appellate process, to the disciplining of Sir Roy Meadow – it may be that other professional standards were found wanting.

Membership Benefit – did you know

- **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 on the new Court Rules when they were in draft form, in so far as they affect experts. The Institute also submitted a response to Lord Justice Auld in respect of his review of the criminal courts procedure. The Institute supported and was represented in the working party on the Code of Guidance on Expert Evidence and were consulted on the new Expert's Protocol. The Institute is represented on the Experts Committee of the Civil Justice Council.
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- **EWI Publications:** The EWI Newsletter, issued three times a year, is free to all members, as it contains articles of interest to expert witnesses, letters from members and the latest case notes, all designed to make sure experts have access to the most up-to-date information. The Governors have approved an Expert's Declaration which complies with the requirements of CPR Part 35, a Model Form of Expert's Report and Terms and Conditions of Engagement which experts can use when being instructed by solicitors.
- **Discounts on External Publications:** "*Experts in the Civil Courts*" has been completed under the editorship of Sir Louis Blom-Cooper QC, which Oxford University Press has published in EWI's name in August 2006. 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%. The Institute commissioned from Allen & Overy a "*Compendium of expert witness cases under CPR from April 1999 to April 2001*" which was published by Sweet & Maxwell and has won universal praise as a key guide to the duties and responsibilities of expert witnesses. Which is now offered to EWI members at a special rate of £10
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Casenotes

Presented by Camilla Macpherson

Presented by Camilla Macpherson and Lucinda Pfaff *Toth v Jarman [2006] All ER (D) 271*

This negligence case concerned a medical practitioner, the defendant in the action, who was called to the claimant's house to give emergency treatment to the claimant's son. The child later died. He had suffered from a rare disorder which meant that he was unable to produce glucose, and the issue was whether the defendant had been negligent in failing to administer intravenous glucose when he arrived at the house. The claim failed for reasons of causation: the judge held that he was not satisfied that, had the defendant administered glucose immediately (as he should have done), the child's life would have been saved, because by then he had already suffered irreversible brain damage. In reaching this decision, the judge heard medical evidence from two experts.

The claimant appealed the decision on various grounds, claiming that the judge should have preferred the evidence of the claimant's expert (who said that the brain damage at the time of the defendant's arrival was unlikely to have been irreversible) over the defendant's expert (who took the contrary view). Various matters were raised in support of the claimant's suggestion that the judge had relied too heavily on the defendant's expert including the fact that the expert had relied on his experience in giving his opinion rather than providing research literature; he was not as specialist in the relevant field as the claimant's expert; the judge had unreasonably marginalised the claimant's expert in favour of the defendant's expert and his anecdotal evidence was contradicted by evidence from the child's own medical records. Having considered these points, the Court of Appeal concluded that the judge had been entitled to prefer the opinion of the defendant's expert over the claimant's.

Of more general interest to expert witnesses is a further matter raised by the claimant, relating to conflicts of interest, and specifically the expert's failure to disclose his membership of the Cases Committee of the Medical Defence Union (the body defending the claim on behalf of the defendant). (The expert had in fact ceased to be a member six months before this case.) Although the membership was clear from the expert's CV, the claimant had not requested a copy of this.

It is essential to the process than an expert's opinion be independent, and where an expert has "*a material or significant conflict of interest the court is likely to decline to act on his evidence.*"

Although this ground for appeal was rejected (it was linked to an application to adduce new evidence that was also turned down), the Court of Appeal made it clear that any conflict of interest which is not obviously immaterial should be disclosed; the decision as to whether it is in fact material is one for the court, and not the parties, to decide. Although the requirement for an expert to disclose a conflict is not referred to expressly in the CPR or the new expert witness protocol, the Court of Appeal said that, not least because of the overriding duty of the expert to the court under CPR 35.3, the court should be made aware of it. Furthermore, an expert should routinely provide a CV with his report, listing details of any activity or employment which could give rise to a conflict.

The Court of Appeal also commented that the Civil Procedure Rules Committee should consider extending the existing requirement for an expert to append a statement of truth to the end of his report, to include a statement on conflicts as follows:

That he has no conflict of interest of any kind, other than any which he has disclosed in his report;

That he does not consider that any interest which he has disclosed affects his suitability as an expert witness on any issue on which he has given evidence;

That he will advise the party by whom he is instructed if, between the date of his report and the trial, there is any change in circumstances which affect his answers to the above.

Whether or not such an amendment to the CPR does ultimately come about, it is clear from this judgment that experts should make a habit of appending CVs to their reports and also making absolutely sure that all potential conflicts are disclosed to the court and to the other parties to a case.

Presented by Camilla Macpherson and Lucinda Pfaff *Jonathan Edward Woolley v Essex County Council [2006] EWCA Civ 753*

This case concerned an apprentice curtain-waller (a job which involves the fitting of large sheets of glass into commercial buildings, often done at heights), who was injured in a road traffic accident, and sought damages for future loss of earnings from the defendant local authority, claiming that the accident rendered him unable to work in this job. An employment consultant, jointly instructed as an expert to give evidence on what a curtain-waller might be expected to earn, produced a report containing the necessary calculations. The report also made reference to the earnings of a glazier, stating that a curtain-waller's salary "*would be at the upper end of a glazier's salary*", but in concluding, gave a figure for the claimant's earnings calculated only according to the "*average waged glazier's*" salary, not the upper end thereof. The expert was not questioned by either party in order to clarify his report. The claimant argued at first instance that the judge should not accept the expert's final figure when assessing future loss of earnings, as the expert must have made an error. The first instance judge disagreed, maintaining that as the report had never been questioned under CPR Rule 35.6 (which states that a party may put written questions to an expert about his report, for the purposes of clarifying the report), the judge must accept the expert's final conclusion, and should not decide the matter for himself. The case went to the Court of Appeal on this point, and the appeal was allowed.

On appeal, Lady Justice Hallett, giving the lead judgment in favour of the claimant, expressed her dissatisfaction at the failure of both parties to question the expert's report, which had not assisted the first instance judge in making his judgment. She went on to state that the first instance judge should nonetheless have analysed the expert's report and decided for himself whether the expert had made an error, as all the relevant data and information were before the court: "*in the face of this lack of clarity and arguably glaring inconsistency, it was not for him to "assume" that the expert had got it right*". Lord Justice Dyson, agreeing with Lady Justice Hallett, went on to highlight that parties should always keep in mind their obligation under CPR 1.3 to help the

court to further the overriding objective of enabling the court to deal with cases justly, and stated that "*where a report by a single joint expert contains manifest ambiguity or error, parties will usually be expected to invoke CPR 35.6 (1) and ask one or more suitable questions*".

In reference to the questions asked of the expert, and the answers obtained, Lord Justice Pill also gave further useful guidance that expert evidence "*should answer the question posed and not treat instructions as an opportunity to provide a wide-ranging review in their area of expertise*".

Ngiry v Intercontinental Hotels (Unreported, CC Torquay & Ntn Abbott)

This personal injury case considered the issue of privilege in expert reports. The claimant and the defendant had jointly instructed an orthopaedic expert to report on the claimant's injuries. The claimant then went on to instruct a second expert, who produced two reports, the first of which was disclosed to the defendant, but the second of which was not (nor did the claimant seek to rely on it).

An initial application by the defendant for the second report to be disclosed was successful. The claimant appealed.

The claimant put forward the following arguments:

- The report was privileged and the district judge had no power to over-rule the rule of substantive law.
- In the case of *Jackson v Marley Davenport*, it had been held that the court could not order disclosure of an expert's earlier report.
- Finally, if the court did have the power to order disclosure, the principle from the case of *Beck v Ministry of Defence* - that a condition of instructing a new report should be disclosure of an earlier report - did not apply because the claimant in this case was not seeking to resile from a previous order from the court authorising her to rely on the second expert.

The defendant argued that, because the claimant had disclosed the first of the second expert's two reports and therefore the defendant was entitled to rely on that first report (pursuant to CPR r.35.11), the court would be misled if it chose to do so, because the first report did not represent the second expert's final views (since these would be contained in the expert's second report). Disclosure of the first report had waived privilege in the second expert's views. The principle of avoiding expert shopping was an

important one, and one of the reasons behind the CPR was to ensure that expert evidence was managed.

The judge rejected the defendant's argument, finding in favour of the claimant on the grounds that the district judge had had no power to over-ride privilege in the second report of an expert on which the claimant did not intend to rely. A claimant was entitled to obtain a second opinion, and did not have to make it available to the defendant. On the subject of expert shopping, the judge said: "*While of course the courts will do what they can to prevent the mischief of expert shopping, they cannot prevent parties from instructing whomsoever they wish...It is outwith the power of the court to order disclosure of the contents of what is plainly a privileged document upon which the claimant does not seek to rely.*"

Marc Tufano v Gareth Vincenti [2006] EWHC 1496 (QB)

This case concerned a libel action brought against a psychiatrist, who had been directed by the guardian of the claimant's children (on the instructions of a judge) to serve a report as to the claimant's and his children's psychiatric condition. After receiving this report, the claimant brought proceedings against the psychiatrist on the grounds that the report contained a catalogue of inaccuracies and errors.

The judge was asked to consider whether a libel action could be brought against the psychiatrist, or whether he was protected by absolute privilege and immunity from suit. The defendant's solicitor cited the case of *Meadow v GMC* [2006] EWHC 146 in which it was held that witnesses, including expert witnesses, were immune from suit in respect of evidence they gave in court, and this immunity extended to any civil proceedings brought against a defendant which were based on that evidence. The judge held that the psychiatrist's report fell squarely within the ambit of the principle of the case, and the psychiatrist himself was immune from suit. The case therefore reinforces the established principle that witnesses are immune from suit.

The judge was also asked to consider whether, by bringing these proceedings, there had been an abuse of process on the part of the claimant, and he noted that it could be appropriate in some rare cases to approach a witness or seek to persuade him to change his evidence if it was genuinely believed to be misleading or false. However in the present case he did not feel he had enough evidence to come to a conclusion on this point.

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