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EDITORIAL

This July number of EWIN will reach its readers during what in the past was the Summer Law Vacation, when almost everything closed down. These days vacations must be fitted into a busier routine of events and activities. So, it is probably forgivable to suggest that these pages might be read in the happy relaxation of a deck chair. But it is with great sadness that we publish the obituary of Alex Brown a great friend and worker of the Institute who died recently. Another gesture to the passage of time and of our function as a publication of record, is the short note about the transactions of the 10th Annual General Meeting, which took place in May. Similarly for the record we record proposed changes in the case management fast track quantum limits for which the consultation period ends just before the July EWIN is published. The final of the 'domestic' items in this number is the beginning of a letter column, which we would like to continue, as a means for members to exchange opinions.

Many of us spend time writing reports about various kinds of negligence. The article by Daniel Bennett on *Hazardous Substances* is of particular interest because under the COSHH Regulations these are matters of strict liability. Working within the limits of our individual special expertise, we rarely catch sight of what our colleague specialists do. In this number we have an article by an insurance expert and a medical general practitioner to give us an insight into their lives as experts. Also, we have the second in a series of articles on the increasingly important subject of mediation. Finally, we have another of our regular series of case notes by Camilla Macpherson of Allen & Overy. Camilla will be taking a career break and before long her interesting and lucid contributions to EWIN will come to an end. We thank her for her contributions for a number of years and we send her our best wishes.

Case Management Track Limits

Part 26.6 of the Civil Procedure Rules defines the financial values of the tracks to which claims for civil damages can be allocated as part of case management. On 20 April 2007 the Department of Constitutional Affairs issued a Consultation Paper *Case Track Limits and the claims process for personal injury claims* [CP 8/07]. The major change proposed is that the fast track limit should be increased to £25,000. The consultation paper can be viewed and downloaded as a pdf file from the DCA website at www.dca.gov.uk. On 12 May members were informed by E-mail of the consultation period which ended on 13 July 2007, just as this number of the Newsletter is issued. This note is published as a matter of record.

Letters Column

Dear Editor,

I refer to the article '*Range of opinion and SJE*' by Bob Goodall in the last newsletter. In the first paragraph, he states the role of the SJE is to reach a conclusion with a broadly median view, adding that it depends on the evidence and strength of viewpoints.

Arriving at a median opinion is certainly NOT the role of the SJE. He should assess the evidence from both sides and provide an opinion or, if the evidence so dictates, a range of opinions. It is not for the expert witness to choose a middle path through the sides' viewpoints.

I apologise if I have misunderstood the literal reading of the article.

Steve Redhead, *Forensic Accountant*

The Expert Witness Institute's Annual Conference: Topical issues for Expert Witnesses Tuesday 18 September 2007

The Expert Witness Institute's Annual Conference is one of the largest gatherings of expert witnesses across all the professions. This year the event promises to be a winner, and we are delighted to be presenting a programme which is varied and topical, as well as enjoyable.

The fallout from GMC v Meadow, and from lurid and often ill-informed media coverage of other recent cases, has discouraged some from undertaking expert work. This conference aims to correct false perceptions, to restate and emphasise the crucial role of experts in the cause of Justice, and to emphasise the undiminished need for high calibre expert evidence in so many areas with which the law is concerned.

Current topics of interest and importance will be addressed by high-profile speakers from politics, the media, as well as by experts at the top of their professions, and the conference will provide the

opportunity to meet and share views and experiences with colleagues in their own and other fields.

The programme will be stimulating and challenging, as well as informative, but there will be light relief as well. Sir Donald Sinden, distinguished actor, wit and raconteur will round off the day with reminiscences of his long theatrical career, and of his role as an Appeal Court Judge in the television series, 'Judge John Deed'.

This year the conference returns to Church House Westminster, which proved such a popular and successful venue in 2005. We strongly commend the event to all expert witnesses. Do be sure to attend and think about bringing a guest or guests – in particular with the aim of introducing colleagues who have not yet taken up the challenge to the fascination and rewards of legal work. The Justice System needs you as much if not more than ever.

ALEX BROWN (1948 - 2007)



The Institute learned with great regret of the sudden death of Alex Brown on 24 April 2007. Alex was a Founder Governor of the Expert Witness Institute and Chairman of its Membership and Public Relations Committee. He was a Fellow of the Institute of Chartered Accountants of England & Wales (ICAEW), a member of the Institute of Taxation, Vice-Chairman of the Forensic Interest Group of ICAEW, a member of the Academy of Experts and of its Fraud Advisory Panel.

David Alexander Hutchison Brown was born on 18 February 1948 on Westray, the larger of the two most northerly of the Orkney Islands where his mother was also born. Having been posted to the Scapa Flow naval garrison, during the Second World War, his father, Sam Brown, came to Westray from North Berwick. Alex remembered living with his parents and two sisters in one of a short row of cottages near the wide sheltered bay of Pierowall, the only village of any size in the island. His father worked on local farms and it was a modest, though comfortable, existence.

In his early years, Alex suffered from a respiratory ailment that restricted his activities and, by the age of five, the lack of local medical resources determined that he should be sent to stay with his paternal grandmother in North Berwick, with easier access to the medical resources of Edinburgh Royal Infirmary. His education began at this time at the local primary school. Eventually, his family moved down from Orkney and it was to be forty years before he was to return to Westray.

Eventually, Alex's condition improved and he able to join other boys in their activities; it was an idyllic and secure North Berwick childhood spent roaming the town, going to the cinema or cycling to the next village. Probably because he was small for his age, he didn't join the more rumbustious escapades of his contemporaries but he would be caught in class drawing elaborate American cars popular at the time, complete with their fins and chrome. He learned at his own pace and though never top of his class, he managed to get into the top stream going to North Berwick High School. As the pace of learning became more challenging, Alex

responded and he turned to study science. It may have been an augury of his future excellence as an accountant that he scored full marks in a mock O-level arithmetic exam. He loved languages and created, as many youngsters do, a hybrid language of Latin, French, German and Scots that facilitated coded communication with his contemporaries. It was also a time of playfully annoying a friend, who earned pocket money by cleaning out henhouses at a local farm, by attempting to overturn his trailers full of chicken ordure.

With the advent of sixties rock, Alex discovered his love of music and, before he was sixteen, he was playing bass with a friend in a local rock band that gigged all over South-East Scotland. By this time, he was a six foot tall and affected an intense look with the black-rimmed glasses that were fashionable at the time. He loved the driving bass lines of rhythm and blues numbers and found a hero in Eric Clapton.

After school, he went to Dundee University to study engineering but playing in a band called the Boon Union interfered fatally with his studies and he left university. After various jobs, including double-glazing sales, he worked for AT & T in Birmingham for three years installing cross-bar switching exchanges. This involved a nomadic existence that took him in a beat-up Mini from Newcastle via Bishop Stortford and Hereford, finally to Norwich. It was at this time that he met his first wife Katy.

In 1970 he began his accountancy training with E.J. Riches & Son and passed his professional exams with ease, becoming a member of the Institute of Chartered Accountants of England and Wales in 1975 and shortly afterwards a member of the Institute of Taxation. In June 1976, he became a partner in the firm. His early AT&T background in telecommunications and electronics proved invaluable when the firm computerised in the early 1980s. In 1987, the firm merged with the large East Anglian practice of Lovewell Blake and Alex became a forensic partner and a member of the firm's computer committee. In the late 1990s, when his interest in routine accountancy declined, Alex developed an interest in forensic accounting with which he enjoyed local success but there was not enough forensic work in the region and his partners agreed to let him set up in London. This venture was not successful and in 2001 he joined Chilterns, part of the Moores Rowland Group. In April 2004, jointly with others he established Amicus Forensic in London and in January this year Amicus Forensic joined The Forensic Accountancy Chambers. He had recently qualified as a mediator with the Academy of Experts. In 2005, he was invited by the United Nations Commission on International Trade Law to join a group of experts to produce recommendations about commercial fraud. Alex Brown was a member of the Fraud Advisory Panel that responded to HM Government's fraud review and co-author of Butterworths' Fraud: Law, Practice and Procedure, and of Tolley's Accountancy Litigation Support.

Alex was a member of the Wyomondham and Attleborough Round Tables in which he held various offices and where he was well known for his humour when he took to his feet. He was a remarkable, immensely industrious man, good humoured and always willing to help when asked; he had a great capacity for friendship. He leaves his wife Anne, a son and a daughter by his first wife and two stepdaughters.

Tenth Annual General Meeting

The 10th AGM of the Expert witness Institute took place in London on Friday, 18 May 2007 at Gray's Inn with the Chairman of the Institute, James Badenoch QC in the Chair.

James Badenoch reported that its 10th year had been a good one for the Institute and he praised the loyalty of its members. The Institute had moved into new premises and at the end of August a new Chief Executive, Janette Gulleford, had been appointed. She would spearhead a major recruitment push and renew the Institute's management systems. A new professional indemnity insurance package for £1M at a premium of £105 had been negotiated and from next year members will be asked to confirm that they hold professional indemnity insurance. A special highlight of the year was the publication of *Experts in the Civil Courts*, edited by Sir Louis Blom-Cooper QC. The Chairman thanked the Institute staff for their work during the year. The deaths during the year of Sir Michael Davies, a founder of the Institute, and of Alex Brown, a Governor from its foundation, at the early age of 59, were noted with regret.

Before Michael Renshall, who was not seeking re-election, presented the Report and Financial Statements for 2006, the Chairman thanked him for his contribution during the first ten years of the

Institute's existence, when he ensured its survival and financial stability. Michael Renshall reported that the Institute was in financial good heart. He emphasised that since the Institute receives no subsidies, it depends on its members for their support.

Of the Directors (Governors) of the Institute, James Badenoch QC, Michael Renshall and Susan Lloyd were retiring by rotation and the latter two had signified that they would not seek re-election. Alex Brown would also have been retiring by rotation. Also during the year John Cowan had resigned as a Director (Governor). James Badenoch, who was eligible, offered himself for re-election and was duly re-elected a Director (Governor). John Cowan was also re-elected. Westbury were then re-appointed the Institute's auditors.

Since the Article that governs the renewal of subscriptions is unclear, Article 39 was amended by deleting "before 31st January" and inserting in its place "before the Annual General Meeting in the relevant year".

Before the meeting was closed, the Chairman paid tribute to Alex Brown and a book of condolence was opened as a tribute to his work.

The Power of Mediation

Chris Makin
Forensic Accountant*

In his first article Chris Makin set out the legal background to mediation. In this article he describes the ingredients of a successful mediation.

What then is mediation?

Briefly, mediation is *facilitated negotiation*. The mediator makes no judgements, and gives no advice; he or she merely assists the parties to *reach a solution they can live with*. The parties can at any time abandon the process and go to court. All proceedings are in private, totally confidential and without prejudice. The mediator does not even share information with the other side, except with express permission. Anything told to the mediator will never be repeated in later hearings. Each party can tell the mediator their side to the dispute, but only he knows the full story from both sides; he shares things with the other side only with express permission, and only when he thinks it will help the most. The mediator has no powers at all, but his skills and the

confidence the parties have in him are crucial to the process.

A good mediator has the following qualities:

- Respect for the parties in their stressful situation
- An ability to grasp the major issues and brush over the distracting detail
- A working knowledge of the subject matter of the dispute, but legal qualifications are not essential
- An ability to find the hidden agenda, which is never obvious from the papers submitted beforehand, and to suggest novel solutions for settlement
- Excellent listening skills – one mouth and two ears!

Perhaps, the power of mediation can best be explained with reference to key points from two

mediations that I have conducted; some facts are changed so that there is no risk of identifying the parties.

Two business neighbours were so entrenched in their dispute that they had not spoken for TEN YEARS! Before we could start I had to persuade them to sit in the same room.

The case concerned “gentrification” of a run-down area. There was a muddy yard between two old industrial buildings. On one side was a motor engineer, and his paint spraying booth had access from the yard. The other building was taken over by a smart architects’ practice, and they tarmaced the yard. Unfortunately, the paint booth was downhill, and whenever it rained it was flooded and work had to stop.

The motor engineer had put in a claim for £100,000 loss of profit. It was greatly exaggerated, and clearly a cry for help. Further, the architects in smartening up the yard had marked out parking spaces, which blocked access to the paint booth, a fire exit, and rights of way.

I took both parties to the site, on a cold and damp November afternoon, and kept them busy measuring parking spaces and discussing drainage problems (and growing very cold!) until their positions softened. The motor engineer agreed to accept a very small amount in damages, and the architects agreed to free up the rights of way and the fire exit, and construct a new drain to avoid future flooding. Best of all, the warring neighbours shook hands at the end of a very long day.

This was such a good example that the judge concerned, without knowing how we had reached settlement, used it in a presentation to litigators on the power of mediation.

In another example, a litigant-in-person claimed £750,000 in damages for professional negligence. The case had raged for years, costs were enormous and an expensive High Court trial was imminent. After seven hours of mediation, the case settled with the litigant-in-person accepting a small sum and the defendants writing off all their costs.

The point here, as with many cases, was that both sides had become so locked in the dispute that they could not afford to stop. Litigation is like dancing with a gorilla: the dance stops only when the gorilla decides to let go. Mediation was the catalyst by which both sides could talk in confidence to me,

whilst not able to talk to each other; and I helped them so that both sides could withdraw with dignity. And both sides were very relieved when the dance stopped! Together, we reached a solution which both sides could live with.

Mediation is surprisingly successful. Even allowing for those unwilling parties who are pressed into mediation, the success rate is about 70%, while my own settlement rate is almost 95%. Once a case is settled, there is nothing more to do, except meet the terms of the agreed settlement, and inform the Court that a hearing is no longer necessary.

In 2003, Mr Justice Lightman made a speech entitled *Mediation the First and Litigation the Last Resort*. His closing paragraph is particularly telling (emphasis added):

“The loss of a good night’s sleep is a real price to pay for litigation, a price which practitioners and indeed the parties all too often forget or underplay when the decision to litigate is made. In the case of mediation everyone can be the winner; the costs can be small; a result may be achieved in a short passage of time; and personal relations may be salvaged. *Mediation is not a universal panacea*: it has its limitations and it is not always applicable. *But where it is available in my view no sane or conscientious litigators or party will lightly reject it* if he fairly weighs up the alternative namely litigation, and any adviser who does so invites a *claim in negligence* against him.”

With impressive brevity he lists the main advantages of mediation: win-win, small cost, speedy solution; building of personal relationships. That is why mediation, even for unwilling parties, so often provides them with solutions with which they can live.

In the final article in the series, in November, Chris Makin will show how experts can assist in the mediation process.

* **Chris Makin** has practised as a forensic accountant and expert witness for 20 years. He has been party expert, single joint expert, Court appointed expert and expert adviser in hundreds of cases, and given expert evidence about 70 times. He also performs expert determinations. Chris is a chartered accountant and a mediator qualified with the Academy of Experts and accredited by the Chartered Institute of Arbitrators. There is a great deal about mediation on his website, www.chrismakin.co.uk.

Hazardous Substances

Daniel Bennett
Barrister, Old Square Chambers

Hazardous substances in workplaces are regulated by the Control of Substances Hazardous to Health (COSHH) Regulations. The latest of four sequential sets of ever more detailed regulations are COSHH Regulations 2002

Substance Hazardous to Health

“Substance” is defined in Reg 2(1) as meaning a natural or artificial substance whether in solid or liquid form or in the form of a gas or vapour (including micro-organisms). Reg 2(1) defines “substance hazardous to health”. The 1988, 1994 and 1999 Regulations define “substance hazardous to health” as:

‘substance hazardous to health’ means any substance (including any preparation) which is—

- (a) a substance which is listed in Part 1 of the approved supply list as dangerous for supply within the meaning of [the Chemicals (Hazard Information and Packaging for Supply) Regulations 1994] and for which an indication of danger specified for the substance in Part V of that list is very toxic, toxic, harmful, corrosive or irritant;*
- (b) a substance specified in Schedule 1 (which lists substances assigned maximum exposure limits) or for which the Health and Safety Commission has approved an occupational exposure standard;*
- (c) a biological agent;*
- (d) dust of any kind, when present at a substantial concentration in air;*
- (e) a substance, not being a substance mentioned in sub-paragraphs (a) to (d) above, which creates a hazard to the health of any person which is comparable with the hazards created by substances mentioned in those sub-paragraphs.*

The COSHH Regulations 2002 have amended the above wording to widen the catch-all sub-paragraph (e), stating:

- (e) which not being a substance falling within sub-paragraph (a) to (d) because of its chemical or toxicological properties and the way it is used or is present at the workplace creates a risk to health.*

A “biological agent” is defined by Reg 2(1) as:

a micro-organism, cell culture or human endoparasite, whether or not genetically modified, which may cause infection, allergy, toxicity or otherwise create a hazard to human health;

Substances that have been found to be included

The following is a list of substances that have been found by courts to be within the COSHH Regulations: Gluteraldehyde (1996); Prawn protein (1997); Micro-organisms in Salmon (1997); Hydrogen chloride (1999); Weed killer (2000); Isocyanates (2002); Latex Protein (2002); Soldering fumes (colophony) (2003); *Pseudomonas aeruginosa* (2006).

Any asthmagen or other respiratory or dermal sensitiser or irritant would certainly be a hazardous substance and such substances form the basis of much of the litigation concerning the Regulations. The writer has experience of litigation with a variety of biocides and many cleaning products which result in the production of chlorine or ammonia gas, with many agents used in food production (particularly baking), with animal dander and other animal products in laboratories and pet shops, with a variety of coolant and lubricating oils and many paints, rubbers and sealants. Toxic gases such as carbon monoxide and hydrogen sulphide commonly result in litigation as do inhalable toxic solids. In the context of food preparation and service, the exposure of sensitised individuals to type 1 allergens contained in nuts, fish and other food products would also be covered by the Regulations.

Similarly, litigation concerning injuries caused by bacteria and fungi in the workplace is common but has not to date resulted in any significant case law. Often the presence of the substance is due to poor maintenance and cleaning such as with *Legionella* and *Aspergillus* in air conditioning and ventilation units and with *Chlamydia* in pigeon faeces. The presence of bacteria, such as *E. coli* and *Salmonella* in poorly prepared food, also comes within the regulations. Specific workplaces pose some specific risks, such as the risk of infection with *Cryptosporidium parvum* in an abattoir.

The most recent and controversial litigation has concerned the presence of certain harmful bacteria in workplaces which, because of their nature, pose

specific risks of harm. This is true of the risk of contraction of *Mycobacterium tuberculosis* in the confined spaces in prisons and with infection of immune suppressed patients with Methicillin-resistant *Staphylococcus aureus* (MRSA) and *Clostridium difficile* in hospitals.

To whom are duties owed

An employer owes duties under the COSHH Regulations to employees, contractors, visitors and anyone else who may be at risk of injury from hazardous substances. Regulation 3(1) states:

Where a duty is placed by the Regulations on an employer in respect of his employees, he shall, so far as is reasonably practicable, be under a like duty in respect of any other person, whether at work or not, who may be affected by the work carried out by the employer ...

The interpretation of this regulation is controversial. Judges have found that the Regulations clearly cover sub-contractors and other non-employees at work and also visitors to the premises. In *Anderson v Crump* [1996] CLY 5657 the court found a defendant liable under COSHH to a neighbour of a factory who developed asthma caused by fumes vented out of the factory premises and towards the neighbours home.

The recent case of *Ndri v Moorfields Eye Hospital* [2006] EWHC 3652 found that a patient infected with bacteria on a transplanted organ was not covered by the Regulations on the basis that the Regulations excluded substances "administered" in the course of medical treatment, an exclusion contained within Reg 5(1)(c). The judge appears to have considered that the bacteria were therefore "administered" to the patient together with the organ. However, he expressly recognised the poor fit of the words of the regulation with what he was describing.

Duties and the reversal of the burden of proof

Three issues of legal principle are key to understanding the Regulations.

1. Once a claimant has established that he or she was exposed to a substance hazardous to health and sustained injury as a result, the burden of proving compliance with the Regulations is upon the Defendant [see *Bilton v Fastnet Highlands Ltd* [1997] SLT 1323 OH and *Dugmore v Swansea NHS Trust* [2002] EWCA Civ 1689]. Accordingly, it is not for the claimant to aver what the defendant should have done and did not do, but for the defendant to aver what they did and that this was sufficient to comply with the Regulations. This is a legislative device commonly used in health & safety legislation and is

also used in the manual handling regulations and in regulations relating to the risks associated with slip and trip hazards on floors and traffic routes.¹

2. The absence of any foreseeable risk is no defence under the Regulations [see *Williams v Farne Salmon & Trout Ltd* [1997] SLT 1329 and *Dugmore* (above)]. This again is a legislative device common in health and safety legislation. The purpose of the regulations is protective and preventive. In *Dugmore* (above) Lady Justice Hale stated that it was not incompatible with the purpose of the regulations that an employer who fails to discover a risk or rates it so low that he takes no precautions against it, should nevertheless be liable for the employee who suffers injury as a result.²

3. The duties are strict and it is not necessary to show any fault or negligence on the part of the Defendant. Lady Justice Hale in *Dugmore* (at para 25) confirmed that the duties are defined without any reference to reasonableness of the conduct of the Defendant: compliance with a duty is a purely practical and factual matter depending on the nature of the substance and the nature and degree of the exposure and nothing else. In *Naylor v Volex Group* [2003] EWCA 222 a breach of the regulations was established as the defendant had failed to show why it was not practicable to avoid all exposure to the hazardous substance.

Hierarchy

The COSHH Regulations impose a hierarchy of measures in Regulations 7 to 12. The first step of the hierarchy is in Regulation 7(1), which requires that so far as is reasonably practicable, exposure to substances hazardous to health be prevented. The second step (also set out in Reg 7(1)) is that, if total prevention is not reasonably practicable, then exposure shall be adequately controlled.

Regulation 7 continues to set out further steps in the hierarchy of steps. If avoidance is not possible, substitution should be considered (Reg 7(2)). By Reg 7(3) the employer must then first make use of work processes and systems to control exposure and, only to the extent that such measures do not provide adequate control, should personal protective equipment be provided (see Reg 7(3)(c)).

Once a control measure is provided, the employer must ensure that it is properly used or applied (Reg 8(1)) and that any equipment is maintained (Reg 9). The employer must monitor exposure at the

¹ See Munkman on Employers' Liability 14th Edition, paras 5.78-5.82, 18.50-52 and 21.42

² See para 27 of judgment

workplace (Reg 10 and Sch 5) and maintain health surveillance over the employees (Reg 11 and Sch 6). Finally, there is a mandatory duty to provide employees with suitable and sufficient information, instruction and training (Reg 12).

On becoming an Insurance Expert Witness - Part I

Geoffrey H. Lloyd

Having been dumped into early retirement by an ungrateful employer after 40 years service, I struggled to find regular work on a part-time basis where I could use my general management experience and fortuitously I met a long-standing business colleague and friend.

“Why don’t you become an expert”, he suggested. “I’m not an expert” I replied, with deliberate emphasis on the word ‘expert’. “Hm.....” my friend mused, “How long have you been in the insurance business? “Have you forgotten that you are a Fellow (by examination) of the Chartered Insurance Institute? “And”, he laid on for good measure, “that you are of Chartered status?”

“So”, he went on, “if you are not an expert, who do you think qualifies to be an expert?” “Well, if you put it like that, perhaps I could be” I conceded, “but I am uneasy. It’s not that I am indulging myself in false modesty: ‘expert’ sounds terribly pompous and even arrogant”.

“You may think that” my friend replied, “but someone who can help the court in a responsible and independently minded way is called an expert by the courts. Furthermore, I think that you would welcome the complete change in the nature of your work, from managing people to a consultancy role in which you can use your long practical experience”. How right he was!

My friend insisted on my looking at some of his current cases. To my surprise, after careful consideration of the documents, it was clear that I grasped the issues quickly. My friend and I were as one on the conclusions and, in truth, I could have written the reports myself. On reflection, I surprised myself: I had believed that drawing on my senior executive experience would be my future but I began to see that my interest in the technical side of insurance - which I had never lost - might be a strength I had overlooked. The business of risk is fascinating and, of course, insurance is so inextricably bound up with the law which has always interested me.

As every seasoned expert knows, the big problem is how to get started. No one knows you and whilst you may have a sound grip on your core skills - handwriting, surgery, building construction, insurance or whatever - you know nothing about the real substance of the role and duties of an expert. You have probably had little experience of the inside of a courtroom and, whilst you may have had plenty of experience of writing business letters and reports, you are somewhat exposed when it comes to writing a report in a way which will be helpful to the lawyers and, most importantly, the judge. It seemed to me that some focused training was essential to avoid making a fool of myself. Echoes of my father’s words to me, when I was but a callow youth, came back “If a thing is worth doing.....”.

All my working life I had been in a business selling a product that everyone needed but no one wanted, so I knew something about marketing and selling, including selling myself. First, I decided to join the Academy of Experts - the EWI had not then been founded - and to invest some money on three courses: the Role & Responsibilities of the Expert, Report Writing and Courtroom Skills. The benefit was immediate. Not only was the training first-class but there was the added benefit of meeting other new experts who, like me, were not lacking in commitment and enthusiasm. They were also prepared to share their fears and concerns for the benefit of us all.

Another thing I did was to sign up to the UK Register of Expert Witnesses, which in time produced more work than any other source. Generally, I put myself about by attending conferences, seminars and other events that brought me into contact with lawyers. The present younger generation call it ‘networking’; I am a simple soul who has always believed that you cannot know too many people.

Then, in a surprisingly short time after my Academy training, came the break. An urgent telephone call from the Academy brought a dilemma. A leading firm of city solicitors needed an insurance underwriting expert for a case that was going to trial within a few months. Did I know anything about one of the more obscure types of cover - commercial mortgage guarantee? With the severe injunction from the Academy’s training still ringing in my ears, “Do not take cases outside your expertise!”, I tried to persuade the instructing solicitors that, whilst I was familiar with domestic mortgage guarantee, my exposure to commercial guarantee business was minimal and it would be wise to find another expert. Alas, by now they were desperate. For weeks they had been searching for an expert. In certain types of

insurance dispute, this shortage of competent insurance expert witnesses continues.

My fears increased when, almost as an afterthought, it was volunteered that the quantum in the case was £100 million! It involved a huge fire loss in West London. The solicitors were not prepared to take 'no' for an answer. I agreed to help them on the strict understanding that I was not an authority on the particular class of insurance but as the issues centred on matters of non-disclosure I would do my best. Within an hour or two of accepting the case, my wife was alarmed to open the front door to a courier on the doorstep from the city, delivering a huge pile of ring binders. It took several days of concentration just to read all the documentation, before beginning to understand the complexities of the case. The solicitors and the QC on the case were very supportive and I produced a report after many hours of work. I owe them both a deep debt of gratitude. They neither bullied me nor left me to fend for myself. The legal team and I were on a steep learning curve!

Much later, I was to meet another key influence in my expert work, a founder member of Associated Insurance Experts. This is a thriving umbrella-type organisation devoted solely to the provision of insurance experts and it is unique and a rich source of work. Later, I became a Principal of that organisation.

My expertise is concerned with policy liability in general insurance; I leave quantum for others. Although I am prepared to offer advice on a variety of underwriting matters, including market practice, policy wordings and policy interpretation etc., by far the most common dispute - probably 95% of cases - involve non-disclosure or misrepresentation. This is due to the unusual position insurance occupies, where the law of contract is concerned. The basis of an insurance contract is not just good faith but the higher duty of utmost good faith. The proposer for insurance is presumed to know all there is to know about the risk and the underwriter is presumed to know nothing about it. The onus is on the proposer/the insured to reveal all material facts that would influence the underwriter in coming to a

decision as to whether to accept the risk at all and, if acceptable, at what premium and subject to what terms.

If a dispute goes to litigation the issue of 'inducement' of the particular underwriter becomes a factor.

Disputes arise when, in applying for insurance in the first place or at renewal time, the proposer/insured fails to reveal all the information that would influence the underwriter. Proposal forms ask searching questions but the proposer may try to hold back, for example, information concerning previous claims or criminal convictions. There are two types of hazard. The first, physical hazards, are to do with the risk itself, such as the type of structure of a building, the power to weight ratio of a car, or the state of health of an applicant for critical illness insurance. Moral hazard is virtually impossible to underwrite. It concerns the character, reputation and probity of the proposer; has he or she a poor financial record? Have they a criminal record?

The Law Commission is currently reviewing insurance contract law and, through my membership of a British Insurance Law Association committee, I have been privileged to provide continuing input to their deliberations on possible reform. My expert experience has been invaluable in giving me insight into the current behaviour of policyholders and insurers.

When I last analysed my work to work out who instructs me, I was agreeably surprised to find that I have acted roughly 50/50 for claimants and defendant insurers.

Sometimes the claimant has been very foolish in not revealing all he knows - or ought to know about the risk. Sometimes the insurers - companies and Lloyd's - have not been very clever either.

In the next article, I shall talk about some of the seventy or so cases I have handled. To my surprise, only about three of them led me into the witness box.

"WHAT I DO" - THE GP EXPERT

*James Carne
Retired General Practitioner*

My professional life, apart from the years of post-graduate training, has been spent in general practice, negotiating the obstacles of trainee, assistant, partner and senior partner over a period of just over 40 years. During my journey I maintained

an interest in teaching and was privileged to influence the careers of many younger colleagues, as undergraduates and postgraduates.

As well as medicine, the law has been a constant

interest and at one point it was touch and go to which my life would be devoted. As semi-retirement followed by retirement approached, I felt that these two interests could be combined with my years of experience by offering my services as an expert witness. Just as the problem presented of getting my foot in the door, I was fortunate that a friend, involved with the Chartered Institute of Arbitration, introduced me to the discipline of arbitration. He suggested I might be interested in working as an arbitrator or mediator and suggested that I attend one of the Institute's courses. The course was short but was followed by a written examination, which was daunting after forty exam-free years. Although not certain that I wanted to be an arbitrator or mediator, except at a superficial level, I recognised that it might be an introduction to becoming an expert witness.

Another obstacle was one all experts face; obtaining the first instruction from a solicitor, when the prerequisite in the legal world was previous experience of this type of work. Fortunately, and by chance, a colleague who had done medico-legal work agreed to "mention my name" and as a suitable case was pending, I was instructed and my career was launched. At the time the Expert Witness Institute had just been formed and I became a founder member. Being both an "MEWI" and "ACI Arb" was helpful and the added interest of work as an expert has been both interesting and stimulating.

A frequent question is, whether one can be an expert when no longer working in the area of one's expertise. However, it is the experience of many years' commitment to a discipline and having the time to study a case carefully that is a prerequisite of its full consideration. Equally, availability to attend a trial is more likely when no longer working full time. Retirement also makes it easier to keep up with the advances in one's area of expertise and often the period of the allegations coincides with one's full time working life.

The term 'GP Expert' may seem an oxymoron; the traditional general practitioner was thought of as a medical "jack-of-all-trades". One is, however, being asked to give an expert opinion on the actions of a fellow general practitioner, against whom allegations have been made: an opinion based on whether the actions were of a standard to be expected from a reasonably competent GP of similar qualification and experience. Although a GP may be expected to be proficient in many areas, the 'standard of care' by which he is judged is that of the management of the patient. About this only a GP, rather than a specialist, can give a valid opinion. It is not a

judgement on the facts of the case, which is a matter for the court, nor an opinion on the actions of others involved. The legal authority for these assertions are, the Bolam test: whether a reasonable body of fellow professionals of equal stature would have behaved similarly, and the more recent case of Bolitho, which makes it clear that the opinion of one's peers has to be reasonable. It would, therefore, not be sufficient to show that a group of maverick doctors would have acted differently. These two principles must be borne in mind when preparing a report if one is to avoid severe criticism in Court by vigorous cross-examination or worse, by a disapproving Judge.

I have been instructed in over 300 cases and instructions have been from solicitors representing both claimants and defendants. I have also been appointed single joint expert in one case that involved a partnership dispute. Rather surprisingly, in spite of the defendants in the case appearing to have the stronger argument in their favour, fear of a possible adverse judgement prompted them to settle out of court for several thousands of pounds.

One case in which I was involved, demonstrates the importance of reading carefully all the documents in the bundle sent by the instructing solicitor and the influence experts can have on a case. I was instructed by the defendant, against whom allegations of negligence had been made. A woman in her early forties had died following a month in intensive care for a severe chest infection. She had a past history of pulmonary embolus (PE) due to a deep vein thrombosis (DVT) from which she had recovered after several months of treatment. Her mother had also died young from a pulmonary embolus. Familial PE is a recognised medical condition, which can be identified by specific blood tests, which in her case had been negative. The GP was being sued for negligence because of his failure to recognise that PE had been the cause of her chest infection when the lady consulted him a few days before she was admitted as an emergency with a severe chest problem. The expert for the claimant husband – not a GP - based his opinion on the fact that the GP should have taken the past and family history into account and suspected an obvious PE and taken appropriate action. Had he done so, it was argued, treatment would have avoided the complications of severe secondary pneumonia and later death. So far, all apparently obvious and grounds for justifying a favourable judgement. However, having examined all the documents, it was clear to me that there was no evidence whatsoever that she had suffered a DVT or PE, but the medical history was one of a respiratory infection leading to pneumonia and death. It was clear that the hospital, a large teaching hospital, had excluded PE or DVT

as a diagnosis and treated her for severe pneumonia. A prominent chest physician was then approached for his opinion, and it accorded with the conclusion I had reached, and as a result, the case was vigorously defended and judgement was later given in the defendant's favour. I believe that had the claimant alleged that the GP had missed an early pneumonia, they may have had more chance of a successful conclusion.

Just as there are 'bad' experts, there are also 'bad' instructing solicitors: those that are reluctant fee payers who make life unnecessarily complicated, and also those that go 'fishing' for experts, can make organisation of one's diary difficult. Similarly, unsorted and unpaginated medical records can add many hours to the time taken to complete a report. Occasionally instructions are vague and later lead to more specific questions, which should have been made clear in the original instructions. The pricing of work and professional fees can also be a problem. There is no recognised schedule of fees and most experts are reluctant to discuss the subject. When approval by the Legal Services Commission is required, solicitors are interested only in the cheapest option. Although lip

service is paid to the Civil Procedure Rules (CPR) in respect of one's duty to the Court, this is sometimes observed only in the breach. Some solicitors try to manipulate the expert's opinion to suit their client's needs. When asked to amend a report, I work strictly within the CPR, which sometimes leads to a "don't call us, we'll call you" attitude from the solicitor, putting prospects for future instructions in jeopardy. It is important to keep intact one's integrity: any work lost is balanced by the extra work generated by a good reputation.

I am now in my eleventh year of writing expert reports. The work has been rewarding and kept my mind focussed on medical and legal processes. The Woolf reforms have been instrumental in assuring that the CPR have been recognised more in their observance than in their breach, as was previously only too common. They have helped the expert to concentrate on his responsibilities to the Court. Before considering taking on the duties of an expert, one must be certain that time can be found to do the job responsibly and properly. Given these conditions, it is well worth the effort and the added interest and variety are ample reward for one's work.

EWI ANNUAL CONFERENCE: Topical issues for Expert Witnesses

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Case Notes

Camilla Macpherson

Expert joint statements made under CPR r35.12 are not privileged; even if used in a mediation they can then be used in court proceedings

Aird v Prime Meridian [2006] EWCA Civ 1866, 21 December 2006

The issue in this case was how CPR rule 35.12, which allows the court to direct experts to prepare a joint statement, inter-relates with a direction staying proceedings for mediation. Both directions had been made.

The experts met and produced a joint statement, which was then used in the mediation. The mediation was unsuccessful and the defendants then wanted to use the joint statement in the court proceedings. Were they entitled to do so? The claimants argued that it had been prepared for use in the mediation and as such, like most documents provided for mediation, was privileged. Yet outside a mediation such a statement would *not* be privileged.

There had clearly been some confusion amongst the experts and lawyers involved as to the intention behind the directions. However May LJ, giving the lead judgment in the Court of Appeal, was quite clear that the joint statement that the experts had been ordered by the judge to produce was one pursuant to rule 35.12, and "*the fact that the order was made with an eye to assisting a contemplated mediation*" did not change this. It could therefore be used in court proceedings, and it had not acquired privileged status by reason of being used in a mediation. The experts could have produced a document for the purposes of the mediation that would be privileged, as separate "*mediation material*" – but what they had in fact produced was clearly a joint statement envisaged by the CPR.

Pre-action expert reports liable to be disclosed as condition of using similar expert reports subsequently

Andrew Carruthers v (1) MP Fireworks Limited (2) Balfour Convenience Stores Limited LTL 6/2/2007 (Unreported elsewhere)

The claimant in this case was injured by an exploding firework manufactured by the first defendant and sold by the second defendant. Before proceedings started, the claimant instructed a fireworks expert to produce a report, and informed the defendants that he was taking this step. The claimant did not disclose the completed report, having chosen, without explanation, not to rely on it. After proceedings were commenced, the claimant sought permission to rely on the report of another fireworks expert. Applying guidance from the Court of Appeal in *Vasiliou v Hajigeorgiou* (2005) EWCA Civ.236 (reported in the *EWI Newsletter*, Spring 2005, at p. 11), the District Judge gave the claimant permission to rely on the report, but only on condition that the earlier expert report be disclosed to the defendants.

The issue on appeal was whether the District Judge was entitled to apply *Vasiliou* and whether there was a distinction to be made between unidentified expert reports obtained *before* an action has started, and identified reports obtained with the Court's permission *after* an action has started.

The claimant submitted that he should have the right to seek expert advice before an action has started, without fear of having to subsequently disclose it, only *after* an action has started would that right be curtailed.

The judge disagreed. He analysed the various cases that considered whether a court should impose a condition that an earlier report be disclosed if a party seeks to rely on a later report, and held that the District Judge had correctly exercised his discretion: where permission to rely on an expert is sought, a condition ought to be imposed that any earlier report in the same discipline be disclosed (if no such permission is sought, the Court has no power to order the disclosure of the earlier report). Judicial attitude to the disclosure of previous experts reports derived from the need to prevent expert shopping and to reassure parties that the process of the court was not being abused.

Additionally, the judge noted that where an expert had performed tests on an exhibit, as the claimant's expert had in this case, open justice and fairness would usually demand that the results of those tests be disclosed (especially where those tests may have caused some physical alteration to the exhibit), whether or not the author was called to give evidence.