EXPERT WITNESS INSTITUTE

Impartial, independent expertise for Justice

Autumn 2024

Expert Matters

- Expert Fees and CXR v Dome Holdings
- Importance of Expert Witness training
- A spotlight on… The Post Office Horizon Scandal
- Top Tips for cross-examination
- And much more….

The magazine of the Expert Witness Institute

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In this issue

Welcome

Sir Martin Spencer
EWI Chair

Welcome to the latest edition of Expert Matters, the membership magazine for the Expert Witness institute.

It has been a very busy six months at the Institute. On the 17th May we held another Online Conference with a fantastic line-up of speakers including The Right Hon Sir Keith Lindblom, Senior President of Tribunals, who, as well as sharing his experience of expert evidence in the courts, considered the role of Alternative Dispute Resolution and the expanding role of Technology through the Online Justice Project; identifying the implications for Expert Witnesses.

In June, we held our Annual General Meeting and I am pleased to confirm the reappointment of Colin Holburn, Kathryn Newns, and Michael Pilgrem to the Board. I am also delighted to confirm the appointment of Barristers Kitty St Aubyn and Sam Makkan to the Board.

In September we delivered another successful Scottish Medicolegal Conference in partnership with EWI Corporate Partner Resolve Medicolegal. The conference brough together 150 delegates from across the medical and legal professions.

Following on from our Networking Survey we have been reviewing our approach to networking and developing some new opportunities. I am pleased to say that as well as our usual Online Conference, the EWI will be running a Study Day on the 18th March 2025 in London which will give both new and experienced experts the opportunity to come together for a range of practical sessions which will enable you to further develop and refresh your practice.

Finally, I hope you will be able to join us for an evening of drinks, canapés and the Sir Michael Davies Lecture on the 9th October. The lecture promises to be an interesting one as it will be delivered by The Hon Mr Justice Trower, a High Court judge and member of The Civil Procedure Rule Committee who will be sharing his views on expert evidence.

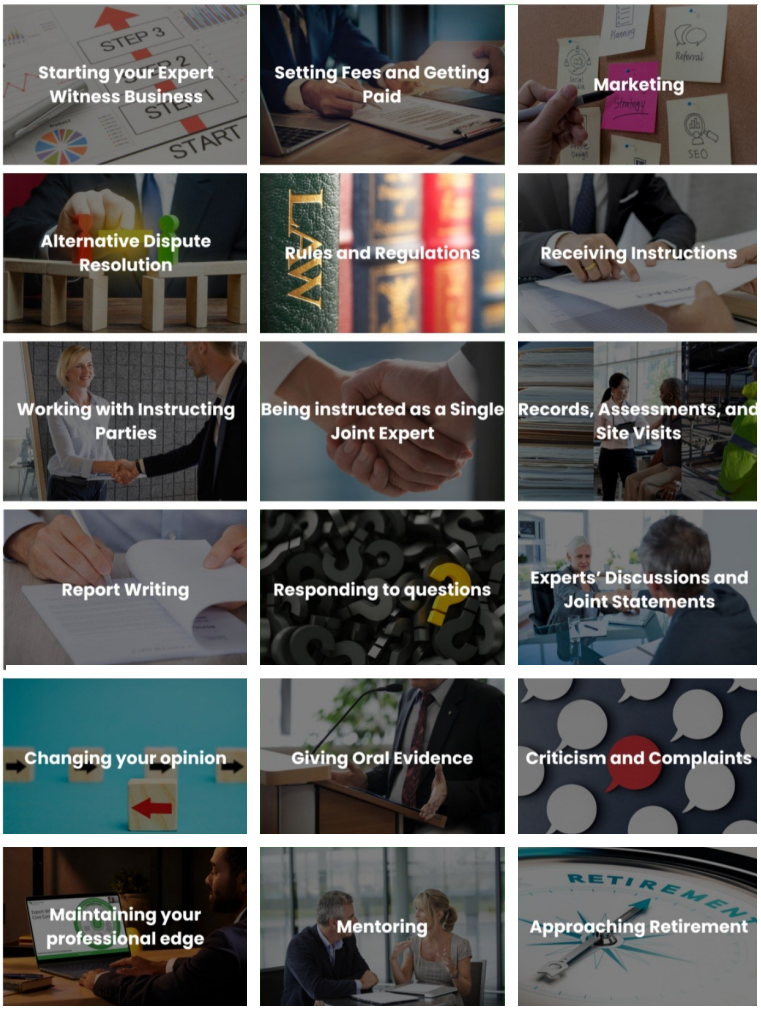
Institute Update

Simon Berney-Edwards
Chief Executive Officer

Have you see the new Knowledge Hub?
As Martin mentioned in his welcome, we've had a busy year so far at the Institute. We have continued to invest in the development of content to improve the value of your membership.

We used the refresh of the website to focus our work on the development of the Knowledge Hub and I am extremely pleased with the result.

The team have created a much expanded Knowledge Hub with advice, guidance and templates which will directly support your work as an Expert Witness. Included is our new standard Terms and Conditions of Engagement for Experts ('Terms and Conditions'). The purpose of the Terms and Conditions is to help you ensure that you have appropriate contractual arrangements in place with the parties that instruct you.



Perhaps more exciting is the plan that the team have developed which is being overseen by the Editorial Committee to continue to add new content to the Knowledge Hub. Of course, if you think there is something that would be useful to have - please do let us know.

Advocating on your behalf
With Sean in post, we have significantly increased our work in raising the concerns of the community with key decision makers. In the last quarter alone:

- We attended the Civil Procedure Rule Committee Open Meeting and posed a question about the way in which the Committee could better engage with the Expert Witness community. As a result, I will be meeting with the Committee Chair in October.
- We met with the Healthcare Professions Council to discuss our concerns over their Fitness to Practise cases in relation to Expert Witnesses. As a result I delivered some training for the case managers.
- We met with the Forensic Science Regulator to discuss the development of their guidance for experts reports, joint statements and technical statements and are working closely with them to improve this ahead of a new draft being released for consultation.
- We responded to a consultation from the Open Justice and Transparency Board and have been invited to join their Stakeholder Committee.
- We responded to the Civil Procedure Rule Committee consultation on Alternative Dispute Resolution.
- I was invited to present at the General Medical Council Fitness to Practise/ Policy Away Day and we will now be meeting with them more regularly to share information.
- Sean has been appointed the Vice-Chair of the Housing Condition

Institute Update

Strategy Group. The group will be working to improve standards of Expert Evidence in these cases.

- We have been reviewing concerns raised about Legal Aid Fees and are developing a response to the Government to make the case for change.

Listen up!

Alongside our policy work, we are keen to continue to provide regular updates to members on key developments. So as well as more case updates and articles, Sean and I have also launched a monthly podcast which takes its name from this magazine. See page 11

Your Directory Profile

As already mentioned we have been working on a small refresh to the EWI website which has improved the look, feel, and usability of the site (especially on a mobile device).

In tandem, we have also increased the information available within your profile building on our member survey last year.

Therefore, you are now also able to indicate on your Directory Profile:

- The date you started Expert Witness Work
- Experience as an Expert Witness (Arbitration, Civil Courts, Criminal Courts, Family Courts, Fitness to Practice Tribunals, Other Tribunals, Single Joint Expert)
- Languages Spoken
- Whether you offer a free consultation with lawyers

Please do edit your Directory Profile via your 'My EWI' on the website to improve the information available to Instructing Parties.

Certification

Many congratulations to all those who have become Certified Members or Certified Fellows.

New Corporate Partners

We have also gained another new Corporate Partner in the last few months.

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Do you work for an organisation employing experts directly or via a panel? Why not encourage them to get in touch to discuss the benefits to them and their experts. (www.ewi.org.uk/corporate)

Congratulations to our new Certified Fellows, Fellows and Certified Members

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	James Paterson	Simon Harding
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Expert Fees and CXR v Dome Holdings

Sean Mosby
EWI Policy Manger

Many expert witnesses, primarily in medicolegal work, use a third-party organisation to help them in their practice. If you use an organisation which invoices the instructing solicitor for your services, you should be aware of legal developments which might affect the information that organisation needs to provide, in order to recover their bill as part of the legal costs recovered at the end of the case.

Background

The process for recovering the 'disbursement' i.e. the cost of expert evidence in a civil law claim is governed by the Civil Procedure Rules ('CPR') Part 47. In the Practice Direction for Part 47, paragraph 5.2 "the receiving party must serve on the paying party… copies of the fee notes of… any experts in respect of fees claimed in the bill". However, the Practice Direction does not describe the form or contents of that fee note.

In the past, there have been various attempts by the court to settle what can be included in these fees claimed in the bill. For example:

In Stringer v Copley [2002], the judge determined that in order to properly assess a medical agency fee, the receiving party must provide a breakdown between the medical expert fee and the medical agency element so that an assessment could be made as to whether the agency's charges did not exceed the equivalent cost of that work being done by a solicitor. However, in the absence of that breakdown the judge used his experience to assess whether the total fee was reasonable and proportionate.

In *Woolard v Fowler* [2006], the agency fee was allowed because the court determined that the cost of obtaining a medical report was a disbursement under the fixed costs rules and that "obtaining" included the work of procuring the report.

Conversely, in *Powels v Hemmings* [2021], the judge held that the costs incurred by the medical agency in procuring the medical report were already covered in the fixed costs element of the claim and were, therefore, not recoverable from the defendant.

The approach in Woollard v Fowler was accepted in the County Court decision *Ms Clair Wilkinson-Mulvanny v UK Insurance Ltd* [2023] with the judge noting that "[h]ad the drafters of the Rule and Rule Committee wanted to limit the fees recoverable to those only paid to the doctor, they could have quite easily made this clear in the Rule, they chose not to do so."

There have been many more cases. The lower courts have been able to make a decision in each individual case because there has not been a decision made by a court of sufficient seniority to be 'binding' on all other cases. As a result there are now many conflicting decisions on this issue and lawyers involved in arguing these points have been required to find a working compromise over many years.

CXR v Dome Holdings

In the recent case of *CXR v Dome Holdings Ltd* – HCJ (SCCO) , Senior Costs Judge Gordon-Saker considered whether the claimant should be required to provide a breakdown of the fees of both the medical expert and the agency.

Expert Fees and CXR v Dome Holdings

He noted that the hourly rate charged and amount of time spent is of great assistance to the court in deciding whether the fees are reasonable and proportionate. Without that information, the court would only have the product of the work, e.g. a medical report, to go on.

Following the approach in Stringer v Copley, he concluded that in the absence of a breakdown of the fees of the expert and the agency, it would be impossible to decide whether those fees are reasonable and proportionate and that "there are good reasons why, although not required by the Practice Direction, experts' fees should set out the work that was done with sufficient clarity, including the amount of time spent, to enable the court to form a view as to the reasonableness of the fee."

Accordingly, he required the claimant to provide a breakdown of the fee note issued by the agency showing the separate fees for the expert and the agency. While this is not a binding authority, it is strongly persuasive because of the seniority of the judge giving the judgment.

This has led to a situation, in contrast to other expert's fee notes, where the recovery of this type of fee appears to be dependant on providing a sufficient breakdown set out in the fee note.

Civil Rule Procedure Committee

At the Civil Procedure Rule Committee ('Committee') meeting in May, the Committee was asked whether it would consider changes to CPR or the Practice Directions to clarify:

A. Whether parties should or should not be required to give a breakdown, and

B. Whether agency fees are recoverable, in principle, in FRC cases.

The Committee's minutes recorded an action for the Ministry of Justice to include the issue as part of the Fixed Recoverable Costs ('FRC') Stocktake in early 2025.

We will be watching any potential developments in this area closely. A policy approach would be able to consider the issue more holistically. However, it will be important to avoid a solution that does not reflect the complexity of the environment.

Challenges with application of the approach in CXR v Dome Holdings

The approach set out by the judge in CXR v Dome Holdings should be straightforward to apply in some cases, especially if the experts and agencies involved work on a time recorded basis for charging.

However, for many fees, it will be more challenging to apply this approach because of the factors described below. Where these circumstances apply, some adaption and/or refinement of the approach may be appropriate.

Fixed fee cases

The approach in CXR v Dome Holdings may not be possible to apply in cases where the expert has received a fixed fee for their report notwithstanding the actual amount of time which they have spent doing their work.

With the exception of complex cases, our members tell us that many organisations pay experts a fixed fee, rather than a fee which corresponds directly to their hourly rate and the time they have taken. This may be a direct monetary cap or a cap on the amount of time for which the agency will pay.

In many situations, fixed fee remuneration may be inappropriate because every case is different with many variables. Even similar cases, for example Medico-legal cases that are clinically almost identical, may have circumstances or causation issues that drive very different report costs. That said, experts have long been used to a 'swings and roundabouts'

Expert Fees and CXR v Dome Holdings

approach to this, so that sufficient work even at fixed amounts will often ensure that their expert witness practice remains profitable, enabling this fixed fee approach to work.

Consequently, while it is good practice to record the time taken to prepare a report, it would be misleading for the court to consider the time taken for each fixed fee report without appreciating this broader dynamic.

Commercial confidentiality

Experts are generally not in a position to comment on what the agency charged the solicitor for their report.

The agency often holds the contract with the instructing solicitor and the terms and conditions of that contract do not allow the expert to bypass this arrangement. This generally includes a requirement to go through the agency for invoicing, so the expert cannot provide their invoice directly to the instructing solicitor. In this situation, the solicitor will probably not know the amount of the expert's fee.

Often the agency will not inform the expert of who the instructing solicitor is to protect their commercial position. This can cause additional problems if the solicitor's instructions are passed on incorrectly or the expert needs clarification of some sort from the instructing solicitor.

Our members tell us that experts do not generally know what uplift agencies add to their reports or exactly what cost inputs are reflected in this uplift.

Agencies generally do not permit an expert to commence work until they have agreed the fee, which includes the agency uplift, with the instructing solicitor.

Multiple agencies

In some cases, multiple agencies can be involved, each adding their own uplift to recover their costs. This can significantly increase the cost to the solicitor of the expert report, with members aware of cases where the ultimate cost to the solicitor was double, and even triple, the expert's charge. It also increases the challenge of assessing the reasonableness of the agency fees when it is not known exactly what each agency is doing. For example, whether they are they charging twice for doing the same work or each agency is doing different work which is justified.

The agency as a support to the expert

Agencies do a range of back-office jobs for expert witnesses although we understand that this varies significantly between companies. These activities can include:

- Marketing the expert's services and obtaining instructions which the expert would otherwise have to find themselves,
- Assisting in the administration of the instruction,
- Obtaining supporting paperwork, such as medical records,
- Providing secure storage and managing GDPR compliance,
- Quality assurance of report,
- Supporting expert training and CPD and helping experts with their appraisal evidence for this element of their scope of practice.

Agencies also effectively act as factors by paying experts at an agreed time, while taking on the delay in payment by the solicitor and liability in the event of non-payment. This may be a significant

Expert Fees and CXR v Dome Holdings

element in the agency uplift, as agencies generally offer end of case terms, which can be 2-3 or even 5 years. In some cases, agencies may also have agreed to reduce or waive their fee if the case is lost or there are no recoverable fees.

Our members tell us that they do not know the actual cost of these activities.

Learning points for members

- This is a developing legal area where there is significant dispute and no binding authority. You can expect to get more questions from instructing parties about your fees.
- The Ministry of Justice intends to consider the issue as part of the FRC stocktake in early 2025, which could potentially lead to changes to CPR or the Practice Directions.
- Fixed fees are part of the medico-legal sector. You should consider whether they work for your practice. However, you should probably avoid fixed fee remuneration for complex cases and higher value work.
- You may wish to consider whether it is appropriate to accept a fixed fee for anything other than cases which are simple to assess and write up.
- It is best practice to record the time you have taken and your (nominal) hourly rate even if your fee is set without direct reference to these factors, e.g. a fixed fee.
- You should provide this information if requested by the agency or if ordered by the court. If another party asks for this information, make sure that you would not be in breach of contract by providing it to them.
- Make sure that you understand the agency's terms and conditions with the instructing solicitor, and ensure you comply with them if you are asked by the instructing solicitor for an invoice or breakdown in your costs.
- If you are required to provide this information, you should provide it with appropriate caveats to reflect the challenges set out above.
- Find out from the agency who the instructing solicitor is and always ask for the original Letter of Instruction. You should also ensure, if possible, that the agency's terms and conditions allow you to contact the instructing solicitor directly if needed.
- Keep in mind that if the intermediary goes out of business you may still be instructed and have a duty to continue with the case, even if your fees have not been paid and the instructing solicitor considers the earlier work is with the agency.

EWI Webinar

The EWI is running a webinar on costs on the 29th October to clarify the range of issues experts face in this area. To book, please visit: www.ewi.org.uk/Training-and-Events/Event-Details/eventDateId/232

In June, the Expert Witness Institute launched the Expert Matters Podcast. Each month, the Institute's CEO, Simon Berney-Edwards, and Policy Manager, Sean Mosby, take an informed look at the key developments in the work of expert witnesses and expert evidence.

In June, Simon and Sean introduced the podcast and reflected on the highlights from the Institute's recent Annual Conference. In July, they discussed the importance of expert witness training in the context of Gareth Jenkin's evidence before the Post Office IT Inquiry and some recent judgments which highlighted the need for better training. In August, the podcast focussed on Single Joint Experts with great insights from EWI members and Single Joint Experts, Heather Dune and Jonathan Galbraith. And in September, the topic was expert fees, including an insightful interview with Dominic Woodhouse on cost management and budgeting in civil proceedings and discussion of the recent case of *CXR v Dome Holdings* on the breakdown of agency fees.

The podcast has been a great success so far, with fascinating and insightful contributions from our members and partners. Look out for upcoming topics including *Range of Opinion* and *Equal Representation for Expert Witnesses* as well as a guest host or two!

You can access all episodes via the website at www.ewi.org.uk/podcast

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The importance of Expert Witness Training

Sean Mosby

EWI Policy Manager

While Expert Witnesses must sign a declaration stating that they understand their duties and obligations, there is plenty of evidence that inadequately trained experts sign without really understanding what they are signing up to. These experts can even wander through the justice system for some time before coming a cropper. In this article, we look at three recent cases where the Expert Witnesses acted without fully understanding their duties and responsibilities as an expert witness.

Hamed v Ministry of Justice

The claimant brought an action for damages against the Ministry of Justice for personal injuries he allegedly suffered after a fall from the bunk bed in his prison cell. He relied on a report from Mr Dabis whose report included a signed declaration that he was aware of the requirements of CPR Part 35 and practice direction 35.

The judge noted that Mr Dabis had failed to comply with the requirements of CPR Part 35 and practice direction 35 because he had failed to:

- Provide a copy of his instructions (CPR 35.10(3)),
- Provide details of the range of opinion (35PD.3.2(6)), and
- Provide details of any literature relied upon (35PD.3.2(2)).

The judge stated that:

> "These are serious failings and it was clear from Mr Dabis' evidence that he did not have an understanding of the requirements of Part 35, despite signing a declaration on 7 May 2021 that he was aware of the requirements of part 35 and practice direction 35… it is not sufficient for an expert giving an opinion upon which a court may rely, to simply state what his/her opinion is without justification for that opinion beyond that it is the expert's opinion that '…' on the balance of probabilities."

She concluded "that his was a very weak report which failed to comply with the requirements of an expert report" noting that "I would urge Mr Dabis to undertake some further training in expert medico-legal report writing to ensure that he fully understands the obligations of part 35 and his duties to the court."

Kwik-Fit Properties v Resham

This case concerned the unopposed business renewal claim brought by the tenant and claimant pursuant to Part II of the Landlord and Tenant Act 1954. Expert evidence was adduced from two chartered surveyors: Mr Hardy for the claimant and Mr Bloomfield for the defendant. Both experts were cross-examined.

The judge concluded that Mr Bloomfield strayed into partisan argument and saw himself as an advocate rather than giving independent and impartial evidence to the court of his own independent opinion. He noted that was also to some extent true of Mr Hardy. Mr Hardy's experience of acting for tenants and negotiating relevant matters on their behalf "rather came to the fore in how in advanced his 'opinions' and the manner in which his position developed." The judge concluded that "[a]s with Mr Bloomfield I regarded him as naturally advocating positions… rather than candidly giving the court the benefit of his independent expert opinion."

The judge noted that that the manner in which both experts gave their evidence was more advocacy than opinion was to some extent demonstrated by their positions with regard to the effect of the lease on the rent. Both experts held one view about his effect with respect to the tenant's break clause, and the opposite position in respect of the market rent.

The Post Office IT Inquiry

The Post Office Horizon IT Inquiry held the public hearings for its phases 5 and 6 from April to July 2024. The expert evidence relied on by the Post Office in its prosecutions of Postmasters was under scrutiny when the Inquiry heard from Gareth Jenkins, former Distinguished Engineer at Fujitsu Services Ltd, between 25 to 28 June. The expert evidence provided by Mr Jenkins had already been subject to criticism.

Mr Jenkins told the Inquiry that he was unaware of the duties of an Expert Witness until the end of 2020. He accepted that he had received a letter from his instructing solicitors in 2005 clearly setting out the duties of an Expert Witness, but that he had not understood the significance of these duties or subsequently remembered them. Mr Jenkins later noted that he had not been offered any training opportunities to support his role as an Expert Witness.

The importance of Expert Witness Training

The Expert Witness Core Competencies and the need for regulation

We agree with the judge in *Kwik-Fit v Resham* who noted that "[t]here appears to be all too often an approach of the placing of evidence before the court… which treats the formality requirements of CPR regarding evidence as being technical and not necessary to be observed."

The EWI has long argued that Expert Witnesses should be required to have training in their duties under the relevant procedural rules, practice directions and guidance, as well as in the practical aspects of an Expert Witness's role. The effectiveness and efficiency of the justice system is compromised by expert witnesses who are not properly trained in their duties and obligations, while the current system's reliance on the integrity of those expert witnesses, such as the members of the Expert Witness Institute, who seek training of their own accord, is simply inadequate.

This training should be provided by registered training providers. There are a number of long-standing and reputable training providers, such as the Expert Witness Institute, who would be able to meet such registration requirements.

The EWI, for example, has developed Core Competencies for Expert Witnesses, which form the basis for all of our training courses. All members of the EWI on our Find and Expert Directory have demonstrated proficiency in these core competencies, in addition to expertise in their own field. This training is not overly burdensome and can be obtained from the core training modules that EWI provides on a regular basis. We also recognise the expert witness training provided by other credible training providers.

However, despite its availability and affordability, many Expert Witnesses do not seek training. Simon Berney-Edwards, Chief Executive Officer of the Expert Witness Institute, said:

> *"The Expert Witness Institute promotes the importance of impartial, independent expertise to support the proper administration of justice. Our members sign up for a code of conduct which embodies this.*
>
> *Is it not time that the Judiciary consider the importance of the proper regulation of Expert Witnesses and seek to ensure that anyone giving evidence in cases have the relevant training and sign up to a code of conduct such as ours? This is yet another high profile case of someone acting as an Expert Witness without having any regard to their duties to the Court or any training.*
>
> *How many other cases do we need to encounter before the regulation of Experts is considered?"*

Free recorded webinars/conference recordings for EWI Members

In February we made some further recorded webinars freely accessible for members. These include the recordings from our 2022 Online Conference - Recordings Bundle, which feature:

- Lord Hamblen's excellent keynote speech
- Lessons from the Pandemic
- Lessons from the Courts
- Clinical Negligence Update
- Giving evidence in court
- Unconscious Bias
- Closing Address

Why not check out what else we have made available?

You can access these from:
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A spotlight on… The Post Office Horizon Scandal

Emma Mitra

Freelance Writer

IT and digital forensics expert, Jason Coyne, was an Expert Witness in the sub-postmasters' case against the Post Office's Horizon computer software. He first spotted errors in the Horizon system in 2003, but had his findings dismissed by the Post Office. He tells us more about his involvement in the case, the wider impact on his work as an expert, and finding himself in the limelight.

How did you first get involved in the Post Office case?

In 2003, I was instructed as a Single Joint Expert by the Post Office to examine Horizon computer system data from the Cleveleys Post Office branch in Lancashire. The sub-postmistress there, Julie Wolstenholme, was being pursued for £25,000 for losses at her branch. I was instructed to assess whether Julie was responsible for those losses. They probably chose me because I was relatively local to the area and one of only a few Expert Witnesses specialising in technology back then.

I requested certain evidence – things like call logs, comparisons between branches, and audit logs – to help form my opinion. But I was told by the Post Office that this information wasn't available.

Instead, I was asked to opine based on the evidence I'd been provided. I had been given some call logs and it was obvious from those that Julie had found a number of errors which could be impacting her branch accounts. I wrote an interim report stating that in my opinion, 61 out of 90 bugs, errors, or defects were as a result of the Horizon system.

The expectation was that I would be given more evidence to assess before I converted my interim report to a full report. But before that could happen, the Post Office and Julie Wolstenholme came to an agreed settlement. So the case didn't go to court, a confidentiality agreement was placed on Julie, and my report didn't see the light of day for another 20 years.

Was the Post Office initially supportive of your investigation? When did that change?

It was clear that the Post Office didn't like what I'd found, because they asked if I would be willing to revise my opinion if I had the chance to review additional evidence. This proposition isn't unusual in Single Joint Expert matters. Someone is often disappointed in how the expert report has turned out and will try to present new evidence. Remember that at the time, no one knew the Horizon issue was a big scandal.

I said I was happy to take on new evidence and listed the exact evidence that I needed. But the Post Office offered me a meeting with Fujitsu and a look around its data centres. I said we were talking about a very specific Cleveleys Post Office branch — I wanted to know what was happening there. Fujitsu's data centre and its operations wasn't relevant to this particular case. The Post Office couldn't provide the evidence I asked for, so I said my report stood as it was.

When the case settled out of court, there was actually a sense of happiness. I believed that the process stopped because the parties saw that there wasn't a case to answer. So back then, I wasn't disappointed — I was pleased.

Jason Coyne

IT and digital forensics Expert Witness

In 2016, you were instructed as an Expert Witness by the claimants against the Post Office in the Bates vs Post Office litigation. How did it feel to be involved again years later?

At first, I didn't put two and two together that it was the same case! The opportunity to get involved again came about when I met James Hartley of Freeth's [*the law firm who acted on behalf of the sub-postmasters*] at the Yorkshire Legal Awards. James said he was trying to assemble a group of sub-postmasters and had a highly technical matter that they needed some experts to look at. I said I was happy to take that on and started to get involved.

Given that you'd already formed an opinion that the Horizon software was faulty, was it hard to stay impartial in the Bates vs Post Office litigation?

The need to be impartial as an Expert Witness is always at the forefront of my mind. My opinions have to be completely

A spotlight on… The Post Office Horizon Scandal

independent and I make sure I'm confident that I would have said exactly the same things regardless of who had instructed me. As long as the court has all the information and the range of opinions to make a decision, then your job as an expert is done.

During the Bates vs Post Office litigation, you were cross-examined for four days. Had you been involved in such an extensive cross-examination before?

I'd never been cross-examined with that level of intensity before, but overall it went really well. Judge Fraser noted in his judgement that I emerged largely unscathed, which I think is an endorsement for my performance in the witness box! I knew that because of the amount of time I spent preparing and the level of research I did, the barristers wouldn't have the level of detail that I had.

I have an ability to be able to hone in on technical detail and that cross-examination was all about technical detail. I knew I was as strong as I could possibly be, largely due to the number of hours I put into it.

There was only one occasion where I got flustered, because I was given what became a maths test! I don't know why I went down that route of starting to find the answer. It served as a reminder not to step away from my area of expertise.

What are the keys to being successful in a cross-examination of such length and complexity?

Don't be defensive. If anyone is challenging you, you have to listen to them and consider what they're saying. If, having examined the evidence again, your opinion is unchanged then that ultimately puts you in a stronger position.

Don't allow yourself to be rushed. Counsel will sometimes jump in when you're halfway through giving your opinion. They often just want a yes or no answer without any qualification. That happened in the Post Office litigation and the barrister got told off on a few occasions with the judge putting him in his place.

Keep your cool. Make sure you understand the questions that are being put to you. If you don't understand the question or its too complex, ask counsel to put it in more simple or direct terms. Questions are designed to trip you up or expose weaknesses. Judges will always be sympathetic to that.

Bring your own copies of documents. I like to have paper bundles available of at least my own report with me in the witness box. If the barrister is the only one going through the documents and you don't have your own to reference, you lose control.

At the 2023 Post Office Horizon IT inquiry, it was heard that the Post Office tried to dismiss your 2003 report as a "very one-sided view" and "very unhelpful". How did you feel when you saw that they had tried to discredit you?

I felt frustrated. Because if the people who were trying to discredit me had just accepted the findings in my report and provided the evidence that I'd asked for back in 2003, the outcome would have been very different.

When I wrote the report, I didn't know they'd tried to discredit it. The first time that I got to see the internal communication that went on at the Post Office was at the inquiry, 20 years on!

My original report wasn't even brought up at the Bates vs Post Office litigation in 2019. It should have come up in disclosure, but didn't. The Post Office didn't disclose it because they either couldn't find it, or it was part of a cover up.
The Horizon scandal could have been stopped it the Post Office had acknowledged that an independent expert had found bugs in the system. Rather than take my report and change things, they chose to bury it. Somewhat tellingly, they never appointed independent Expert Witnesses again, choosing instead to use Fujitsu employees.

A spotlight on… The Post Office Horizon Scandal

What advice would you give to an independent expert whose findings were being rejected by their client?

When you're appointed as a Single Joint Expert, you accept that 50% of the parties involved are probably going to be disappointed with your expert evidence. If you're going to be fully independent, you do have to accept that half the time you'll have been instructed by the party who lost the dispute. You don't always have to be seen as being right.

The ITV drama Mr Bates vs the Post Office sparked public interest in the case. What was it like to suddenly be in the limelight for Expert Witness work?

Not a lot of people outside the legal profession understand Expert Witness work, so it's been great to put our work in the limelight. It's been good to have a platform to help the wider community understand how we operate, show our role in litigation, and get across that people like us exist outside of shows like CSI!

Has the Post Office case changed your approach as an expert?

I wouldn't say it's changed my approach. But it has shown me that in complex cases, teamwork is key. In the Post Office case, many millions of documents needed to be examined. Building an Expert Witness investigations team was what we did as part of that investigation and that's something I've adopted going forward. All my systems are far better today as a result of the Post Office case.

Unusually, Judge Fraser's first task for us two experts in the Bates vs Post Office litigation was to come up with the issues we wanted to consider.

We mapped out the issues, took them back to the managing judge, and they were the issues taken forward. I believe that Judge Fraser wanted to ensure that it was the experts who decided which issues needed to be considered to address the parties' dispute, rather than the lawyers.

I think taking this approach is logical, rather having opposing legal teams instructing separate experts to focus on issues largely supportive of respective cases. This usually results in separate reports that read as though they have looked at different evidence – and often requires further rework later.

The technology experts in a technology case defined what we should look at and that worked really well as a framework.

Taking the driving seat as an Expert Witness is an approach I try to apply in my other cases now. I try to get the lawyers on board, so that they advocate for this process at one of the pre-trial hearings. Then there's the chance that the judge will build it into the process.

Would you like to be featured in Meet the Expert?

Would you like to share about your experiences as an Expert Witness? Perhaps you have experience giving evidence remotely, being a Single Joint Expert, or challenges in handling Experts' Meetings which you would like to share? Or would you like to tell us about the kind of work you do as an Expert Witness.

These articles are available on our website and feature in our legal newsletter.

Contact us at info@ewi.org.uk to express your interest in being interviewed.

Ask an Expert (Witness)

We have had some really interesting questions for the Member Helpline. Here is one which may be of general interest to members.

Don't forget, if you have a query that you would like to put to our panel of experts, please visit www.ewi.org.uk/helpline

From one of our members:

"I would like to thank you again for your guidance and assistance which I found invaluable."

Availability for Court / annual leave

It is common in my practice that I have to provide dates of availability for Court listings. I plan my leave around 12-18 months in advance so that I can book trips etc but also leave adequate space available for Court listings. I am currently dealing with an instructing solicitor who is insisting that holidays / leave are not a reason to be unavailable for Court. They have quoted the case of Matthews v Tarmac.

Answer:

Mathews v Tarmac does not lay down any rule that holidays or leave are not a good excuse for unavailability. At best it indicates that sometimes the Court will not delay a hearing on account of the expert's preferred dates or other commitments. The problem in that case was that the reasons for the two defence experts' unavailability (which were perfectly good reasons) had not been communicated by the solicitors to counsel before the hearing at which listing was discussed, and thus counsel was unable to tell the judge what they were.

This is what Lord Woolf said:

"Courts cannot perform their duty of conducting cases justly if the preferences for hearing dates of doctors are always given priority over all other considerations. The right course for the parties to have adopted in this case was to attempt to reach agreement themselves as to the dates which could be met, to have consulted with the court, and with the court's cooperation to find a date within a reasonable time for the hearing. In this case the parties apparently from October 1998 could have taken that course, but they left the matter until April 1999 and, even when the court fixed a date as far ahead as 15 July of the same year, they say that that date is not practical."

It was for that reason that the CA in that case upheld the judge's decision to list the hearing on a date on which one expert had a pre-booked holiday.

You are entitled to say, "I am not available between these dates because I have a pre-booked holiday arranged x months in advance". However, the situation requires flexibility and good/clear communication - and empathy - on everyone's part. It is important for you not to be too belligerent as this is likely to be counterproductive. So, politely insist when you are not available and the reasons for that unavailability.

You should provide to your instructing solicitor full details of all leave and holiday dates that are currently booked, covering the trial window period and also as far as possible the other periods the solicitor has identified. It is important to differentiate between leave (i.e. time booked off work) and actual holidays that have been booked. The court is likely to be more sympathetic to pre-booked holidays than to annual leave although as a general rule they would aim to accommodate both if this could be done without causing undue delay. As to providing dates outside the trial window, we see no harm in doing that as a precaution in case for some reason there is slippage. You should probably not book any other holidays until you know the trial date.

Provided with that information the instructing solicitor is then in a position to attempt to identify a suitable trial date/s with the solicitor for the other side, taking into account all availability information. If such a date or dates can be identified then the solicitors can ask the court to fix that date for trial, knowing that all the witnesses (and presumably their counsel of choice) are available.

If no agreement can be reached between the parties, then they (the instructing solicitors) will make an application to the court to fix the trial date and will have to provide detailed information about the witnesses' availability.

Things to look out for over the next couple of months

Amendment to the Civil Procedure Rules

On 1 October 2024, the latest amendments to the Civil Procedure Rules will come into force. The full text of the amendments can be found at: The Civil Procedure (Amendment No. 3) Rules 2024. The major change of interest to Expert Witnesses is the amendment to the overriding objective, with additional amendments to Parts 3, 28 and 44, to promote the use of alternative dispute resolution. This amendment follows a consultation by the Civil Procedure Rule Committee to implement the Court of Appeal Decision in *Churchill v. Merthyr Tydfil CBC* [2023] EWCA Civ 1416.

The Scottish Justice Council's Ordinary Procedure Rules

In late 2023, the Scottish Justice Council ('SJC') held a targeted consultation to gather initial feedback on proposed new Ordinary Procedure Rules, which was the next step in progressing their comprehensive rewrite of the rules. The analysis of responses document was published in January 2024, with the SJC indicating that a series of further consultations will be needed to help shape the new rules. Look out for the next consultation later in 2024.

Transparency and Open Justice Board

Courts and Tribunals Judiciary

Transparency & Open Justice Board

The Transparency and Open Justice Board is due to publish its Key Objectives later this year. The purpose of the board is to lead and coordinate the promotion of transparency and open justice across the courts and tribunals of England & Wales. The Civil Procedure Rule Committee has indicated that it will recommence its process on its proposed amendment to CPR rule 5.4C on 'Access to Court Document' once the board publishes its Key Objectives.

Ministry of Justice Fixed Recoverable Costs Stocktake

The Ministry of Justice will hold its Fixed Recoverable Costs Stocktake in early 2025. The Ministry has indicated that the Stocktake will include a consideration of whether parties should or should not be required to give a breakdown of fees and whether agency fees are recoverable, in principle, in FRC cases. The issue of the breakdown of fees was addressed in the recent judgment by Senior Costs Judge Gordon-Saker in *CXR v Dome Holdings Ltd – HCJ (SCCO)* which required the claimant to provide a breakdown of the fee note issued by the agency showing the separate fees for the expert and the agency.

Forensic Science Regulator guidance

Forensic Science Regulator

Following its recent consultation on version 2 of the Forensic Science Code of Practice, the Forensic Science Regulator intends to update its guidance on expert evidence. The EWI is in contact with the FSR to help ensure that the proposals are informed by the views of the expert witness community.

Consultation on Court Bundles

The Family Procedure Rule Committee ('Committee') is consulting on a new draft Practice Direction 27A. Practice Direction 27A sets out universal practice in respect of court bundles in family proceedings in the High Court and the Family Court.

The deadline for responses is 21 October 2024, with the new PD27A coming into force by Spring 2025. The EWI may provide a response to the consultation and would welcome the views of members at policy@ewi.org.uk to help inform the response.

EWI Study Day

The Rembrandt Hotel, London

Wednesday 18th March 2025

9.30am - 5.30pm

Join our full-day event packed with seminars, panels, and group discussions exploring key areas for helping you develop your practice as an Expert Witness.

This study day will be valuable for both new and experienced Expert Witnesses.

Programme

9.30am **Registration and refreshments**

10.00am **Welcome**

10.15am **Develop your expert witness practice**
We look at the steps and provide helpful ideas for marketing and improving your practice and how EWI can support you.

11.00am **Steps to success**
Experienced Expert Witnesses share their journey to building a successful practice, including some cautionary tales.

11.45am **Break**

12.00pm **Wellness matters: How to build resilience**
We explore the emotional demands of being an Expert Witness and provide tips for wellbeing and resilience.

12.45pm **Lunch & Networking**

2.00pm **Report Writing Clinic**
Delegates will reflect on their experience of Report Writing with opportunities to discuss issues and get support and advice.

3.00pm **Break**

3.15pm **Handling difficult situations**
We consider some of the more problematic elements of being an Expert Witness.

4.00pm **Working with Instructing Parties**
Our panel members share advice on how Experts and Instructing parties can work together more effectively and offer essential tips on how to handle issues.

4.45pm **Legal update**
EWI Policy Manager, Sean Mosby, updates you on the latest lessons from the courts.

5.15pm **Closing remarks**

CPD: 8 Hours

Early Bird (until 31st October)
Member: £325 / Non-Member: £375

Standard Price
Member: £325 / Non-Member: £375

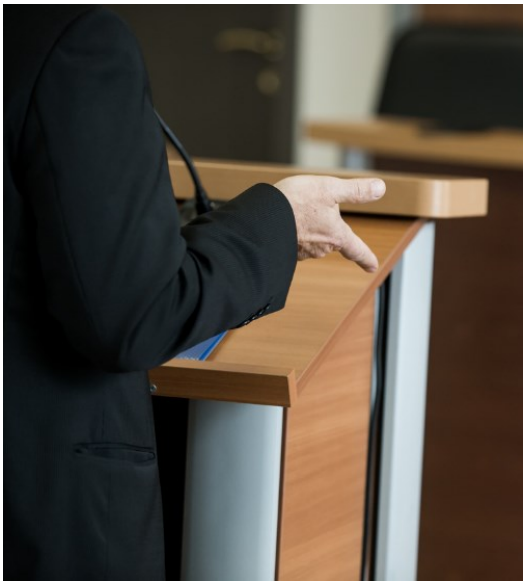
Book at www.ewi.org.uk/events

Key tips for cross-examination

At the EWI Conference earlier this year, the delegates broke into discussion groups to talk about oral evidence and cross-examination. The groups had some fascinating insights into this key aspect of Expert Witness work.

The top tips to help you succeed in cross-examination were:

1. Be thoroughly prepared:
    a. Know your report inside out and be familiar with other material. Turn every page in the evidence bundle,
    b. Be aware of the page numbers in the bundle, especially the location of your report and your opposite numbers report, to ensure you can move easily between them,
    c. Read the skeleton argument from the other party to get an insight into the issues they have with your evidence and their likely approach to cross-examination,
    d. Consider alternative aspects and think about the questions you might be asked.
    e. Avoid over-referencing your reports so the references are necessary for the specific purpose.
2. Be independent from the lawyers in drafting reports and joint statements.
3. Write the same report irrespective of whether you're instructed by the claimant or the defendant.
4. Stay within your area of expertise. If a question is outside your expertise, don't be afraid to say that you don't know.
5. If possible, go to the court the day before to get a feel for the place and the way cross-examinations are being held. Try to hear more of the evidence than just 'your part'.
6. Listen carefully to the questions and don't rush your answers. Be calm, clear, and consistent:
    a. Don't lose concentration during cross-examination,
    b. Ask for clarification if you don't understand the question,
    c. Clarify if you said, or agreed to, something you didn't quite mean,
    d. Reflect on the range of possible opinions explaining what is realistic or unrealistic, before saying "so in my opinion…"
    e. If being pushed into a yes/no answer, clarify that it would mislead the court,
    f. Don't worry about silence,
    g. Pause before everything you say, so it looks natural later if you need to pause. Drink water during long thought processes.
7. Be careful not to make any concessions you don't need to make.
8. Ask for time to consider new evidence.
9. Use models and diagrams if relevant.
10. Make sure you have undertaken Expert Witness training at the start of your practice and stay on top of the relevant procedure rules with CPD.



You can get more advice on preparing to give Oral Evidence at our next Confidence in the Courtroom webinar which takes place over two consecutive evenings (15th October (part 1) and 16th October (part 2) 2024, 5.30-7.30pm).

You can book here: www.ewi.org.uk/Training-and-Events/Event-Details/eventDateId/215

Forthcoming Training and Events

9/10/2024, 18.30-21-00, LONDON

Sir Michael Davies Lecture

Join us for an evening of drinks, canapés, and the Sir Michael Davies lecture which will be delivered by The Hon Mr Justice Trower, a High Court judge and member of The Civil Procedure Rule Committee who will be sharing his views on expert evidence.

Members: £45 / Non-Members: £60

15 & 16/10/2024, 17.30-19.30, WEBINAR

Confidence in the Courtroom

This two-part webinar looks at ways to ensure maximum pre-trial preparation and provides advice and techniques on how to excel during cross examination. It will also highlight the importance of CPR compliance when asked to provide oral evidence.

Members: £260 / Non-Members: £220

17/10/2024, 18.00-19.30, WEBINAR

Acceleration and Exacerbation Expert Witness Roundtable

This roundtable will examine the complexity of establishing acceleration and exacerbation periods which are instrumental in medicolegal reports to provide Lawyers and Barristers with time periods that they can use to value cases.

Members: £35 / Non-Members: £50

17/10/2024, 18.00-19.30, WEBINAR

Costs Management: Budgeting in Civil Proceedings

Join Dominic Woodhouse for an explanation of the Costs Management regime, the documents and procedures involved, the very great pressures being brought to bear on all fees in civil litigation, how you can best protect your fees, and the essential points to take into account when you're asked to reduce them.

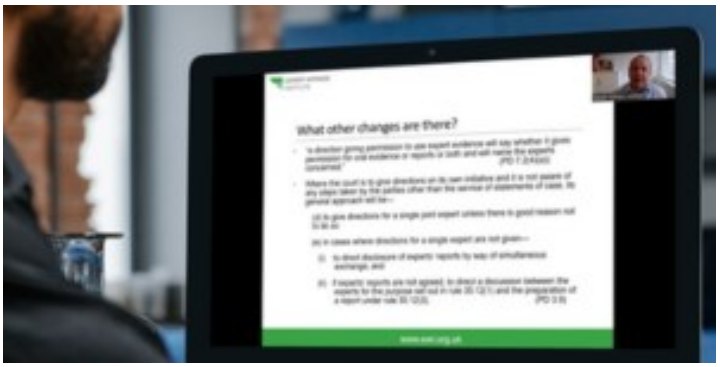
Members: £35 / Non-Members: £50

13/11/2024, 10.00-16.30, WEBINAR

Report Writing I

The framework of Court rules and procedure that form the context for expert reports will be explained, as will the basic evidential writing skills necessary to produce reports that fulfil all the requirements of the litigation process.

Non-Members: £390 / Members: £360



19/11/2024, 9.30-16.30, WEBINAR

Report Writing II

Building on the fundamentals of Report writing I, you will learn techniques and strategies that will enable you to deliver more impactful evidence across increasingly complex issues.

Non-Members: £390 / Members: £360

20/11/2024, 18.00-19.30, WEBINAR

Single Joint Experts

Join us for this informative session which will cover everything you need to know about producing jointly instructed expert reports.

Members: £35 / Non-Members: £50

26/11/2024, 18.00-20.00, WEBINAR

Expert Discussions & Joint Statements – From Law to Practice

This webinar examines the importance and features of experts meetings and the creation of a joint statement. Giles Eyre and Alison Somek will look at the legal and practical frameworks for taking part in an effective joint discussion and the importance of a clear and focussed joint statement.

Non Member: £60 / Member: £45

18/3/2025, 9.30-17.30, LONDON

EWI Study Day

Join our full-day event packed with seminars, panels, and group discussions exploring key areas for helping you develop your practice as an Expert Witness.

Until 31/10/24: Member: £275 / Non-Member: £325

From 1/11/24: Member: £325 / Non-Member: £375

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