

## Differences Between Scotland and England on the Recovery of Documents – an overview by Jackie McRae

1. A recent case in the Court of Session re-emphasises differences between Scottish and English courts in the handling of experts' reports and witness statements. In Scotland such statements are called 'precognitions'. *Amy Whitehead's Legal Representative v Graeme John Douglas and Others* concerned a claim for damages for injuries to a 12 year old child arising out of a road accident near Wick, in the Scottish Highlands. The claimant instructed an English accident reconstruction expert who analysed precognitions taken by the claimant's solicitors and referred to salient points from these in his report. The claimant also obtained a psychologist's report which referred to the content of witness precognitions. In Scotland precognitions are confidential to the client's legal advisers and reference to their content is generally not permitted at a proof or jury trial.
2. The defenders applied to the court for a commission and diligence to obtain copies of the witness precognitions. Although precognitions are subject to legal privilege, the defenders argued that they were entitled to recover them because they had been relied upon by the experts who had referred to them in their reports. By implication re the defenders had waived any legal privilege attaching to the documents. The court refused the motion.
3. The judgment noted that in Scots law an expert's report is not evidence, nor can it substitute for the expert's evidence in chief. By contrast, in the English courts the report may become part of the expert's sworn testimony or substitute for the expert's oral evidence. In Scotland the fact that a report discloses the existence of written material or even quotes from it, does not override the ordinary rules governing recovery of documents and does not entitle the other party to obtain material which the expert may have used in forming his conclusions. A party does not waive his rights of confidentiality by disclosing confidential documents to his own expert and later lodging a report from that expert which mentions them. Lodging the expert's report does not allow unlimited access to the opposing party to material which would normally be regarded as privileged.
4. The court also noted that in England expert witnesses owe clearly defined duties to the court, overriding the particular interests of the party instructing them. This is not the case in Scotland. An expert instructed by one party has no duty to the court greater than that of any other witness. The reason for disclosing an expert's report is to give the opposing party fair notice of what the expert's opinion will be if certain facts are proved. What evidence the expert can give will depend on what he is asked by the parties in examination. He is not in a position to volunteer information, and his conclusions will be placed within the context of all the oral evidence.

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