Your Witness

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Report agencies

I anticipated that Alan Craxford's letter on the Synapse collapse (*Your Witness* 24) would elicit a high level of interest amongst experts, and I was not disappointed! A selection of responses is published on pages 7 and 8.

The existence of organisations set up to manage the provision of expert reports for solicitors and insurers is now well known. The regular flow of questions we receive about their role, status, etc., tells me that they have always been a cause of curiosity for experts. But recently, curiosity has often been replaced by unease. As interest has been heightened by the Synapse failure, I review here the particulars of that case and present some of the important general considerations facing experts dealing with report agencies.

The vast majority of the cases handled by these agencies lies in the area of civil law. Of these, personal injury claims contribute the dominant slice, and most of the reports are, therefore, in the broad medical field. Indeed, many agencies engage only medical experts and procure only medical reports.

Typically, an agency offers solicitors an inclusive package of services that encompasses:

- finding an expert
- obtaining relevant records
- issuing instructions
- setting up an examination
- chasing the report
- paying the expert.

Unfortunately, problems with each of these items seem to arise with monotonous regularity.

There is no restriction on the setting up of an agency, and there is no requirement for expert or legal experience. Unsurprisingly, there appears to be a wide variation in the type, aim and, above all, performance of the agencies.

Factors in development

So how and why have expert report agencies come about?

The first, and possibly most important, factor was the provision of an optional 'uninsured loss recovery' clause in motor policies. Introduced over the last 10 years or so, these clauses have achieved a very high take up and give potential litigants the means of pursuing a claim in personal injury.

The insurers made block contracts with selected solicitor firms, and that faced the latter with an immediate geographical problem. Claimants, previously drawn mainly from the firm's locality, were now distributed throughout the country. Seeing the client personally became impossible, but worse was the difficulty of finding a suitable expert near to the claimant. Hitherto, solicitors had maintained lists of experts in their own region, but for most, covering the whole country was unrealistic.

Concomitantly, perhaps not coincidentally, the conduct of this type of legal practice was liberated by deregulation in several respects:

- conditional fee arrangements (CFAs) were derestricted
- legal aid was removed
- open season was declared on advertising
- non-solicitor claims handling was freed of stigma.

Finally, the Civil Procedure Rules (CPR) encouraged streamlining of the whole process, including the provision of expert evidence – sacrificing quality for speed, some would say.

Effects of the factors

The outcome was inevitable: fast turnover, impersonal, paper-based fact-finding and subcontracting of report provision, more hands on the tiller, loss of continuity, rushed process, corner-cutting and squeezing of costs.

Once solicitors began using report agencies to find experts and obtain opinions, the floodgates opened. The experience seems to have been that report agencies get experts to work for less while, at the same time, applying generous mark-ups on the fees charged to solicitor firms. It was this promise of high profits that fuelled the rapid growth in the number of report agencies. So much for cost containment as a main aim of the Woolf reforms!

Experts now find themselves subjected to a bewildering bombardment of propositions, none entirely palatable. High volumes of work are offered as inducements to accept low fees, rushed work and delayed payment. We have heard of some staggering practices, such as demands for reports by return before documents have materialised, keeping signed declarations of truth on file to be added to the report by the agency, fees as low as £40 for a doctor's report and payment delayed for as much as 2 years.

But not all the effects are bad; at least solicitors now have a commercial imperative to expidite those cases they take on, rather than promote delay and obfuscation!

The Synapse collapse

Synapse was an agency started in 1998 by a husband and wife team working from home. It rapidly built up turnover so that in March 2001 it owed over £1.5 million, most of it to experts who had provided large numbers of reports without

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News

Employment specialists under fire...

Tribunal talk

Employment tribunals are very much in the news these days, and for good reason. The number of applications they deal with has more than doubled over the past decade, from 44,377 in 1990 to 118,400 last year. In an effort to limit any further increase in this huge workload, and its consequent cost to the Exchequer, the Government last month announced its intention to start charging applicants a fixed fee for bringing a case of unfair dismissal – a proposal that not surprisingly enraged trades unions.

Meanwhile, regulations that came into force in July have made a number of significant changes to employment tribunal procedure. Tribunals are now required to consider making an order for costs when warranted by the conduct of a party's representatives, and the maximum amount they can award has been increased from £500 to a whopping £10,000.

On the plus side, the maximum compensation that may be awarded for unfair dismissal has been raised to £50,000, increased rights have been given to part-time workers and – perhaps most significant of all – the rules of procedure now incorporate an overriding objective to deal with cases justly, which is similar to that contained in the Civil Procedure Rules 1998.

The Employment Appeal Tribunal (EAT) has also contributed to the reform of tribunal practice and procedure, most notably with regard to the use made of expert evidence. In the recent case of *De Kayser Ltd -v- Wilson*, it dealt with criticisms made by the tribunal of consultants who had acted for the employer. The EAT noted that this was not the first time it had had to comment on the conduct of representatives who 'are liable to no disciplinary proceedings as being members of no professional body'. Pending the development of more formal rules, the EAT then laid down guidelines for the future use of expert evidence that incorporate into tribunal practice many of the provisions of CPR Part 35. Interested readers may like to know that these guidelines are reproduced in the latest addition to our series of factsheets, on 'Expert evidence in employment cases'.

... and the OSS gets a roasting

Law Society woes

Solicitors, of course, do belong to a professional body, but it is becoming increasingly doubtful whether the Law Society will be allowed to retain for much longer its present responsibility for disciplining them.

In her latest annual report, published in July, the Legal Services Ombudsman, Ann Abrahams, once again lambasted the Society over the woeful performance of its regulatory arm, the Office for the Supervision of Solicitors (OSS). Although there was a slight drop in the number of complaints made to the OSS last year compared with 1999, she found no comfort in this because at the same time its performance in handling them reached an all-time low. She recorded a satisfaction rate for 2000/2001 of 57%, as against 59% for the previous year and 64% in 1998/1999. In the face of this decline, it is difficult to see how the Society can hope to meet the target the Lord Chancellor has set it of achieving a 75% satisfaction rate in the second half of 2001.

As most readers will know, the OSS was relieved some while ago of responsibility for dealing with complaints against solicitors for the slow payment of expert fees – unless, that is, the complainant has secured judgment for the debt in court. Even then, however, the OSS may not act.

In 1999, a Dr Simon Fordham successfully sued the Liverpool firm of Paul Crowley & Co for non-payment of fees for some 40 medical reports. After the court hearing, Dr Fordham reported the firm to the OSS for professional misconduct but failed to get a satisfactory reply. He then referred the matter to Ms Abrahams, who found that the OSS had neglected to investigate the matter properly and should do so forthwith. The eventual outcome, in June this year, was that both partners of the firm were severely reprimanded for breaching solicitors' rules of professional conduct – but it had taken 2 years and some persistence on Dr Fordham's part to achieve that result.

We can only hope that if the Lord Chancellor should decide next year to transfer the Law Society's regulatory functions elsewhere, it will be to an organisation that can do much better than that.

Criminal rates

First, the good news. Expert witnesses in criminal cases who cannot use public transport to reach court may now claim 45p a mile for getting there by car. The rate was increased by 9p on 1 August. From the same date, the overnight allowance for experts giving evidence in criminal courts in Central London went up by more than £25, from £59.90 to £85.25. On any reckoning, this increase is overdue, since the rate was last changed in 1991!

Now for some less good news. If you choose to use your car when public transport *is* available to get you to court, you can only claim mileage at the public transport rate, and this was increased last month by a mere 2.2p a mile: from 22.8p to 25.0p. Furthermore, if you have to stay overnight at a hotel in the provinces you will only get an extra 70p: £55.25 a night instead of £54.55.

However, the worst news of all is that for the second year running the rate bands which largely determine how much experts can be paid for giving evidence in court in criminal cases have not changed at all. In recognition of the fact that expert witnesses attend court not out of public duty but in the line of business, the Lord Chancellor's Department (LCD) does not seek to prescribe the fees experts may receive for their services. Instead, it issues guidance to Crown and magistrates' courts as to what experts may

reasonably be paid in normal circumstances. It is these rate bands that have not been updated since September 1999.

The reason for this, or so we have been told, is that the British Medical Association (BMA) did not ask for the bands to be changed! Apparently, the Association is the only professional body that routinely lobbies the LCD for increased levels of payment on behalf of its members, and it is only when doctors get more that experts in other forensic specialties benefit, too. This year, however, the BMA chose to press instead for increases in the rates paid to 'professional witnesses', i.e. those giving evidence of fact, and so no changes at all were made to the rate bands for expert witnesses.

It seems to us that if scientists, engineers and others (including doctors) who regularly give expert evidence in criminal courts want to be paid more for this, they had better get their professional bodies, or one or more of the expert witness organisations, to start lobbying the LCD on their behalf.

We understand that witness allowances are due to be reconsidered again next spring, so there's no time to lose! Meanwhile, details of the current rates may be found on our website and in our newly revised factsheet on 'Expert Witness Allowances in Criminal Cases'.

BMA effectively determines no change in rates

This autumn's conferences

By the time this issue of *Your Witness* is distributed it may be too late to enrol for the Expert Witness Institute's annual conference on Wednesday 26 September, but we will hope to report on it in our December issue.

The Society of Expert Witnesses is holding its autumn conference at the Hilton Hotel, Sheffield, on Friday 12 October, and as usual there will be a mix of formal presentations and associated workshops. The topics being covered during the morning sessions are 'Human rights legislation and the expert witness' and 'The nature of professional negligence', while in the afternoon delegates will consider: 'How unbiased can an expert be?' Members of the Society have already been sent booking forms: the attendance fee for non-members is £135 + VAT. For further details, please ring Teresa Baron on 0845 702 3014.

Bond Solon's Expert Witness Conference 2001 takes place on Friday 9 November, and as in previous years it is being held at Church House, Westminster. It boasts the usual selection of legal talent, headed this year by the Master of the Rolls, Lord Phillips of Worth Matravers, plus a forensic accountant who will be initiating a debate on the subject of 'Prospecting for the goldmine'. Further details and an enrolment form are enclosed.

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being paid. Several individuals were owed more than £20,000, and one as much as £90,000!

Synapse was caught in a trap of its own making.

- Some 90% of its book debts were owed by one law firm, with whom it appears no defined payment date had been agreed.
- The agency was unable to pay for reports for many months, yet continued to accept instructions and refer large numbers of claimants for examination.

It can be of no surprise to learn that the solicitor firm concerned was in no financial difficulty.

Problems for experts

The **status** of report agencies is not defined, so for all their faults, the professional regulation of solicitors and the financial stability of the insurance industry afford infinitely more protection. Experts instructed by agencies are potentially exposed to a far greater degree of **risk**: reliance may not be placed on an agency in the same way as it can on a solicitor. This vulnerability extends to **professional culpability** as well as to the danger of **bad debts**.

When accepting an instruction, **contract** is all important. Unbelievable as it seems to us, we are aware of numerous experts who still do not have so much as a simple set of terms of engagement. Contract is, however, more fragile in agency instructions; some agencies even specifically disclaim liability for payment.

Experts often feel **remote** from the case, and this isolation is increased by the use of an agency *and* the solicitor's increasing remoteness from the client. The expert's obligation to comply with the CPR and pre-action protocols is made more difficult by the lack of direct contact with the parties; the resulting 'Chinese whispers' may lead to misunderstanding and misrepresentation.

What to do?

Clearly, experts have a duty to ensure the quality of their work and to protect their own interests. There are plenty of general ways to do it, but **good communication** between experts would seem natural and important. This can be helped by joining an expert body (see Factsheet 13) or attending meetings and conferences (see above).

Conclusions

Report agencies would seem to be an inevitable and increasing part of the evolving character of litigation. Undoubtedly they can contribute, but there is currently too much laxity.

Experts have no *prima facie* obligation to raise the standards of such agencies, but they would do well by all if they declined to work for those they found unsatisfactory.

Importantly, there is no need for experts to lower their sights, fees, contractual requirements or standards when agreeing to accept work from a report agency.

Chris Pamplin

Communication between experts is important

Court report

Can a friend give expert evidence on your behalf?

No, for reasons of public policy

Trial judge begs to differ

Readers may recall that in our last issue we drew attention to the judgment in a pre-trial hearing of *Liverpool Roman Catholic Archdiocesan Trustees Inc. -v- Goldberg*. The claimants had applied to the High Court for a ruling that the defendant's expert evidence was inadmissible, and one of their grounds for doing so was that the expert providing it was a friend and colleague of the defendant. For that reason, they argued, he could not show the necessary independence for his evidence to be received at trial.

The application was heard by Mr Justice Neuberger, and in the event he left the matter for the trial judge to decide. However, he expressed the opinion that the fact the expert had had a close personal and professional relationship with the defendant – in the sense that they had been friends and in the same Chambers for a long time – did not mean, as a matter of law, or even as a matter of fact, that he was incapable of fulfilling the functions of an expert witness as defined by Lord Wilberforce (in the case of *Whitehouse -v- Jordan*) and Mr Justice Cresswell (in that of *The Ikarian Reefer*).

The claimants renewed their application to exclude the expert's evidence at the trial of the action, but the trial judge, Mr Justice Evans-Lombe, decided against ruling on its admissibility there and then. Instead, he said that he would deal with the question in his judgment. At the beginning of June the parties were sent draft copies of the judgment to enable them to correct any minor errors, and at the same time 3 July was set for its formal handing down. There was then a most unexpected development. On the evening of 2 July the parties asked the judge *not* to deliver judgment the following day as they had arrived at an agreement that would settle the dispute between them.

In deference to the parties' wishes, Mr Justice Evans-Lombe held back all his findings on the merits of their respective cases. That only left his decision on the admissibility of the defendant's expert evidence, to which he proceeded to devote the whole of the judgment then handed down.

His Lordship began by drawing attention to the ruling he had given earlier in the year on an application to exclude expert evidence in the *Barings* case (see our last issue for more details). When considering in the instant case whether the proposed evidence came within the provisions of section 3 of the Civil Evidence Act 1972, his Lordship decided that it did. He went on to say, though, that the court could still disregard the evidence on grounds of public policy.

In his report, the expert – who, it is worth emphasising, was a QC – had written that he did not believe that his relationship with the defendant would affect his evidence. However, he continued, 'I certainly accept that it should not do so but it is right that I should say that my personal sympathies are engaged to a greater degree than would probably be normal with an expert witness.' And it was this admission that rendered his evidence unacceptable to Mr Justice Evans-Lombe.

His Lordship acknowledged that neither section 3 of the 1972 Act nor the authorities under it expressly exclude the expert evidence of a friend of one of the parties. Nevertheless, where there existed a relationship between an expert and the party calling him, such that a reasonable observer *might* think it capable of affecting the views of the expert in a way unduly favourable to the instructing party, that expert's evidence should not be admitted, even though it might be completely unbiased. It is not just a question of justice being done, justice must also be *seen* to be done.

For experts, the practical effect of this ruling is clear. If, in future, you are asked to provide expert evidence on behalf of a friend, a colleague or even a client for whom you already act in another capacity, you should decline to do so. If you were to prepare a report in such circumstances, and the nature and extent of the relationship came out, it is now pretty certain that the court would refuse to admit it in evidence. Moreover, it would take that decision without even considering whether your report *was* biased in any way.

Questioning the expert

As readers will be aware, the sole ground for which a party may put questions to an expert about his or her report is for the purpose of clarification – unless, that is, the court permits them to range more widely or the other party agrees to them doing so (*see* CPR 35.6 (2)). But what if one court gives that permission and another, higher, court subsequently rescinds it? That was the issue facing the Court of Appeal in a hitherto unreported case decided earlier this year.

The facts of *Mutch -v- Allen* are straightforward enough. The claimant was injured in an accident while travelling as a backseat passenger in a car driven by the defendant. He was not wearing a seat belt at the time, and on that account the defendant alleged contributory negligence. If proven, and depending of course on causation, it could have reduced the eventual award by 50% or more.

In his report, the claimant's principal expert, a Professor Solomon, noted that the claimant was not wearing a seat belt but said nothing of the consequences of this failure. After considerable delay, the defendant's solicitors wrote to Professor Solomon to ask whether the severity of the claimant's injuries would have been reduced, if not prevented altogether, had he been wearing a seat belt. They also asked which injuries might have been lessened or avoided in that event.

The letter was copied to the claimant's solicitors who straightaway objected to the questions and

instructed Professor Solomon not to answer them. When, however, the point was considered at a case management conference in August last year, their objections were overruled and the request to the claimant's expert was renewed.

In due course he confirmed to both parties that in his opinion the claimant's injuries would indeed have been much less severe if a seat belt had been worn. In particular, he would not have suffered the very severe fracture to his pelvis that he sustained on being thrown from the car.

The trial of the action was fixed for 5–7 February this year. But at a pre-trial review on 19 December, Judge Hutton, sitting as a High Court judge, accepted counsel's submission that the questions put to the claimant's expert witness went beyond clarification of his report. For that reason neither the questions nor the answers to them should be placed before the trial judge.

This was a double whammy for the defendant, because in the expectation of being able to rely on Professor Solomon's answers he had not sought permission to instruct an orthopaedic expert of his own and now had insufficient time to do so. Not surprisingly, then, he sought to have the decision reversed in the Court of Appeal.

As Lord Justice Simon Brown dryly observed while delivering the Court's lead judgment, there could be little doubt that had those answers been more favourable to the claimant's case they would have been enthusiastically adopted by him. The issue was, being disappointed in that regard, could he properly seek to have the answers annulled on the ground that, as Judge Hutton had put it, 'the claimant does not have to prove the defendant's case'?

His Lordship then quoted with approval a footnote in *The White Book* concerning the relevant rule (CPR 35.6), which reads:

'This is a most useful provision... it enables a party to obtain clarification of a report prepared by an expert instructed by his opponent or to arrange for a point not covered in the report (but within his expertise) to be dealt with. In a given case, were it not possible to achieve such clarification or extension of the report, the court, for that reason alone, may feel obliged to direct that the expert witness should testify at trial.'

Had Professor Solomon been called to give evidence for the reason cited there, the defendant would almost certainly have taken the opportunity to ask the same questions in cross-examination, and equally plainly he would have been entitled to rely on the answers then given to prove his case.

Lord Justice Simon Brown was perplexed by Judge Hutton's apparent failure to recognise that expert medical evidence on the issue of causation – namely what effect the claimant's failure to wear a seat belt had had on the severity of his injuries – was not only relevant but of greatest materiality to the outcome of the case. However, his principal difficulty with the judge's approach was that it overlooked the fundamental purpose of CPR Part 35: to ensure that experts no longer serve the exclusive interest of those who retain them, but rather contribute to a just disposal of disputes by making their expertise available to all. In the instant case, both the questions put to the claimant's expert and his answers to them were admissible as part of his evidence, even though they manifestly redounded to the defendant's advantage.

Questions may also seek to extend a report

The lesson of this Court of Appeal decision is clear: a court is entitled to be provided with all relevant matter in the most cost-effective and expeditious way. To that end, it is legitimate to ask questions of an expert in *extension*, as well as clarification, of his or her report.

Net trouble

It is a common experience that the losing parties in civil actions blame everyone but themselves. Recently, though, this was given a new twist when a disgruntled client threatened to air his differences with an expert witness on the Internet. Given the widespread use now made of the Internet, perhaps all expert witnesses should be taking note of the resulting skirmish in the High Court.

A patient (Mr Heathcote) brought an action for medical negligence and his solicitors instructed an orthopaedic surgeon to provide expert evidence on his behalf. After due consideration, the surgeon, a Mr Moran, advised that in his professional opinion the claim was unlikely to succeed. As a result, counsel for Mr Heathcote had to tell the Legal Services Commission that the case no longer merited public funding. The patient thereafter pursued his claim as a litigant in person, but failed to establish it at trial.

The patient had already given vent to his views on the medical profession and medical litigation through various web sites, and after the trial he informed Mr Moran that he would be adding comments relating to him. Thereupon the latter applied for, and was granted, an interim injunction restraining the threatened publication of defamatory material.

When, however, *Moran -v- Heathcote* reached the High Court, the injunction was discharged. Mr Justice Eady ruled that there was no real evidence that the defendant was motivated by malice or would be attacking Mr Moran's honesty or integrity. He was merely bringing their differences into the open. Moreover, if in due course Mr Moran were to sue for libel, there was a chance that the defendant might successfully raise the defence of qualified privilege, seeing that there was scope for real debate on the issues between them and on the existence of the duty for which he was contending.

Client entitled to air disagreement on the Internet

First set, then, to the disgruntled client.

Regulation: the CRFP's stance

How the CRFP aims to meet its objectives

What is the CRFP?

The Council for the Registration of Forensic Practitioners (CRFP) is an independent body, governed by users of forensic practice and experts. It exists to promote public confidence in forensic practice in the UK and has three main functions: publishing a register of competent forensic practitioners; ensuring, through periodic revalidation, that forensic practitioners keep up to date and maintain their competence; and dealing with registered practitioners who fail to meet the necessary standards.

We have started with those who practice chiefly in the criminal and coroners' courts: scientists, scene examiners, fingerprint examiners. We will extend it to police surgeons, dentists, etc., who use professional skills to prepare evidence for court.

Our Government start-up funding is tapering off sharply. As with other regulators, our income will soon come from registration fees alone.

Registration is – and will remain – voluntary: it is not for us to tell the courts who they can or cannot admit as witnesses. But naturally we hope the courts will come to see the register as a definitive indicator of professional competence.

What do judges think?

Lord Woolf does not favour the compulsory accreditation of witnesses. But at CRFP's launch last October he said: 'CRFP are to be warmly congratulated on the efforts they are making to encourage forensic practitioners to adopt the necessary standards and good practice. The establishment of a register is very welcome. It should ensure that those practitioners who fulfil the required standards can be identified. It should encourage those who do not meet those standards to improve their practice.' He has also expressed interest in the idea of offering registration to expert witnesses in the civil courts. Lord Phillips and Lord Bingham have been equally welcoming.

What is the added value?

CRFP has no place unless it adds value to what already exists. In many professions there are established bodies promoting standards. In one or two specialties there are accreditation schemes specifically for forensic practitioners. But these are the exception.

How the CRFP believes experts would benefit

The Civil Procedure Rules are probably reducing the opportunities for charlatans to prosper, but the existence of publications such as the *UK Register of Expert Witnesses* demonstrates that there is still a market for guidance in choosing an expert. CRFP will not replace these: they can give broader information about individuals than will our register. But there is a place, too, for a definitive register, admittance to which is through not only qualifications and experience, but peer review of recent casework showing current competence; where there is provision for periodic revalidation (we will do this every 4 years); and where there are effective teeth to deal with misconduct and poor performance.

How are the courts to know who is the competent expert they should hear, lacking the expertise that only the experts can bring? A straightforward, accessible register, easily found and easily consulted, is the key.

Who guards the guards?

Typically in this debate someone quotes Juvenal – 'quis custodiet ipsos custodes?' For those who like that sort of thing, I reply 'et quis custodiet eos qui custodes custodient?' Where do you stop? Who, for that matter, guards entry to the existing registers and directories, and who guards them? You have to trust someone.

The assessors who scrutinise applications for CRFP registration are from the same professional groups as the applicants. They have been nominated by colleagues in both private and public sectors – going way beyond the Forensic Science Service, for which only a minority of forensic practitioners work. We have trained them to apply consistent standards, and all submit to the same assessment process themselves.

A voluntary or mandatory register?

Your survey results show a surprising degree of support for the idea of accreditation – as did the Bond Solon debate to which you refer. Of your respondents, 32.9% supported CRFP registration for civil law practitioners. My debate is with the others – of whom nearly a quarter express no view as yet. I agree strongly with the view that the same standards should apply in the public and private sectors, and for defence as well as prosecution experts. It is professional standards we are upholding: organisation and delivery are side issues.

Where I fault your methodology is in the assumption that the CRFP is offering only a mandatory scheme, giving a choice between the present arrangements – inconsistent between specialties and not as effectively policed as they might be – and compulsory accreditation. We are not. The courts must remain free to hear their chosen witnesses, however comprehensive our register becomes.

Nor will we try to cover every conceivable specialty: this would be inefficient and we would never cover everything. Your respondent who argues against the exclusion of the 'rare, occasional expert' is exactly right.

What is in this for you?

Registration is a definitive statement that someone is part of a coherent professional group, subscribes to high professional values, takes all necessary steps to keep up to date, and has the confidence to have their fitness to practise reviewed by a peer before registration and by a professional tribunal if a serious question arises later.

I am eager to pursue this debate.

Alan Kershaw, Chief Executive, CRFP

Letters

We have received a number of letters in response to Alan Craxford's contribution on the Synapse collapse, published in the last issue of *Your Witness*. We have room here for only a selection, but have included in this issue (see page 1) a review of the important issues surrounding the development and use of report agencies.

Medico-legal referral agencies

From Mr M J Evans, FRCS, Consultant Orthopaedic Surgeon

The letter from Mr Alan Craxford (*Your Witness* 24) is a timely reminder that one should beware of medico-legal agencies. I have steadfastly refused to have anything to do with them, and I have been waiting for something like Synapse to happen. I suspect there will be many more such failures.

When approached by an agency I usually write to say that I will only deal with solicitors direct. This has not affected my practice, and in fact some solicitors – including Irwin Mitchell – have as a result instructed and corresponded with me directly. I dare say that if we all took the same line the agencies would go away.

One agency stated that they would pay my bill only after receipt of a fee from me of £75 with the completed report. Another offered me a maximum fee of £150. This is frankly ridiculous, as is the fee of £350 quoted by Mr Craxford for annual registration with an agency.

The contract should be between the expert and the instructing solicitor. There is no room and no need for a middleman. The solicitor is bound by solicitors' rules to pay all fees. There are no rules concerning the conduct of agencies.

I feel, too, that a doctor is on shaky ground if he accepts instructions to send his report to the agency. A doctor's report should be confidential between the claimant or defendant, the solicitor and the court. Sending it to the agency would probably break this confidentiality. How many of your readers, I wonder, have ever seen a signed consent form allowing the sending of medical records and reports to an agency?

I would urge medical experts to write to these agencies as well as the instructing solicitors just as I have done, stating their intention to correspond with the solicitors alone. That should put an end to these cowboys, who serve no useful purpose, increase the eventual cost of litigation and probably end up restricting the fees paid to experts.

From Mr David Finlayson, FRCS, Consultant Orthopaedic Surgeon

I read with great interest Mr Craxford's letter regarding these agencies and share many of his concerns. I would in particular like to emphasise the following points.

First, the mark-up is a very worrying feature. It is clear that it significantly increases the costs of civil litigation, and that, as I understand it, was certainly not one of the aims of the Woolf reforms.

Secondly, the addition of these intermediaries increases the length of time it takes to receive instructions and process the subsequent correspondence. The expert is then expected to provide the report within an unreasonable time scale, a circumstance which could have been avoided had the solicitors corresponded directly with the expert.

No role for report agencies...

It is clear, too, that many of the individuals working in these agencies have remarkably little training, and there is often a distinct lack of courtesy in the tenor of their requests, as pointed out by Mr Craxford.

I, along with several colleagues, am on the verge of refusing requests from these agencies because of the above irritations, and this view is now further supported by the legal concerns raised by Mr Craxford.

I have always found it much more satisfying to do business with professional law firms who have expertise in the area of litigation, provide clear instructions in a courteous fashion, respond promptly to queries and, in general, accept their obligations as instructing agents to pay their bills promptly.

From Dr Peter Hall, FRCPsych, Consultant Psychiatrist

I am writing to add a little to Mr Alan Craxford's very important letter. I entirely agree with him that discussion of the issues he raises, and possibly legislation, is long overdue.

I regularly accept instructions from about half-a-dozen agencies whom I have learnt to trust but – no doubt like many of your readers – I am frequently approached by others who are unknown to me. I would certainly not be prepared to pay a fee to be included in an agency's directory or on its database. I would also refuse to accept instructions from an agency that insisted on its name not being included in the report.

On the other hand, I cannot see any objections to an agency requiring that no contact be made with the originating solicitor nor to agencies instructing on a single joint expert basis. I also see nothing wrong in agencies trying to negotiate a 'volume' fee lower than an expert might otherwise charge. I think Mr Craxford is perhaps being a bit hard in characterising this as 'browbeating'.

... or is there?

I would agree that when a new agency introduces itself, there is no way in which one can check out its financial credentials. Accepting even a couple of instructions from it means that one could be entrusting it with a good deal of money without any evidence of its creditworthiness. This is a matter of importance not only for experts but for those established agencies who clearly fulfil a useful function.

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Factsheet Update

The following new factsheet is now available:

ID	Factsheet title
45	Expert evidence in employment cases

You can access factsheets through our web site, or by using our *Factsheet Viewer* software. Call us on (01638) 561590 for details.

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In the event that an agency cannot – or will not – pay an expert's fee, it would seem to me that the initiating solicitor does have some responsibility, in that it was his or her decision to use the agency in the first place. Moreover (and this is a point not made by Mr Craxford), most agencies will only instruct for an initial report. Should CPR questions need answering, a conference with counsel be required, or a court appearance become necessary, responsibility for making the necessary arrangements lies with the initiating solicitor. For this reason I increasingly ask that both the solicitor and the agency sign my Terms and Conditions before I accept instructions.

Regulation of expert witnesses

From Mrs Zena Schofield, Chartered Physiotherapist

I read with interest your article on the regulation of expert witnesses *(Your Witness* 24*).*

Whilst 'combination of qualifications, experience and membership of… a professional body' may be a reasonable minimal baseline, is even this a reliable reflection of the competence of an expert?

Qualifications may have been gained decades previously and, especially within medical/scientific fields of work, have limited relevance to present day demands and reasoning.

Experience within a particular area does not necessarily imply that the expert's current practice is best practice.

Membership of a professional body? Many such organisations have shown woefully inadequate Continued Professional Development (CPD) requirements. Few, prior to recent government demands, required obligatory ongoing postgraduate training, with often devastating consequences.

Attendance at conferences or seminars is no guarantee that experts or professionals will evaluate current concepts and upgrade their working practices. How often have we seen delegates sound asleep in the back row of the conference hall following the previous evening's gastronomic delights! Yet they still acquire 'brownie points' for attendance to submit to their professional bodies as part of their CPD. Judging outcome rather than input is the issue, and without mandatory postgraduate examinations at *all* levels it is extremely difficult to evaluate.

Until professional bodies can get this right, I fail to see how any outside organisation can accredit experts on their professional competence in a truly meaningful way.

Fees for reports in medico-legal cases

From Dr Charles Essex, FRCPCH, Consultant Neurodevelopmental Paediatrician

I get a number of requests from solicitors for preliminary screening reports in medico-legal cases but differing stories as to how much they can pay for them. One solicitor wrote: 'The Legal Services Commission [LSC] considers that preliminary views should take only 1–2 hours to prepare. There is therefore a standard fixed fee of £250 for the preparation of a preliminary screening report.' Another said that they only had £750 to spend on an expert opinion and so my charges would have to be less than that.

I queried this with the LSC, whose Policy and Legal Department replied that '… rather than setting out fixed rates for experts, the Commission has issued guidance on how screening of the potential claims is to be approached' and that '… £250 would appear reasonable, given that if the preliminary report is positive then more substantial levels of time and cost will subsequently be invested in the investigation of the case.' However, the Department went on to say that '… the Commission has not specified a particular amount for a preliminary report… '. It also said, with reference to the figure of £750 for a full report, that 'The Commission does not prescribe the cost of a full report as obviously the time needed to prepare such a report will vary from case to case depending upon the complexity of the issues.'

The issues are these:

1. The LSC has *not* prescribed specific amounts for either a preliminary screening report or a full report.
2. Whilst £250 may seem reasonable payment for preliminary reports in 'straightforward' cases, both solicitors and the LSC should realise that in complex ones involving, for example, children with complex neurological disabilities, there may be several volumes of case notes. To expect even a preliminary report for £250 risks that some important aspects of the case may be overlooked, leading to a recommendation that the case should proceed when further consideration might show that it ought not to do so. Worse, the recommendation might be that the case is flawed when in fact it has merit.
3. Limiting the cost of a full report may maximise the profit to the solicitor but risk, for the reasons just given, a flawed case being presented in court.

I am willing to be instructed on behalf of claimants or defendants, but if solicitors acting for claimants are unwilling to pay a professional rate for a professional report, I believe that could be to the detriment of their clients.

Editor's note

I am always happy to consider for publication letters on topics of concern to expert witnesses, although for obvious reasons I cannot undertake to print all those I receive. Please note that I also reserve the right to edit the letters we print for reasons of 'house style' or to shorten them to fit the space available.

Address
J S Publications
PO Box 505
Newmarket
Suffolk
CB8 7TF
UK

DX 50519 Newmarket

Telephone
+44 (0)1638 561590

Facsimile
+44 (0)1638 560924

e-mail
yw@jspubs.com

Web site
http://www.jspubs.com

Editor
Dr Christopher F Pamplin

Staff writer
John Lord