SOLICITORS JOURNAL

Common ground

Reforms and fee cuts have led to tensions between expert witnesses and solicitors, but both professions are united in deploring the impact on access to justice, says **Mark Solon**

As the courts and government continue their endeavours to keep a lid on litigation and curb costs, expert witnesses have remained in the spotlight.

Two years on from the civil procedure reforms spearheaded by Lord Justice Jackson, solicitors and experts are both still getting to grips with the altered landscape, marked with costs budgeting and tight deadlines – and costs sanctions where these have not been adhered to.

The relationship between the two sets of professionals, historically sometimes a tense one, has not been eased by the reforms or by the punishing fee cuts that both have had to bear in the legal aid sphere.

With one voice, expert witnesses and lawyers have warned that the cuts are adversely affecting the number and quality of experts willing to act in publicly funded cases, with a consequent impact on justice in some cases.

Legal aid dilemma

Richard Emery, of 4Keys International, an expert in retail and credit card theft, paints a gloomy picture from the legal aid front. He explains that the fee rates paid by the Legal Aid Agency (LAA) for expert work were fixed in 2007/8 and reviewed every year for six years but never increased. Off the back of those stagnant rates, fees were cut by 10 per cent in 2013 and by a further 20 per cent in 2014, so experts are now paid £115 an hour.

'Balanced against inflation, in today's money that means we are getting paid half of what we were paid ten years ago,' he laments.

Emery, who says that without his other commercial practice he would have to think seriously about continuing to do legal aid work, states that many others are no longer willing to do the work for the rates on offer.

'I am concerned that the quality of experts has slid and will continue to slide further if the rates, particularly in highly specialised areas of medical science, are not increased,' he cautions.

He foresees a future in which hospitals will not release medics from their clinical duties in order to act as expert witnesses.

Kay Linnell, the treasurer at the Expert Witness Institute (EWI) and a forensic accountant, echoes his concerns. She asserts that it is no longer possible for an expert to complete a job to their own satisfaction unless it is done at their own expense.

The pool of experts is diminishing, she says, as fewer experts are willing to act and there has been a 'dumbing down' of their evidence to 'formulaic tick-box questions and answers' that no longer fulfil a true 'assistance to the court' role.

This, she observes, has had an 'adverse effect on justice for individuals to the extent that litigants' human rights are at risk', and in some instances 'incorrect' decisions are being made by courts.

In addition, where work has been requested, Linnell notes that the LAA is taking even longer to pay experts for the work they have done.

Uncertainty over payment for court attendance, where required, is another factor that Emery cites as militating against taking on expert work. Unlike with the production of written reports, he explains, there is no prior authority given for how much an expert will be paid to attend court.

'The maximum is £490 for a whole day, but the senior clerk in court can reduce that to as little as £226 for a day,' he says, and there is the risk that experts will not get paid a penny if the trial is adjourned, or the case dropped or otherwise resolved.

A side issue, but one that Emery says is irritating nonetheless, is the low payment for travel costs and the allowance for staying away from home overnight. With the exception of the country's six biggest cities, the allowance for staying overnight is £55.25 a night – a rate that was fixed in June 2005 – and travel fees have been slashed by 50 per cent to £40 an hour.

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Tension over who bears third-party costs overruns has yet to play out fully

'It is not uncommon for me to spend more than I can recover in the expense allowance – that is unacceptable,' he states.

Expert witnesses are often of crucial assistance to the court in criminal cases. Their reports can result in a defendant pleading guilty, thus saving the court's time and thousands of pounds of taxpayers' money, and sparing victims from having to give evidence.

Yet, says Emery, the LAA has no methodology for measuring the value of an expert witness. He recalls: 'Recently I was paid £3,000 for a report. As a result of the contents of my report, the defendant pleaded guilty and the trial, listed for three to four days, was vacated, saving huge sums of money – but no one records or measures this.'

He adds: 'No one understands the commercial or judicial value of the expert witness,' and proposes that judges keep a note of the performance of experts and the outcomes to circulate to the LAA and to solicitors.

Post-Jackson fallout

It is not purely in the realms of publicly funded cases where money can be a thorny issue. The Jackson reforms have meant that lawyers have to give earlier and far greater consideration to the costs that are going to accrue in litigation. That includes third-party costs, such as those relating to experts.

Despite the seismic shift in approach, the claimant clinical negligence partner at Bolt Burdon Kemp, Suzanne Trask, said the change in funding arrangements in April 2013 has 'not significantly altered the way we work with experts'.

While the recoverability of elements of costs from the defendant has altered, after the event insurance products remain available to the claimant to cover these disbursements, she explains.

'Part of the insurance premium can still be recovered from the defendant in successful clinical negligence cases, with the other part of the premium being deducted from the compensation recovered.

'So the client now bears the cost of insuring for the cost of some expert fees. In my experience this has not been something that deters claimants,' says Trask.

What has changed, however, is the stage at which issues and costs need to be identified. Francesca Kaye, the immediate past president of the London Solicitors Litigation Association and a partner at Russell-Cooke, explains that solicitors need to identify at directions hearings what an expert is being instructed for and their associated cost.

This is easier to do in larger cases where the courts will more readily permit experts' costs, she says.

Budgeting and timetabling can be problematic. Kaye observes that there has been a tendency for experts to regard deadlines as guidelines. 'They are not,' she insists, and if an expert cannot meet the deadline set by the court, they should give the solicitor early notice and have a good reason to boot.

'Solicitors have had to learn to manage the new regime and experts will need to get better at it too,' she adds.

While Kaye finds the idea of budgeting easier in smaller cases, Emery suggests that it can be totally impossible in larger cases where there can be large quantities of information to analyse in circumstances where the volume cannot be predicted.

Where court-approved budgets overrun, the question of who should bear the pain can be a moot point. Some experts are taking a robust approach and claiming their stated fees in full, regardless of what the court dictates, which can put the solicitor and client in an awkward position.

Although the Jackson reforms have been in place for just over two years, Kaye says that everyone is still struggling with budgeting. Most cases that started post-Jackson are still going

through the courts, but she predicts that the tension over who bears third-party costs overruns has yet to play out fully. 'There will be cases where solicitors get caught,' she adds.

Linnell notes: 'Solicitors can take uplifts on fees and enter conditional fee agreements with clients based on a risk/success matrix or underwrite costs and have an interest in the outcome of cases.'

Experts cannot do that and retain independence, so their expert's fees should be ring-fenced, she argues.

Other phenomena that have come out of the Jackson reforms are the use of single joint experts and the practice of 'hot-tubbing' – where experts give their evidence together. For both practices, it is early days, and hot-tubbing remains rare.

But Thayne Forbes, the joint managing director at Intangible Business, says he has seen signs of the benefits of hot-tubbing type exercises where the parties adopt a more proactive, open, and constructive approach to test instructions given to experts.

'This sometimes reveals that common ground between experts is more extensive than originally thought,' he notes.

To regulate or not to regulate?

The professional standards of some experts, particularly given the increasing financial constraints, have continued the (as yet unresolved) question of whether and how experts should be regulated.

While most solicitors and experts themselves state that the majority of experts are honest and conscientious, an undercover investigation by the BBC's *Panorama* last year revealed the willingness of some to breach their professional obligations and write dishonest reports. In *Justice for Sale*, only one out of the nine experts featured declined to write the dishonest report requested by the reporter, who was posing as a litigant in person.

The majority of those who act as expert witnesses are already regulated by their own professional bodies, so the value of another layer of regulation is questionable. However, for those in niche areas of practice where there is no professional body, it is again uncertain who should determine whether a person has the requisite skills to act as an expert.

Linnell favours the proposal of the European Expertise and Expert Institute: certification and the development of a national register of experts, reviewed every five years and monitored by judicial feedback and assessment.

The former Bar Council chairman and regulatory barrister Tim Dutton QC, who appeared in the BBC's documentary, suggests that a study be carried out under the aegis of the Ministry of Justice to discover the extent of abuse.

If after 12 to 18 months it shows that abuse is continuing and widespread, he suggests thought should be given to making it an offence to 'knowingly fail to comply' with the duties set out in either the Criminal or Civil Procedure Rules.

Whiplash reforms

Meanwhile, the government's crusade against the perceived 'compensation culture' led to the introduction in April 2015 of the MedCo online portal through which all medical reports in whiplash claims are commissioned.

Medical experts must be registered with the company behind the site, MedCo Registration Solutions, in order to provide £180 fixed-fee medical reports.

Opponents, including the Law Society, have warned that the new arrangements will increase costs and complexity, while a group of personal injury firms have prepared a judicial review challenge to the scheme, claiming it will impede a claimant's ability to prepare their own case and ultimately deny access to justice to those with personal injury claims.

The reform also sees the introduction of mandatory accreditation and reaccreditation of experts from January 2016. **SJ**

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