Your Witness

Newsletter of the UK Register of Expert Witnesses, published by J S Publications

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Issue 17

The draft Code of Guidance

We are distributing with this issue the draft text of a Code of Guidance for Experts for use in accordance with the new Civil Procedure Rules.

Regular readers will recall that in the report of his Inquiry into the civil justice system, Lord Woolf recommended that such a code should be drawn up jointly by professional bodies representing experts and the legal profession. Within a matter of months a Working Party was established for this purpose, with terms of reference supplied by the senior judge in charge of implementing the Woolf reforms, Sir Richard Scott. At that stage it was envisaged that the code would have the status of a Civil Procedure Rules (CPR) protocol and be buttressed with costs sanctions in much the same way as those subsequently adopted for personal injury and clinical negligence litigation. However, as time went on, it seemed that the authorities had begun to despair of the Working Party producing anything worth having, and the talk was of a code of best practice that might not be given any teeth at all. Not any more, though, for what we now have is a document that is destined to become a Practice Direction. Woe betide any expert who breaches the Code thereafter.

Clearly, the draft is an important document that deserves close study by all those who practice as expert witnesses. But here we come to a most extraordinary circumstance: although it is headed 'for consultation', it has been given the most circumscribed of distributions. As publishers of this newsletter, and having been asked previously by the Lord Chancellor's Department (LCD) to assist in consultation exercises with experts, we have on several occasions been assured by the LCD that we would be sent a copy as soon as the draft was ready. It was only on 23 August, though, that we acquired one, 7 weeks after it had become available. It would seem, too, that even some members of the Working Party were unaware that the draft had been published, to judge from a memo about it which the Academy of Experts has sent to its members.

What would appear to have happened is that the Chairman of the Working Party, Sir Louis Blom-Cooper, decided that the need for consultation would be satisfied if he were to have copies of the draft Code distributed to members of the Expert Witness Institute (EWI) – of which, coincidentally, he is also the Chairman. I will not speculate further of the reasons he might have had for taking that view, but I am concerned that they should not prevent those readers of *Your Witness* who are not members of the EWI (a very high proportion indeed) from having their say. If, then, you should have comments to make on the draft Code, or suggestions for its improvement, please send them to me by 1st October. I will then ensure that they are forwarded to the Working Party in good time to meet its deadline later that month.

Contributing to Your Witness

The editorial matter in this issue is more varied than ever. It includes the first results from the survey we conducted in July, news of criminal legal aid developments, summaries of two recent cases about the availability of experts to attend court and an article by Bruce Widdowson on the use of risk assessment in experts' reports.

It is a particular pleasure to welcome Bruce Widdowson as a contributor in view of his considerable experience. He commenced his career with the Royal Exchange Assurance Group in 1961 and subsequently worked for many years in corporate broking and risk management, with particular reference to the construction and road transport industries. He is also a risk surveyor, and for the past 5 years has been involved with forensic investigations and expert witness work. My only regret is that for reasons of space we have been unable to reproduce in this issue the whole of the article he prepared for us. However, with his help we hope to return to the topic in the next issue.

Meanwhile, if you should feel inspired by Mr Widdowson's example to share your experience with other expert witnesses, I would be very pleased to hear from you.

And finally...

The court report in this issue features two civil appeals heard in June. Although only one of them was decided under the CPR, the judgments in both stress the importance of adhering to trial dates once they have been fixed.

Insofar as the decisions reflect judicial resolve to speed up litigation, they can only be welcomed. It is tempting, though, to contrast the cases with another that was due to be heard the same month at Winchester Crown Court. In that instance, the case was postponed till December because the judge had tickets for Wimbledon on what was expected to be the last day of the trial. It was, of course, a criminal case (in more senses than one, perhaps) and so not at all comparable. The incident does suggest, though, that what may be sauce for the expert goose is not yet sauce for the judicial gander.

Chris Pamplin

Expert witness survey 1999

Best ever survey response.

There was a splendid response to the questionnaire we enclosed with the June issue of *Your Witness*. No fewer than 671 forms were returned in a period of 5 weeks, a total which is all the more remarkable because it was reached at a time when many readers would have been on holiday. As far as we are aware, it is also quite the largest response ever achieved by a survey of its kind, and one that promises to provide the expert witness community as a whole with easily the most comprehensive and up-to-date body of information on fee rates and other matters of common concern. We extend our grateful thanks to everyone who took the trouble to complete the questionnaire.

Analysis by profession

Of the experts who returned questionnaires, 249 were medical practitioners, which in itself is a sufficiently large total to justify more detailed analysis of the information they provided. We plan to publish a further report on this in the next issue of *Your Witness*.

Of the remaining 422 respondents, 94 were engineers, 79 had scientific, veterinary or agricultural qualifications, 49 were surveyors or valuers, 49 were accountants or bankers, 36 were in professions ancillary to medicine and 19 were architects or builders. The inevitably large 'others' category totalled 96 experts, of whom the largest subgroups were accident investigators (11) and psychologists (10).

Work status and workload

Of the respondents, 484 (or 72% of the total) are currently working full time, and a further 134 (20%) are working part time. Only 40 (6%) described themselves as retired, and for none of the individual professional categories did this proportion exceed 9%.

We also invited respondents to state what percentage of their workload was accounted for by expert witness work, and for 55% of them it was less than 20%. This compares well with the 50% of respondents who claimed as much in our first survey 4 years ago. Furthermore, the involvement in expert witness activities averaged out at 33% of workload, which is exactly as we found it to be in a follow-up survey we carried out 2 years ago.

Overall, the picture that emerges is of a body of people much involved in expert witness work but with an even more extensive commitment to their professions – which is, of course, exactly as it should be.

Experience

The age of individual expert witnesses is not of any concern to us, but in the questionnaire we did ask respondents to say for how long they had been doing expert witness work. Here again, the information thus gleaned is heartening: they are clearly a very experienced lot. Of those who replied, 83% had been doing expert witness work for at least 5 years, and 50% had been doing it for more than 10 years.

There is some change to report, though. When we asked the same question in our 1995 survey the corresponding figures were 91 and 60%. A possible explanation for this shift could be that more professionals who are relatively new to expert witness work now see the advantage of having their details listed in a directory such as the *UK Register of Expert Witnesses*. Alternatively, it may mean that professionals are tending to get involved in expert witness work at an earlier stage of their careers. Has anyone noticed that expert witnesses seem to be getting younger?

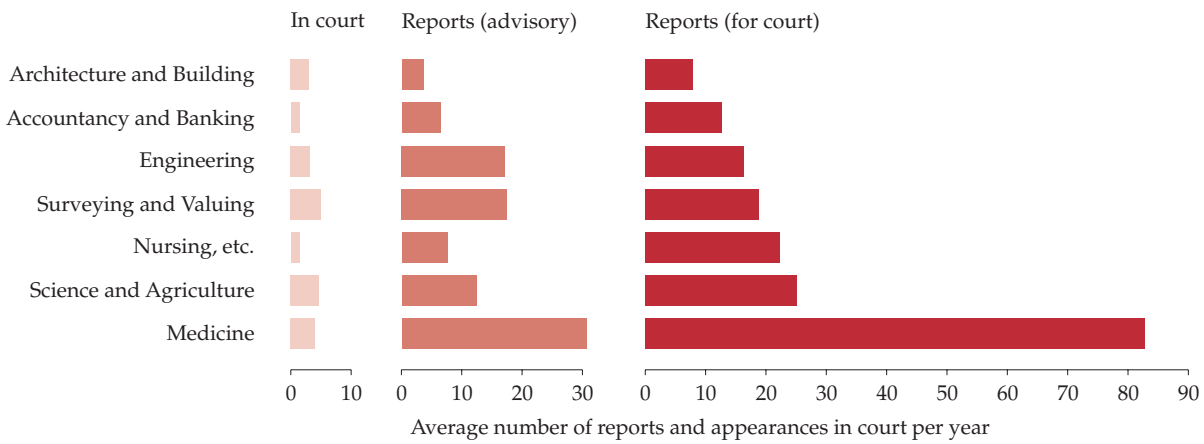
A further intriguing possibility is that expert witnesses are tending to give up this sort of work sooner, and the answers to another question lend some support to that idea. Those replying were asked whether or not they foresaw their involvement in expert witness work increasing. Whereas 82% did so in 1995, 71% do so now. Given, though, all the changes in litigation practice that have taken place during the past 4 years, it is quite remarkable that even that many should still be bullish about what the future holds for them.

Organisations

One striking difference that emerges from the answers to the latest questionnaire is that a far

Figure 1. Breakdown of workload within the professional categories.

Majority of experts still confident about the future.



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higher proportion of those replying to it belong to an expert witness organisation than was the case 4 years ago. In itself this is hardly surprising, since there was then only one such body in existence, whereas now there are three.

Overall, 54% of respondents belong to at least one expert witness organisation, while 13% of them belong to two and an ultra-keen 4% are members of all three. However, one should not conclude from these figures that half of all experts belong to an expert witness organisation. The combined membership of all three organisations is in the order of 2,000 experts, which can only represent a small fraction of the total number of expert witnesses in the UK. The relatively high percentage in this survey is more likely to reflect the fact that experts who respond to surveys are more likely to also belong to an expert witness organisation.

Activity

The answers to questions about level of activity are most easily summarised in tabular form. As Table 1 and Figure 1 show, medical doctors write on average three to four times as many reports for court use as experts in the other major disciplines. On the other hand, they are as unlikely as any to be required to give their evidence in court.

Although we asked similar questions of the experts who took part in the survey we conducted in 1997, the two sets of replies are not strictly comparable. This is because on that occasion we did not attempt to distinguish between reports written for use in court and those written purely for the benefit of the instructing solicitor and his or her client. This explains why the figures in the 3rd and 4th columns of Table 1 are so much lower than 2 years ago. It is only when they are added together that we arrive at totals that are comparable. They are then found to be broadly similar to those from the 1997 survey. Here, though, there is an exception, which this time is provided by nurses and those other experts in professions ancillary to medicine. For them there does appear to have been a steep decline in report writing activity over the past 2 years. Can anyone say why?

Most experts are as busy as ever.

From the replies to the question about advisory reports it would appear that four out of five of our respondents had written at least one in the course of the previous 12 months. However, for those in most professional categories advisory reports were still being requested less frequently than reports intended for exchange with the other party. It will be interesting to see from future surveys whether the growing reliance on conditional fee agreements (CFAs) leads solicitors to commission advisory reports more often in future.

Hitherto, of course, CFAs have been confined almost entirely to personal injury litigation, and even there they have been used in only a minority of cases. This explains why 88% of respondents reported no involvement during the past year with cases funded in this way, and also why the majority of those who had had some experience of them were medical doctors. Again we shall hope to be able to use future surveys to follow changes in these respects, too.

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Table 1. Summary of the results.

Professional category	No. of replies	Average no. of advisory reports per year	Average no. of court reports per year	Average hourly rate for reports (rate from 1997 survey)	Average no. of court appearances per year	Average full-day rate for court appearances (rate from 1997 survey)
Medicine	249	30.6	82.8	£136 (£124)	4.0	£890 (£870)
Nursing, etc.	36	7.6	22.3	£68 (£76)	1.4	£512 (£535)
Engineering	94	17.1	16.2	£71 (£73)	3.2	£567 (£560)
Accountancy / Banking	49	6.4	12.6	£135 (£116)	1.5	£987 (£821)
Science / Agriculture	79	12.4	25.1	£79 (£89)	4.7	£577 (£543)
Surveying / Valuing	49	17.5	18.8	£83 (£77)	18.8	£642 (£629)
Architecture / Building	19	3.6	7.8	£77 (£75)	3.1	£612 (£612)
Others	96	8.9	27.8	£71 (£76)	5.2	£521 (£525)

Accountants and medics top the charging table.

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On the other hand, the current survey is almost certainly the last for which we shall be able to record such a high level of involvement in legal aid cases: 78% of respondents provided reports for at least one such case during the 12 months to June 1999, and 19% had done so for more than 25 such cases. Here again, medical doctors scored more heavily than experts in other professional groups: 32% of those responding had written reports for more than 25 legal aid cases in the course of the year. As personal injury actions account for close on two-thirds of all money claims currently assisted with legal aid, this is only to be expected. It remains to be seen what effect the threatened withdrawal of public funding from such actions will have on future demand for medical reports.

Most experts still don't use written contracts.

Fees

Table 1 also gives the averages for each of the professional groups of experts' hourly rates for writing reports and full-day rates for attending court. In each instance the rate is followed by that reported in our previous survey 2 years ago. In view of the size of the samples, it would be unwise to read too much into some of the changes these figures reveal. However, it does seem that accountants and bankers are poised to take over from medical doctors the distinction of charging most for their time!

Once again, the figures in the final column demonstrate the extent to which officially determined allowances fall short of fees that experts are free to negotiate for themselves. From this month the most that consultant medical practitioners, psychiatrists or pathologists can expect to be paid for attending court in a criminal trial is £415 a day, which is less than half the average fee they charge in civil cases. For forensic accountants the discrepancy is even greater: a maximum of £408 a day in criminal trials as against an average of £987 a day in civil ones.

Cancelled hearings

The issues concerning cancellation fees were explored in the report on our previous survey (see *Your Witness* 11) and will not be repeated here. Indeed, there is space in this issue for little more than an updated summary of the average percentage of their normal fees that experts in different professions charge for different periods of notice. On the whole, the details set out in Table 2 differ little from those of 2 years ago, apart from the fact that experts who levy cancellation fees would appear to be charging rather more than before when the notice they are given of the cancelled hearing is less than 24 hours. With doctors, for instance, the average is now 91% of the normal fee as against 75% 2 years ago, and for experts in general it is 82% as opposed to 73%.

Increased charges for short-notice cancellations.

Terms of engagement

Perhaps the most startling single piece of information to emerge from our latest survey is that the majority of experts responding to it have yet to devise for themselves a standard written form of contract for use when accepting instructions. Only 38% of them reported that they had such a contract, which is little different from the situation 4 years ago when we found that just 32% of experts were using one. Although there is some variation in practice between the different professional categories, it would appear that in none of them does the majority of experts use a formal contract for work of this kind, not even the accountants and bankers! After this, it is hardly a surprise to learn that when accepting instructions 43% of respondents to the survey do not stipulate how soon after issuing their invoice their fees are to be paid.

Payment

Not that there is much encouragement to be gained from the experience of experts who do stipulate a fixed period for payment of their fees. Only 35% of them are able to report that their instructing solicitors pay up on time in even the majority of cases, and an astonishing 39% say that they never do so. The latter figure indicates a marked deterioration since 1995.

In these circumstances it is no surprise at all that experts should find it necessary to take legal action to recover unpaid fees. Of those replying to the latest questionnaire, 24% say that they have sued for their fees at some stage in their expert witness career. What is astonishing is that no less than 15% of them should have found it necessary to do so during the past 12 months. This, too, can only reflect a worsening payment situation.

John Lord

Table 2. Percentage of normal fee charged for cancelled hearings.

Professional category	Notice period (in days)		
	< 1	1–7	8–14
Medicine	91%	50%	39%
Nursing, etc.	83%	50%	31%
Engineering	80%	49%	38%
Accountancy / Banking	54%	49%	40%
Science / Agriculture	80%	57%	39%
Surveying / Valuing	73%	52%	40%
Architecture / Building	72%	46%	33%
Others	78%	58%	51%
Overall	**82%**	**55%**	**40%**

Risk assessments in experts' reports

Assessing risk is not new. The first step is to recognise that risk exists as a consequence of uncertainty.

We all make daily decisions about risk. However, the idea of setting them down in a mathematical form will be new to most lawyers and to some experts.

Assessing risk

Mathematical calculations have helped to enhance many experts' reports. For some disciplines they could even become the norm, due to the requirements of Part 35 of the new Civil Procedure Rules 1998. However, the calculations used in risk assessments need not be complex. Indeed, the reverse is desirable if such assessments are to be easily understood.

In simple terms, risk can be defined as hazard (of injury, ill health, loss or damage created by the feature) multiplied by probability (of an incident occurring). A broad assessment could start by grading each of these factors on a scale of 1 to 5, giving a maximum product of 25.

Numerical value	Hazard	Probability
1	Insignificant	Unlikely
2	Low	Possible
3	Standard	Standard
4	Significant	Probable
5	High	Almost certain

However, the assessor will need to make some allowance for the unique features of each case. In addition, some situations may be subject to Regulations or a Standard where risk is actually defined in a specific form. A footnote within the report should clarify these situations, e.g. BS 8800 – 1996 'Guide to Health and Occupational Management Systems'.

The next stage is to refine the process by allocating scores on both scales to 0.25. For example, hazard = 4.25 and probability = 3.50. This finer tuning retains the advantage that the product of their multiplication can be further multiplied by 4 to convert to a percentage.

Let us look at a hypothetical case. An insurance surveyor visits a country house hotel and notices that during the alterations two rooms were knocked into one to form the bar area. The fireplace, which had been in the centre of the original wall, was now on a corner by which people had to squeeze when the premises were crowded. This feature could attract a hazard value of 4 on the above scale. However, in the sedate surroundings of our country house hotel there was little chance of anyone impacting the feature with much force, so a probability grading of only 2.25 might be assessed. The result: a risk grading of 4.00 x 2.25 = 9 out of 25, or 36%.

Now let us consider a higher risk situation. Our hotel lounge bar becomes a sports room in a health farm. Large numbers of people, including children whose faces will be at the height of the mantleshelf, are playing games in the room. The fireplace still has a hazard value of 4, but the probability value of someone bumping into it forcefully is now 4.25 on the scale. The risk value is therefore 4.00 x 4.25 = 17 out of 25, or 68%.

Incidentally, when risk gradings are used in their preventative mode, there are points at which a surveyor would say that remedial work should be done, and others at which it must be done. These would probably be at 48% and 56% respectively on the scale we have been using.

It would be for the court to say if liability should cut in at any particular percentage. However, a well thought out report should help a judge in reaching the desired quality of judgment.

We can now see how the system is intended to work, but different professions will have to consider how the methodology fits in with their own working practices.

Probability gradings in isolation

Another version of the methodology is used when the hazard element of the equation is missing. It will already be familiar to many experts and will come to the fore with implementation of the new Funding Code for legal aid.

Consider, for example, the police investigation of a road traffic accident where there is neither a hazard feature in the road itself nor a vehicle defect. Most RTAs are caused by driver error and sometimes there is no independent evidence, e.g. skid marks or a witness statement. The textbook case is that of a head-on crash between two cars on a bend where the final resting place is not conclusive. Each driver blames the other. One of them says that the other cut the corner, but the second driver says the first was forced to go wide in the other direction due to excessive speed.

A police officer conceals himself near to the bend of the road and observes that while many cars cut the corner, none go wide. The actual probability grade would depend on additional factors, including the length of period over which observations were made. Furthermore, such an exercise should of course be conducted, as far as possible, in similar conditions to those of the accident. Assuming, though, that between three and ten cars were observed to cut the corner, a probability grading of between 3.75 and 4.25 might be recorded.

It is to be hoped that, once cases have been decided on the basis of experts' reports that contain risk gradings, precedents will be created. Then in similar situations it should become easier to persuade insurance companies to settle more quickly.

Bruce Widdowson, ACII AIRM

No need for complex calculations...

... a simple grading system should suffice.

News and conferences

Withdrawal of PI legal aid saves no money.

Last chance for re-think

The Access to Justice Act received the Royal Assent on 27 July, but it may be some while before it takes effect. In particular, it now seems unlikely that any of the changes affecting legal aid will be introduced before the new funding body, the Legal Services Commission, has been established, and that is not expected to happen before next April. There is still time for the Government, therefore, to have second thoughts about implementing the Act's least sensible provision – the withdrawal of legal aid from personal injury cases.

As we have said before, to make such cases ineligible for legal aid would be a singularly short-sighted move. Although they account for over 60% of non-matrimonial cases in receipt of civil legal aid, their *net* cost to the Legal Aid Fund is in far smaller proportion. In the last financial year for which we have the details (1996/97), the net cost of PI cases came to £34 million out of a total net expenditure on non-matrimonial cases of £325 million. The reason for this is that at least 90% of assisted personal injury cases either settle out of court or are decided in favour of the claimant, and that enables the Board to recover through costs the bulk of its expenditure on them.

For the Treasury, though, there is an even better outcome because the successful conclusion of a personal injury case enables the DSS to recover from the defendant's insurers benefits it has paid to the claimant. In 1996/97, it is reckoned that the sums clawed back by the DSS totalled at least £90 million. Then again, it can be argued, although it is less easy to prove, that successful claims reduce the need for future DSS support and for long-term medical care paid for by the NHS. In other words, the end result of using legal aid to fund the PI claims of the less well off has been a net saving in public expenditure.

Over and above these considerations, of course, legal aid has been helping tens of thousands of accident victims to secure the compensation for their injuries to which they are entitled. In England and Wales last year 69,895 of them were assisted in this way. By withdrawing legal aid from the personal injury claims of people who can least afford to fund litigation out of their own resources, the Government would be reducing, not enhancing, access to justice. Only insurance companies would have reason to be pleased with that outcome.

Government plans reduce access to justice.

Legal aid spend 1998/99

Meanwhile the Legal Aid Board has published figures which show that last year the net cost to the taxpayer of the legal aid scheme for which it is responsible came to £1,298 million. This is £63 million (or 5.1%) more than in the previous year. The main increases were in the cost of providing legal advice (the 'Green Form' scheme) and of representation in matrimonial cases. Expenditure on criminal cases in the magistrates' courts and on administration was also up, but that on non-matrimonial civil cases came down for the third year running. Overall, the Board's expenditure has risen 19.6% in 5 years: faster than inflation, certainly, but hardly indicative of a system that has been running out of control, as the Government would have us believe.

Conferences

The autumn conference season will shortly be upon us again. Over the next 3 months there are three conferences for expert witnesses.

EWI Conference

On Wednesday 29th September the EWI is holding a conference entitled 'Experts in the New Legal World'. The venue is the Common Room, The Law Society's Hall, London. The speakers' list, which reads like a who's who of the judiciary, includes Lord Bingham, Lord Chief Justice of England and Wales.

This is the most expensive conference of the three, costing £275.00 for members of the EWI and £375.00 for non-members.

The EWI can be contacted by telephone on 0171 583 5454 or you can e-mail them about the conference on ewiconf@pmint.co.uk.

SEW Conference

On Friday 15th October the Society of Expert Witnesses is holding its autumn conference. The venue is the Weston Building, Manchester Conference Centre. The conference will be looking at the effect of the Civil Procedure Rules 6 months after enactment and the thorny issue of the accreditation of expert witnesses.

In accordance with the Society's expert focus, the speakers' list is balanced between experts and lawyers, and the afternoon session includes workshops and an open forum at which experts can be expected, on past performance, to play an active role.

This is the lowest cost conference of the three at £77.55 for members of the Society and £117.50 for non-members.

The Society can be contacted on their lo-call helpline 0345 023014 or by e-mail at conference@sew.org.uk.

Bond Solon Conference

On Friday 12th November the training company Bond Solon is holding its annual expert witness conference looking at the practical effects of the changes that have occurred this year. As usual, the conference will be held at Church House Conference Centre, Westminster.

The keynote speaker will be Lord Woolf, who will be giving his view on how the recent changes have worked for expert witnesses and his vision for the future.

The cost for this conference is £158.63. Bond Solon can be contacted on 0800 731 2095 or by e-mail at witness@bondsolon.bdx.co.uk.

Criminal matters

As regular readers will know, one of the main provisions of the Access to Justice Act 1999 is the establishment of a Criminal Defence Service to take over functions currently exercised by the Legal Aid Board (LAB) and the Lord Chancellor's Department. As with the Community Legal Service, a key element of the Government's plans for the Criminal Defence Service is the development of a system of exclusive contracts for lawyers providing services funded by legal aid.

As part of this process the LAB published last month two consultation papers, one on introducing and implementing new contractual arrangements for criminal defence work, and the other on 'Ensuring quality and controlling cost in very high cost criminal cases'. It is with the latter document that we are concerned here.

It is a notorious fact that around 40% of legal aid expenditure in the Crown Courts goes on just 1% of the cases tried there. Moreover, it is fraud and fraud-related cases which figure most prominently in that 1%. In 1995/96 there were 11 trials for which legal aid payments totalled more than £500,000, and 10 of them were fraud cases.

To deal with such high-cost cases in future, the LAB proposes a different approach to funding from that to be applied to the general run of criminal cases. The distinguishing feature of this approach is to be contracting on a case-by-case basis with entire defence *teams*, comprising solicitors, counsel and, yes, experts. Hitherto, of course, experts in criminal cases have been free to negotiate their fees with their instructing solicitors, but in high-cost cases, at any rate, it does not seem that they will be able to do that for much longer.

The LAB envisages that individual case contracts would be based on overall case plans, with rates of payment for members of the team to be agreed at the outset. Thereafter, a price would be agreed for each main stage in the proceedings, with each member of the team being required to record the time they actually spent on the case during that stage in order to trigger payment of the money for it.

Although the LAB document devotes only three paragraphs to experts, these demonstrate well enough official thinking on the way experts are to be remunerated in future. They read:

> **6.20** The solicitor will be responsible for choosing and managing the use of experts, again as an integral part of the defence team. Payment rates for experts will be agreed as soon as they are brought into the defence team. Work, and the prices to be paid for that work, will be identified in each costed stage plan.
>
> **6.21** The current legal aid system has struggled to control the cost of experts, and has been less successful in doing so than with solicitors' fees. We will wish to work with solicitors to address this issue and to ensure that the cost of experts can be controlled and that value for money can be obtained. We are inclined to the view that effective control will only be achieved when set rates for experts are prescribed in the same way that rates are set for other professionals in the case.
>
> **6.22** As a starting point, before the prescription of rates, we will wish solicitors to select experts using competitive quoting wherever possible. We recognise that in some narrow specialisms, or where a small field may be further narrowed by conflicts of interest and/or availability, this may not be possible and we may initially have to rely on direct negotiation over fees. However, as the contracting arrangements develop, we foresee the need to prescribe hourly rates in regulations.

LAB wants fraud experts to become 'part of the team'.

While we do not have the space to elaborate any further on the proposals made in this consultation paper, experts interested in learning more may obtain a copy of it by telephoning the Criminal Defence Service Team at the LAB on 0171 813 1000, extension 8524. Experts should note, too, that responses are required by 30 September.

New attendance rates

Meanwhile, the Lord Chancellor's Department has announced increases in the allowances that may be paid to expert witnesses for attending court in criminal cases. Although they may appear more generous than those made last year, they are taking effect 5 months later on and the rate of increase is, in fact, no different.

This year the upper figure for preparation time increases by £4 per hour (£2 per hour for fingerprint experts), while that for a day spent in court is being increased by between £11 and £20. For most experts, this works out at 2.7% per annum, which is the same as in 1998. (See Factsheet 11 for the updated rates.)

As the lead article in this issue of *Your Witness* demonstrates, the LCD's new guideline rates are still way below those that most expert witnesses can expect to earn for a day in court in a civil case.

LCD announces 'increases' in expert allowances.

Are you organising a gathering of experts?

Should you decide that a presentation by us on marketing your expert witness skills would fit in well with the day's agenda, then do let us know. We are able to talk about the different ways of increasing an expert's rate of instruction, or the range of services we offer as the *UK Register of Expert Witnesses*.

Similarly, if you would like information about the *Register* for inclusion in any information packs you may be sending out or think it would be useful for us to man a stand, do call.

Contact Debby Dyson on 01638 561590.

Court report

Experts everywhere will be keen to learn how the courts are applying the new Civil Procedure Rules in matters concerning expert evidence. That it will not always be in ways favourable to them is apparent from the following decisions of the Court of Appeal.

Solicitors must check that experts will be available before instructing them

Hitherto, if an expert found that he or she could not make the day or days listed for trial, the instructing solicitor would ask the court to set a new date for the hearing. Although the judge might grumble about it, providing the other party was amenable, such a request would usually be granted. Not any longer, though. Under the new Rules, once trial dates have been fixed they are to be adhered to, and postponement will be allowed only in exceptional circumstances.

Rollinson -v- Kimberley Clark Ltd was a personal injury action brought by an employee of the defendant company. Proceedings commenced in July 1996, and the defendant's medical expert examined the claimant some time during 1997. In December 1998, though, he recommended that the claimant should be seen by another expert. Even though listing of the case was then imminent, the claimant consented to be examined a second time.

Then in February of this year the defence found that its new expert would not be available on the days for which the case had now been listed. It duly applied for new dates to be set, but the request was refused. The company then appealed that decision to the Court of Appeal, arguing that if the hearing went ahead on the original dates it would be seriously disadvantaged. To this Lord Justice Judge gave a robust answer. If it had ever been acceptable, which he doubted, it was certainly no longer acceptable for a solicitor to seek to instruct an expert witness at such a late stage unless the solicitor had already ascertained that the expert would be available to attend court. If the expert's availability is uncertain, another should be instructed.

Appeal dismissed.

Good reasons now required for changing dates of hearings

In the same week a differently constituted Court of Appeal heard an application made in rather similar circumstances. *Matthews -v- Tarmac Bricks and Tiles Ltd* was yet another personal injury action. In this case the defendant company was seeking leave to appeal the decision of a judge at Plymouth County Court that the trial of the action should take place on a date when neither of its medical experts would be available.

A preliminary hearing had been called to settle the trial date. At this hearing the defendant was represented by a barrister who had been supplied with a list of the dates when the doctors would be unavailable but no explanation for this. The judge wanted to hear the case on one of the dates, and in the absence of reasons why the doctors could not attend, he ordered accordingly. In fact one of the doctors had been subpoenaed to attend a London court that day, while the other was going to be on holiday. The defendant's solicitors sought the judge's permission to appeal his decision, which in the absence of any further information he refused. They then took their application to the Court of Appeal.

Dismissing the application, Lord Woolf noted that counsel for the company had relied heavily on the Civil Procedure Rules, and in particular on their stated objective of enabling courts to deal with cases justly. His submissions had, however, signally failed to take into account the parallel requirement that parties must co-operate with the courts in furthering that objective. The defendant's lawyers had apparently thought that all that was required of them was to tell the judge in Plymouth the dates the doctors would find difficult and he would thereupon settle on one that met their convenience. It was an approach that explained why in the past so many personal injury cases had suffered inordinate delay.

As regards the first doctor, Lord Woolf surmised that the court in London might have been able to arrange for him to give evidence there at a time that would also have allowed him to attend the hearing in Plymouth. As for the second doctor, a request should have been made to him to change his holiday dates.

Cases need to be heard expeditiously, and this requires co-operation all round. Doctors practising in the medico-legal field must be prepared to arrange their affairs to meet court requirements. As for the lawyers, if there was no agreement on dates that were acceptable to the court, they have to be ready with explanations why particular dates were not possible for their experts.

Commercial Court facilities

The Court Service is shortly due to submit proposals to the Treasury for a new court building in London, part of which is to accommodate the Commercial Court.

As many readers will know, the courts where commercial judges currently sit are scattered through different buildings and are often inadequately equipped for the purpose. If any experts who regularly appear in commercial cases have suggestions to make for better facilities in the new building, the judge in charge of the commercial list would be pleased to hear from them. He is The Hon Mr Justice Rix, and letters should be addressed to him at the Royal Courts of Justice, Strand, London WC2A 2LL.

Factsheet Update

Two new factsheets are available now:

ID	Factsheet title
36	The Access to Justice Act 1999
37	The Draft Code of Guidance for Experts

The following new factsheet will be available from 30 September.

ID	Factsheet title
38	Pre-action Protocols

The faxback number is (01638) 565809.

Factsheets are also available on our web site, or can be purchased as a complete set (including updates) in a binder at £30.55 (£26.00 + VAT).

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