

5. PRACTICAL PROBLEMS

5.1 Being in court

If a water chemist is involved in court proceedings he or she should be careful not to commit perjury by knowingly swearing a false statement concerning the disputed matter. This can either be in a statement made prior to the commencement of court proceedings or during the hearing itself. Equally, it is an offence to instruct or procure someone else to commit perjury.

Discussing the evidence you will give in court with another witness, e.g. a colleague, can lead to your evidence being rendered inadmissible because of "collusion" between witnesses.

See section 5.4 below on contempt of court.

5.2 The Evidence - is it admissible in court?

Evidential matters are extremely complex and detailed advice must be sought in specific situations. There is a general prohibition in accepting hearsay evidence in court. Hearsay is a statement which is "offered as evidence of the truth of its contents", other than a statement made by a witness in the relevant proceedings. In effect this means that the only non-hearsay evidence is those matters which the witness personally saw or experienced. Original documents (not copies) constitute documentary evidence and are therefore also admissible. In practice, there are various exceptions to the hearsay rule, including the use of photographs, though if the provenance of the photograph is disputed, it is advisable to be able to prove that the negative was from the film that was in the camera at the relevant time. The photographer's identity needs to be recorded, assuming that it was not an unmanned camera.

In any matter which is likely to be used in litigation, it is essential that ALL documentation is retained including "rough" books. Chain of custody procedures should be followed for samples. All laboratory and other record books should be signed and dated, preferably on each page. Contemporaneous notes and documents can be relied upon by a witness in giving evidence in order to refresh his memory, so it is important to create such documents at the operative time. For example, police officers are trained to record details of incidents in their pocket notebooks and can refer to these when giving evidence.

5.3 Taking samples - evidential problems

When taking samples which may later be used as evidence in court, section 209 of the Water Resources Act 1991 must be complied with. This has been amended by the Environment Act 1995 in recognition of the case of CPC(UK) v Harcross Timber where a result from a probe in a river was held to be admissible evidence even though the "tripartite" sample procedure could not be followed. The "tripartite" sampling procedure is therefore no longer necessary.

Failure to comply with evidential requirements may not only lead to an unsuccessful prosecution but, conceivably, could leave the prosecuting body (and the individual) open to a charge of obstructing the course of justice or wasting court time if proceedings then fail. However, the most likely outcome is an order to pay the other side's costs.

There is also the problem that unauthorised taking of a sample could be theft or conversion of goods, see section 4.4 above, or trespass to land.

5.4 Legal proceedings - contempt of court

No material should be made publicly available, whether intentionally or otherwise, which risks offering comment on matters which are set to go to court or are already there.

Parties involved in court proceedings should also avoid doing anything that risks constituting a contempt of court. There are two types of contempt of court, civil and criminal. Civil contempt is anything that plainly shows a disregard for the authority of the court, for example an open insult or disobedience to a judge's orders. Criminal contempt, on the other hand, is conduct that is either likely or intended to obstruct or prejudice the course of justice, for example by publishing material that may adversely affect the open mind of the jury, or the witnesses. Both perjury and contempt of court are punishable by imprisonment.

5.5 Drinking water supplies

The supply of drinking water to the general public is the responsibility of the water undertakers (the water companies) under section 6 of the Water Industry Act 1991. The Drinking Water Inspectorate enforces standards for drinking water under section 18 of the Water Industry Act. Sections 18 to 21 deal with the procedure to be followed if a contravention of the drinking water standards has taken place. Thus, an enforcement order can be served on a water undertaker. If the order is breached and loss or damage is caused, then this is actionable in civil law under section 22. There are various rights of entry in relation to these powers.

Sections 71 to 84 of the Water Industry Act deal with various problems in water supply, including contaminating a water supply or wasting or misusing water.

5.6 Powers of entry for sampling and other purposes

Sections 71 to 84, 168, 170, 171 and 172 confer powers of entry upon persons designated by the water or sewage undertaker, as the case may be. These powers only relate to the activities specified in the above sections. Under section 173 there is an offence of impersonating a person entitled to entry. Schedule 6 contains supplemental provisions relating to rights of entry. Part I includes a general prohibition on exercising powers of entry to non-business premises unless 24 hours notice has been given. It also deals with serving notice for entry on occupiers of non-business premises, warrants to obtain entry and conditions of issue, obstruction of persons having a right of entry or who hold an entry warrant, and maintaining confidentiality in regard to manufacturing processes and trade secrets. Part II deals with further aspects including exercise of rights of entry without a warrant (on 24 hours, or 7 days notice, depending on the case, or in an emergency), use of identification, duty to secure premises afterwards and compensation.

Under the Water Resources Act 1991, there are equivalent powers of entry under sections 169, 170, 171 and 172. Schedule 20 covers the requirement to serve a notice before exercising any of the powers of entry available otherwise than in an emergency, and deals with allied matters though there is no equivalent of Part I of Schedule 6 of the Water Industry Act dealing with non-business premises, presumably as such access was thought to be less of a problem for issues of water resources.

Taking samples from a highway or public path can also have its problems. In the case of Hickman v Maisey an injunction was granted to prevent a horse tipster from loitering on a public highway to spy on the horses in training. The basis for this is that the right to use a highway or path is for the purposes of transport, or allied ones such as having a "breather", and not for anything else.

5.7 Compiling reports and keeping records

Care should be taken when compiling reports. When doing so the following should be taken into consideration, as well as section 5.8.1 on copyright.

5.7.1 Negligent misstatement

Reports, especially if inaccurate, are capable of causing loss to a business. An untrue statement may be made either carelessly, (that is without due concern for its truth), or fraudulently, (where the author either knew the statement to be false or was reckless as to its truth). Ambiguous statements may fall into either camp, depending upon whether the statement was honestly, though ineptly, used or, on the other hand, phrased so as to be intentionally misleading. If the report is relied upon by the person to whom it is addressed, and causes either that person or a third party to suffer harm or loss, the author is potentially liable in an action for damages. In a situation where the information contained within a report was true at the time it was made, but which, subsequently, becomes false, the author has a duty to correct or update the information before it is relied upon. This makes it important for those supplying information to keep both themselves, and those relying on it, current with developments in their field of expertise.

5.7.2 Defamation

Statements that could injure the reputation of a company or a person risk being defamatory if conveyed to a third party, whether in writing (libel) or in spoken words (slander). Generally, for a case to succeed, the words or statements must be maliciously published and refer, whether explicitly or implicitly, to a particular person, company or group of people. It is, however, a defence to an action for defamation if the statement is true or a fair comment on a matter of public interest. Accordingly, great care should be taken to substantiate anything which is potentially defamatory before it is in any way published or broadcast. Defending defamation proceedings can be very expensive, even if done so successfully.

5.7.3 The correct analysis?

In the unfortunate event of a water chemist deliberately putting down the wrong result of his analyses, or omitting results, there are various possible consequences.

As regards the general law, creating a document which is inaccurate (eg even wrongly dated), could result in the creator being charged with forgery under the Forgery and Counterfeiting Act 1981, if done other than as an innocent mistake. If the chemist's superior ordered or pressured him to taking such action, the superior could be charged with inciting the offence, or conspiracy with the chemist if that were in fact the case.

In section 5.1 above, the problem of perjury is mentioned. There is also the offence of suborning perjury if a superior pressurised a chemist into giving a false sworn statement, in court or otherwise.

Under the legislation specifically dealing with water, there are powers for the regulators to obtain information from anyone concerning various matters impinging on the operations of a water or sewerage undertaker, or concerning pollution incidents (respectively ss203, 207 Water Industry Act 1991, and ss202, 206 of the Water Resources Act 1991). In both cases, there are penalties for failing to comply with the order to supply the information and with supplying false information. Omitting to include relevant information is taken to be included in the concept of supplying false information. If anyone was foolish as to record incorrect results or omit results, and there was a demand for the relevant information to be supplied, then the individual could be subject to an unlimited fine in the Crown Court.

5.8 Intellectual property

When using material produced by others, care should be taken to avoid infringing any intellectual property rights. The different types of rights are dealt with below.

5.8.1 Copyright

This could be important for those dealing with written material, including as an author of reports. Copyright will exist automatically in any report or letter or other document from the moment of its creation.

Copyrighted material may not be reproduced in whole or in part without the author's consent (though in the case of published material the author will have assigned or licensed his rights to his publisher). There are certain exemptions for fair dealing. Copyright for most documents and photographs lasts for 70 years from the author's death. It is equally breach of copyright to make a copy of a computer program.

Authors of reports should be careful to ensure that their terms of engagement by the client do not give the client unrestricted rights to copy the report, or at least the author's consent is required under such circumstances. For employees, copyright will normally rest with their employer.

5.8.2 Patents

A patent is intended to protect the inventive idea of a product by affording a 20 year monopoly for a patented product or process. During this time no one else can sell, manufacture or use the process without permission. To do so may result in the object being seized and destroyed and damages being sought, unless the user can show that they had no grounds for supposing that the product was patented.

5.8.3 Trade marks

A trade mark is any device, brand, heading, label or ticket which gives a product unique distinctiveness (e.g. "Coca Cola", "BMW"). The owner of a trade mark has a right to stop others from using it. This is deemed to be infringed by anyone using an identical or very similar mark. It is unlikely that a water chemist will have much responsibility in this area, but care should be exercised when devising any new logo or name for a product, agency or company.

5.8.4 Design Rights

Many products have design features added which are protected by design rights. These fall into two categories: unregistered and registered. Unregistered design rights arise automatically and protect the general aspect, shape and configuration of an object giving the owner of the design right the exclusive right to reproduce the design for commercial purposes. Anyone plagiarising the design may be liable for damages, unless they can show that they reached the same design independently. Registered design rights are similar but confer stronger rights for products which display a degree of ornamental or artistic 'eye appeal'. As above, it is unlikely that design rights will impinge on a water chemist's day to day work, but he should be aware of them not only to avoid infringing those of others but also to protect his own.

5.9 Vicarious Liability

A negligent act committed by an employee of an organisation in the normal course of his or her work will render that organisation liable because it is the employer of the individual responsible. This is termed vicarious liability. The situation arises, firstly, because persons, when acting for their employer are considered to be an

embodiment of it. Secondly, it is generally possible to obtain higher awards from organisations than individuals, making the former more attractive to sue.

In the case of an employee acting on their own behalf and committing a crime or a civil wrong (for example, theft or infringing computer software copyright) the employer is not vicariously liable.

5.10 Personal liability of directors and managers

There is a standard clause which appears in virtually all modern Acts of Parliament for personal liability of directors and managers. They can be personally charged where an offence has been committed by a company, and the individual has contributed to the offence by consenting to it, or it happened because of his neglect. Examples are section 157 of the Environmental Protection Act 1990 and section 37 of the Health and Safety at Work Act 1974. The penalties are the same as for the company.