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Guide to Expert Witnesses 2016

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Under the microscope

The role of expert witnesses in criminal and civil cases is set to come under greater scrutiny. **Grania Langdon-Down** reports

Developments in the forensic science market, proposals for fixed recoverable costs in clinical negligence cases and a review of the new MedCo scheme for whip-lash cases could have a significant impact on the role experts play in both criminal and civil cases in 2016.

As the *Gazette* went to press, the Home Office, faced with criticism that specialist expertise is being lost, was due to publish its forensic science strategy for the next five years. This will, it says, seek to find a balance between 'promoting a decentralised, market-driven approach and maintaining the breadth and quality of forensic science provision across the whole law enforcement landscape'.

One of the elements in that strategy will be a decision whether to give the Forensic Science Regulator Dr Gill Tully statutory powers. She says they are necessary because, 'while you may get 80% towards compliance through persuasion, there will always be a hard core of individuals and organisations who won't move forward without them'.

At the Department of Health (DoH), officials have promised to publish its twice-delayed consultation on clinical negligence fees in 'early 2016'.

This is awaited with great trepidation by claimant lawyers, who described pre-consultation proposals that they could be fixed in cases up to £250,000 as deeply flawed.

And then to the Ministry of Justice, which has had to institute a review of the MedCo scheme within a few months of its launch – rather than the planned three years – because behaviour by some medical reporting organisations (MROs) has threatened to undermine its objectives.

Throw in continuing difficulties over legal aid fees and relationships with instructing solicitors and

litigants in person – plus a new guide to working in the European civil courts – and it is certainly an interesting time in the expert witness field.

Looking first at forensic science, Dr Tully recently published guidance on the dangers of cognitive bias influencing scenes-of-crime examinations and laboratory work (see box, p22).

She wants all forensic scientists, police investigating officers and lawyers to put in place strategies to mitigate the risks. The focus on potential bias could also open up defence challenges.

But, she stresses: 'It would be irresponsible not to take academic research into cognitive bias into account. It doesn't mean all work done previously has been wrong, but it is absolutely right to put out guidance to improve practice going forward.'

'If it results in a reasonable cause for challenge then, absolutely, that is what people should do. I should never hold back issuing new guidance in case it opens a can of worms for previous cases.'

Tully was appointed to the three-day-a-week post of regulator a year ago after two years in the private sector. For four years she was head of research

We don't want to drive experts away thinking this role is not worth doing — Amanda Stevens, Irwin Mitchell

and development at public body the Forensic Science Service, which the government shut down in 2012 despite an outcry from leading forensic scientists.

Since then, forensic scientists have warned that an over-reliance on cheap DNA techniques and a reduction in spending on forensic examinations –

which has fallen by £20m over the past two years, according to a National Audit Office study – mean more expensive, specialist expertise is being lost and the risk of miscarriages of justice is increasing.

Dr Tiernan Coyle, a fibre expert, is in the process of closing down his company Contact Traces, which he says will mean the loss of more than a third of the country's full-time fibre experts.

He tells the *Gazette*: 'We had to close down because the police weren't commissioning forensic fibre work. It was not for scientific reasons but from a very blinkered approach to forensic science. Concern





Over-reliance on cheap DNA techniques and a reduction in spending on forensic examinations mean more expensive, specialist expertise is being lost and the risk of miscarriages of justice is increasing

about their resources is paramount so they compare everything to really cheap DNA analysis, which makes our work look expensive.'

And in a double-whammy, defence solicitors then struggled to get legal aid funding to carry out the missing analysis. 'If you have to do original work for the defence to support their client's case, it is a big spend compared to a normal defence paper review by an expert,' he notes.

This approach worries Dr Tully. She is reviewing a series of rape cases to see if the process is working from the crime scene to the court hearing. 'These cases are often complex forensically but have less resources than homicide inquiries,' she says. 'A number of cases have been brought to my attention and I'm trying to understand if these are rare instances where the strategy and decision-making were not optimal or if there is a more systemic problem.'

Are the right types of evidence being analysed? 'I would be concerned if we are driving solely towards fairly ubiquitous, cheap evidence types and leaving more specialist types,' she says. 'There is a risk that is happening. I have seen instances where, for example, DNA analysis has been commissioned when it couldn't really answer the question in the case.'

Moving on to clinical negligence, the DoH says it is 'working upon the assumption that there is nothing about a fixed recoverable costs regime which will alter the percentage of unmeritorious claims. Any scheme proposed will include consideration of the right incentives to support a fairer and quicker process that provides improvements to the system while maintaining access to justice.'

However, Deborah Evans, chief executive of the Association of Personal Injury Lawyers, says: 'Our data show there is a wide range of fees charged by experts, depending on their discipline, from a few hundred pounds for a straightforward report in a simple case to several thousand for an area of real specialism with few experts. If the DoH is looking at capping expert fees, the only place they could do that is in low-value cases below £25,000. We appreciate they think low value is £250,000, but they are barking mad.'

The pre-consultation also only talked about capping fees on the

claimant side. 'That would leave the defendants with a deeper purse to go and buy a better expert, so if there is to be any capping it has to be on both sides,' she stresses.

Stephen Webber, head of Cardiff-based Hugh James' medical negligence team, is chair of the Society of Clinical Injury Lawyers. He says it is impossible to have fixed fees because of the complex nature of the cases.

'There is a huge difference in how you use experts compared with personal injury cases. If you have a car crash and your leg is amputated, I don't need an expert to tell me the two are linked,' he explains. 'But if you have compartment syndrome and you lose your leg – was it because it became so bad or because your treatment was negligent? Both are worth about £25,000, but in the clinical negligence case I would need to instruct four experts. Where does the government fix the fee – per expert or a lump sum to cover them all?'

'The idea of fixed fees in claims up to £250,000 or even £100,000 is absolutely preposterous – these involve life-changing injuries. You would end up with a situation where lawyers can't risk taking on a case if it involved too many experts.'

The third major review affecting experts concerns the running of MedCo. As the *Gazette* went to press, the outcome of a judicial review brought by Speed

Medical that the present system of MRO allocation is unnecessary, ineffective and anti-competitive was still awaited.

Other issues include: multiple registrations by MROs; the quality of the medical experts; definition in the MRO market; different business models; and shared IT platforms.

Experts have also been told they must be accredited by 1 February 2016, but confusion over the training provision has caused MedCo to review the options offered to experts.

So far 189 MROs, 489 medical experts and 1,728 authorised users have registered. There have been 246,000 searches resulting in the selection of an MRO and 27,000 searches resulting in selection of an individual expert.

According to MedCo, 'a number' of tier 1 MROs have failed to meet the qualifying criteria and are to be reclassified as tier 2 non-national MROs. It is now dealing with appeals against those decisions. Other reported poor behaviour includes a firm of solicitors that insisted on being present at a medical examination, and a medical 'expert' conducting examinations by Skype.

Dr Chris Pamplin, editor of the UK Register of Expert Witnesses, argues that MROs have a 'distorting' effect on the market: 'As Lord Justice Jackson suggested initially, leave the cost of expert evidence as a recoverable item but make the fee of the intermediary MRO unrecoverable. If, for internal operational reasons, law firms wish to make use of intermediaries to source expert medical reports rather than employ their own staff for that task, as happened in the past, then that commercial decision should be a matter for the law firm.'

There has also been criticism that the allocation system effectively works on a quota basis. Pamplin says good expert witnesses who are instructed by solicitors will find themselves penalised and taken off subsequent searches.

However, MedCo says that it operates a 'tally' system to ensure allocation is fair. Once an MRO or expert is chosen, all seven that come up after a search will have their tally incremented by one, and they will not appear in any search results until other MROs or experts in their area have the same tally.

Experts at the recent Bond Solon expert witness conference were asked about mandatory accreditation and random allocation. While 57% believed the former would improve standards, a similar proportion were against the latter, arguing that it allowed those with 'dubious ability' to receive instructions while solicitors' choices were limited.

Evans says randomisation was 'troublesome initially' because of the huge amount of admin it caused law firms in entering into new service level agreements with new experts. But that has now settled down.

'A number of law firms have started working with good new experts they might not have come across otherwise, so there are some positives,' she says. Overall, she says more firms are choosing to instruct via MROs because the organisations are 'familiar with payment terms and service level agreements and generally offer better client service, set quality standards and arrange quicker appointments'.

The next question is, can the scheme be extended to other areas? Richard Mason, deputy director for civil justice at the MoJ, told the Bond Solon conference that, although there were no plans 'at the moment', it was 'not beyond the bounds of possibility' that there were other areas suitable for the MedCo approach. These could include noise-induced hearing-loss claims, which the Civil Justice Council is due

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If the DoH is looking at capping expert fees, the only place they could do that is in low-value cases below £25,000. We appreciate they think low value is £250,000, but they are barking mad
– Deborah Evans, APIL

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to report on to the MoJ by next April.

However, Evans says the MedCo model could not be extended to other medical reports: 'It only works in a narrow area where there is large demand and there are lots of non-specialist experts. Even in low-value clinical negligence cases there are so many different types of injuries it would be hard to fit the various medical discipliners into the scheme.'

Looking across the spectrum of expert witnesses, fewer experts – 44% compared with 60% – see the work as a growth area of their business compared with four years ago, according to the UK Register's 2015 survey of 400 experienced experts.

One of the big issues is, unsurprisingly, fees. A survey of experts at the Bond Solon conference found that the average hourly rate for report-writing was £190 in civil cases, £103 for criminal cases and £110 in family cases. Half of those surveyed said they no longer work on legal aid rates.

Both Webber and Amanda Stevens, a clinical negligence partner at Irwin Mitchell, report having to fight for legal aid in birth injury cases. 'We were willing to do one for nothing,' Webber says, 'but they wouldn't give us enough money to cover the experts' fees so we are now doing it under a CFA.'

The change seems to have 'come from nowhere,' Stevens says. 'We have had some very surprising rejections which we have had to take to appeal. If we do get legal aid, we are very restricted on the number of experts. This dramatically lengthens the investigation phase because these experts have such long waiting lists.'

When it comes to accepting instructions from litigants in person, 60% of the UK Register's survey respondents say they will not take them on. Of those who do, most take just a handful each year. Just over half said they now require payment on account in such cases.

Experts are also concerned about single joint expert (SJE) instructions. The UK Register survey says respondents reported on average eight SJE instructions a year – half the average in the 2009 survey.

Pamplin says that, since the removal of expert witness immunity in January 2011, the role of the SJE has become even more fraught. 'Working for both parties in a dispute may lead to a disgruntled instructing party, and that party can sue the instructed expert,' he says. 'Indeed, we have heard from experts – even those who until now have been very supportive of the SJE approach – who say that they will no longer undertake such instructions.'

Another issue raised at the Bond Solon conference was whether experts have a 'sell by' date. Lord Hughes commented that 'evidence or advice is not much use to anyone unless you have current hands-on experience in your field.'

However, David Winch, director at Bartfields Forensic Accountants, argues that, while it might be essential for medical experts to have up-to-date knowledge of current practices, many issues are raised in court proceedings where expertise gained in mainstream practice is not relevant. This could be an alleged criminal activity which would very rarely be seen in mainstream professional practice but may be familiar to an 'expert expert,' he says.

The pressures in both civil and criminal cases have led to almost half the experts in the Bond Solon survey saying they would refuse to work with particular solicitors

BEATING BIAS

There is a risk that the objectivity and impartiality of forensic science experts is being undermined by cognitive bias, according to new guidance from the Forensic Science Regulator Dr Gill Tully (pictured). This

raises important issues for both prosecutors and defence practitioners.

Cognitive bias – subconscious personal bias – has been seen as a potential issue within criminal justice systems since the 1970s. But it is now being red-flagged after some high-profile cases, including false-positive fingerprint identifications, brought the issue into sharp relief.

Countering the risks has significant consequences for the way experts work with the police and prosecutors. It also opens up potential challenges for defence practitioners, who have been criticised in the past for not challenging expert evidence robustly enough.

The guidance, published as an appendix to the regulator's codes of practice and conduct, sets out examples of good practice in specific subject areas associated with forensic science examinations at crime scenes and within laboratories.

Cognitive bias can take many forms, including confirmation bias, whereby people test hypotheses by looking for confirming evidence rather than for potentially conflicting evidence. There are also 'role effects', where scientists identify themselves as part of either the prosecution or defence teams.

The 'most powerful means of safeguarding' against that, the guidance says, is to ensure that

or firms because of late payment, poor instructions or pressure to change their evidence.

Looking more widely, a new free guide for expert witnesses across EU member states is now available to lawyers, experts, judges, magistrates and academics (tinyurl.com/p4we8wz). Created by the European Guide for Legal Expertise, it covers qualifications, experience, ethics and expert report writing. It is designed to harmonise the use of expert witnesses in the EU's civil courts.

One of those involved in the project, Barry Turner, a lawyer and senior lecturer at Lincoln University, says the eventual outcome will be a compulsory registration scheme to ensure quality of evidence in all EU

the practitioner conducting the analysis only has information about the case that is relevant to the analysis.

However, it accepts that case assessment, targeting and interpretation may be hampered without relevant information. And it warns that risks are higher when practitioners are inexperienced, unmonitored and left to adopt their own approach, and when checking is less rigorous and/or conducted collaboratively.

The leading expert in cognitive bias, Dr Itiel Dror, senior cognitive neuroscience researcher at UCL, has held workshops for senior judges, while laboratories and police forces are starting to provide their forensic examiners with cognitive training.

He stresses that this is not an ethical issue – 'experts are not letting this happen intentionally' – but they must try to minimise the risk of cognitive contamination as they do physical contamination. 'By telling an expert there is a suspect, for instance, the expert then works from the suspect to the evidence and not from the evidence to the suspect,' he told the recent Bond Solon expert witness conference.

However, he said lawyers like to give information to experts. 'To be honest, they don't want your opinion, they are building a case and they want to recruit you,' he said.

'I did a case where the lawyers wanted me to get involved. I explained why I didn't want the information but they forgot accidentally and sent me irrelevant information. I didn't need to know the details of the rape or that the person had been charged before. I am not accusing them of intentionally trying to manipulate me but, regardless, they contaminated me.'

jurisdictions, especially as cross-border litigation is growing.

Any accreditation will need to focus on quality, skill, lack of bias and protect against the development of reliance by the courts on favoured experts, says Dr John Sorabji, senior fellow at the UCL Judicial Institute and principal legal adviser to the lord chief justice and master of the rolls. In an article for the Expert Witness Institute (EWI), he argues that the European approach will help shape the future of expert evidence as the government's austerity measures lead to the rise of the 'inquisitorial expert'.

Following the new ruling that judges should do more to help LiPs, he says experts may find themselves increasingly questioned by judges, alongside judge-led 'hot tubs', where experts go in the witness box together. Once judicial evidence-taking becomes the norm, he says the cultural change could see the reintroduction of court-appointed experts, with party-appointed experts becoming the exception.

However, the immediate challenge ahead, says Stevens, an EWI governor, is to bring on the next generation of experts. 'Experts are going to have to get to grips with giving more accurate forecasts of their costs,' she says. 'We can't have experts continuing to work in the way they always have while every other part of the cost-recovery process is squeezed.'

'But what we don't want to do is drive experts away thinking this role is not worth doing. We need to think how we can use them more cleverly and work smarter together.'

Grania Langdon-Down is a freelance journalist

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— Stephen Webber, Hugh James



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 Web: www.healthyminds.net

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Dr Joshua Adedokun

FCARCSI, FRCA, FPPMRCA

Chronic Pain Expert

Dr Adedokun has experience in the assessment and treatment of a wide range of chronic pain conditions. He has extensive experience in Personal Injury and Clinical Negligence claims with an expanding and ever-growing medico-legal practice preparing reports on the instruction of Claimants, Defendants and on a Joint Expert basis.

Current instruction ratio is Claimant (60%); Defendant (30%); Joint (10%), producing an average of 200 reports a year and has made a number of Court appearances.

Dr Adedokun is listed on the UK Register of Expert Witnesses, he is an APIL Expert, and is Sweet & Maxwell checked (2016) Member of Society of Expert Witnesses and Expert Witness Institute.

He has no waiting lists, most clients are seen within an average of 1–4 weeks.

Urgent appointments and reports can be accommodated. Average turnover time for reports is 4–6 weeks. He covers Manchester, London, Liverpool, Leeds and Birmingham.

Domiciliary visits are also undertaken.



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Forensic accountancy

Forensic Accountancy—its Role in the Detection of Fraud

Forensic accountancy describes the accountant's role in the general area of fraud detection. It is an essential discipline which has grown primarily during recent years as a result of an increasing volume of litigation. This article examines the nature and types of fraud and forensic accountancy's role in the investigation and analysis of financial statements, explains how forensic accountants are selected.

Forensic accountants are required to be conversant with the "forensic" techniques and procedures used by the courts in the investigation of fraud. The skills of an accountant need to be combined with those of an investigator and the findings need to be presented in a way which is understandable to the court. This is particularly important in an expert witness role where it may be necessary to witness a trial or to give evidence.

Introduction

A large proportion of the general accountancy profession is involved in the detection of fraud. This is a complex task which requires a high level of technical skills and a thorough knowledge of the law. The accountant's role is to investigate and report on the financial statements of the company in question.

General nature of forensic accountancy
The forensic accountant's role is to investigate and report on the financial statements of the company in question. This is a complex task which requires a high level of technical skills and a thorough knowledge of the law. The accountant's role is to investigate and report on the financial statements of the company in question.

Skills in the forensic accountant's role
The forensic accountant's role is to investigate and report on the financial statements of the company in question. This is a complex task which requires a high level of technical skills and a thorough knowledge of the law. The accountant's role is to investigate and report on the financial statements of the company in question.

Loss of profits cases: the expert accountant's role

George Sim looks at the ways in which a forensic accountant can add value

A forensic accountant's role in loss of profits cases is to investigate and report on the financial statements of the company in question. This is a complex task which requires a high level of technical skills and a thorough knowledge of the law. The accountant's role is to investigate and report on the financial statements of the company in question.

- identify the cause of the loss of profits
- identify the parties involved
- identify the losses
- identify the parties who should be liable for the losses
- identify the parties who should be liable for the losses

What to ask forensic accountants to do
When an accountant is asked to investigate a loss of profits case, they should be asked to investigate the financial statements of the company in question. This is a complex task which requires a high level of technical skills and a thorough knowledge of the law. The accountant's role is to investigate and report on the financial statements of the company in question.

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Forensic accountancy

Rakesh Kapila describes the role of the expert in the calculation of quantum of damages

Forensic accountancy is a term which describes the accountant's role in the investigation and report on the financial statements of the company in question. This is a complex task which requires a high level of technical skills and a thorough knowledge of the law. The accountant's role is to investigate and report on the financial statements of the company in question.



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What price experts?

Rakesh Kapila guides us through the complex issue of fee arrangements for experts

As a result of the increasing volume of litigation, the role of the expert witness has become increasingly important. This is a complex task which requires a high level of technical skills and a thorough knowledge of the law. The expert's role is to investigate and report on the financial statements of the company in question.

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SIM KAPILA is a niche practice known for its expertise in forensic accountancy.

Our extensive experience includes • loss of profits cases • fraud cases • personal injury and fatal accident claims • divorce cases • professional negligence actions and • insurance claims.

We are members of the Academy of Experts, contribute regularly to legal journals and give seminars to solicitors and insurers.

If you would like to benefit from Sim Kapila's expertise and experience, we will be happy to give you a preliminary view without obligation on any of your cases.

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