

# Your Witness

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## Sanity restored

The importance of Mr Justice Collins's judgment in *Meadow -v- GMC* [2006] EWHC 146 (Admin) is clear. First he found that the Fitness to Practice Panel (FPP) of the General Medical Council (GMC) was wrong to find Meadow guilty of serious professional misconduct. Second, he went so far as to describe the actions of the FPP as verging on the 'irrational' in imposing the ultimate sanction of erasure from the medical register.

Lord Nimmo Smith in *McTear -v- Imperial Tobacco* makes clear that judges are well versed, well able and well practised at recognising and dealing with material introduced by an expert but that is outside that expert's area of expertise. Why, then, did the GMC feel that Meadow's behaviour was out of the ordinary? The GMC failed properly to understand (i) the role of the expert witness, (ii) what the court expects of an expert witness, and (iii) those aspects of our adversarial justice system that serve to compensate for human failings. Their decision has thrown into stark contrast the need to clarify the jurisdictional boundaries between the courts and professional regulatory bodies. In pursuing Meadow for acting outside his area of expertise, the GMC was acting outside its area of expertise!

## Witness immunity extended

But in terms of their general importance, these findings pale in comparison with the decision by Collins J to use the *Meadow* appeal as an opportunity to address, of his own volition, the clear and present danger of professional regulatory bodies doing side runs around witness immunity.

Collins J takes pains to set out the long history of the witness immunity rule, which goes back at least as far as *R -v- Skinner* (1772). It is clear that he wishes to leave no doubt as to why the rule exists and its importance in the proper administration of justice before he goes on to extend its reach to encompass all disciplinary proceedings.

But, despite what the GMC said in its press release, the extended scope of witness immunity does not 'place doctors, and other professionals, beyond the reach of their regulator, when writing reports for the courts or giving evidence.' Expert witnesses owe an overriding duty to the court. It is, therefore, right and proper that it should be for the court to determine whether any particular expert witness has fallen short in performing his or her expert witness duties.

There is an important principle that underpins the witness immunity rule but which is often overlooked. Witness immunity exists to protect the public, not the witness. I don't expect the GMC to understand this – why should they, it has nothing to do with being a doctor – but it is fundamental to

the proper determination of whether any shortcoming in a witness is serious enough to warrant action against that witness. That is why it is proper for the court to make that judgment.

The immunity for expert witnesses is not a special favour to them. It is just part of the immunity extended to all witnesses. Any defendant who bemoans this protection for an expert witness with whose opinion they disagree ought to reflect on the fact that it also protects those experts with whose opinions they find favour. Allowing the 'disciplinary bypass' of immunity would inevitably lead to defendants who had access to virtually no expert input.

## 'Experts in Wanton Interventions'

One bemusing aspect of the appeal was the efforts of the Expert Witness Institute (EWI) to get involved. If one golden rule of life is to stay away from litigation, then the platinum rule is to stay away from other people's litigation!

In their wisdom the EWI decided that the Court needed a refresher course on the principles 'relating to the duties of expert witnesses in both criminal and civil courts'. Quite why they thought that a High Court judge of the standing of Collins J sitting in the Administrative Court needed such guidance is unclear.

In any event, they went about it the wrong way. Instead of instructing solicitors to brief Counsel to make an application to intervene (a costly business), they wrote a letter to the Judge, which is rarely a good idea unless you are a juror.

Furthermore they ignored the basic rule of litigation etiquette that if you want to communicate with the Judge you must tell the parties to the action what you are doing in case they want to object. They usually do. Mr Henderson QC, appearing for the GMC, certainly did!

Quite why the EWI acted in this way is a mystery. But I reject, out of hand, the explanation which I heard was put forward by one cynical hack that, seeing the appeal as one likely to have great significance to expert witnesses, the EWI sought to gain some reflected glory in helping it on its way!

## A clear and precise message

There must be a certain sense of dismay amongst campaigners who had set out to place constraints on the role of the expert witness. Helped along by the GMC, they have achieved precisely the opposite effect. The message this judgment sends out is an emphatic one: expert witnesses must be able to give opinions in court, that on occasions may be unpopular or controversial, without fear of retribution.

*Dr Chris Pamplin*

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# Fixed fees and the CJC

## Woolf's attack on costs

The control of costs was a fundamental part of Lord Woolf's reforms. In his final report he said the judge should, at the case management conference, aim to find out what costs have been incurred to date and also control likely future costs. Costs, he said, were central to virtually all of his recommendations, which were designed to make costs more predictable and proportionate, and to provide parties with greater control over the expenses incurred by their lawyers.

## Expert fees under CPR

Since implementation of the CPR, there has certainly been much greater scrutiny of the need for expert evidence than was the case previously. However, there is little evidence to suggest that expert evidence is being disallowed purely on grounds of cost in cases where the issues clearly turn on matters traditionally within the competence of an expert. Furthermore, we find almost no evidence that the level of expert participation in cases has fallen below that pre-CPR, although case management and the use of SJs may have decreased the number of experts permitted in a single case. So far as the expert's fees are concerned, the CPR have had little or no effect on these. Based on the *Register's* bi-annual surveys, the average fee for different classes of expert has risen only slightly (allowing for inflation) over the past 8 years. And yet, it is generally recognised that the overall cost of litigation has actually increased significantly, despite the intentions of Lord Woolf and the principles embodied in his reforms.

## Case funding creates the problems

The problem is that whilst Access to Justice and the CPR dealt with the matter of costs and their proportionality, the nuts and bolts of how litigation should be funded was largely ignored. It was the hope of Lord Woolf that the introduction of conditional fee agreements (CFAs) would aid access to the courts and ease the burden on the civil legal aid system. CFAs, after the event insurance, medical reporting organisations (MROs) and the removal of legal aid for personal injury claims have, however, caused problems of their own which were neither foreseen nor addressed by the CPR.

The difficulty arises when costs awarded by the court are insufficient to cover a party's actual costs, e.g. lawyer success fees, insurance or hidden or unpredicted fees, or costs disallowed or reduced on grounds of proportionality. In such cases a party will find that those costs are funded by the damages award, leaving a successful litigant feeling decidedly out of pocket. This has led to an explosion of associated litigation purely on the question of recoverability of costs and disbursements. Indeed, since the advent of the CPR there have been more than 150,000 such claims.

## Expert fees have a distinctive nature...

There is increasing pressure from solicitors for experts to accept any caps and reductions imposed by the court. Understandably, experts are reluctant to do so. Unlike solicitors, experts are barred from undertaking work on a contingency basis – to do so would fly in the face of the expert's impartiality and duty to the court. Neither can they seek a 'success fee' over and above their contractual fee for the provision of services. Furthermore, the amount a report costs can become difficult to assess if the expert is a doctor who has been instructed via a medico-legal agency.

An expert's fee is a matter for individual negotiation between the expert and the instructing solicitor. The expert is contractually entitled to payment by the solicitor, regardless of any cap or limit that might be ordered by the court. The solicitor, in turn, will usually be entitled to recover such expenses from the client under the contractual terms of the retainer. The court only regulates the amount of costs that one party must pay to the other or those arising between a solicitor and his or her own client.

## ...which makes them harder to control

Consequently, the cost of instructing an expert has been one area where proportionality and, more importantly, predictability have been difficult issues. To assist access to justice and adequately compensate a successful litigant, it is desirable that the expert's costs should be recovered in full, but in some cases this does not sit easily with the concept of proportionality or predictability. What happens when the costs of an expert are entirely out of kilter with the sum in dispute and could not easily have been predicted by the parties (or even the judge) at the outset of proceedings?

## CJC enters the fray

It was against the background of all of these identified difficulties that in December 2001 the Civil Justice Council (CJC) commenced a review of problems relating to the funding of civil claims and the proportionality of costs. Since that date the CJC has been working towards what it refers to as 'proportionate costs based on "industry" consensus'.

In 2002 the CJC held discussions to investigate the possibility of introducing fixed fees for medical reports in RTA cases involving less than £10,000 which would bring these within the scope of the predictable costs scheme. Following preliminary meetings with the BMA, representatives of medical reporting agencies, the Law Society and others, the CJC held a forum for expert witnesses in November 2004. The forum agreed that:

- (1) There should be a rebuttal presumption that in non-litigated RTA claims under £10,000 medical evidence should be obtained from a general practitioner.

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*Cost increases not explained by rises in expert fees*

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*CJC wants fixed fee expert reports*

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- (2) Predictable fees for the costs of obtaining such medical evidence should be the subject of an industry agreement facilitated by the CJC.
- (3) Consideration should be given to extending such arrangements to all fast track personal injury cases.
- (4) There should be no enquiry by the paying party into the breakdown of the cost of obtaining a medical report where the clinician does not provide the report direct.

The CPR have adopted the recommendations for a scheme of fixed recoverable costs in RTA cases below £10,000 and fixed success fees in such cases and some employer's liability cases. The CJC is currently looking at similar possibilities for public liability and defamation cases.

At a meeting in June 2005 these proposals were examined further. It was resolved that proposal (1) be amended to substitute 'appropriate medical practitioner' for 'general practitioner' to recognise the changes in the way the medical profession describes its members and current trends in the way that medico-legal reporting is being provided by the medical profession.

More difficult was the question posed by proposal (2). Various groups provided non-binding suggestions for figures that might form the basis of fixed fees for medical reports within the predictable costs scheme. All that could be agreed was that 'further work is to be undertaken to ascertain data that will better inform the decision on the figures to be agreed for insertion into the scheme'.

The meeting also failed to arrive at agreement on proposal (4). With the significant exception of the representation of the medical profession, the view was that a breakdown is unnecessary and adds no useful benefit (this element of the debate is examined in greater detail in a separate article in this issue of *Your Witness*).

A further consideration yet to be resolved, said the report, was whether in all cases a medical practitioner must have access to the patient's medical records before writing the report. The Cabinet Office has issued guidelines that medical records are not necessary in all cases. However, the BMA and the GMC are drafting guidance that **a medical practitioner who fails to refer to medical records when writing a medico-legal report could be open to disciplinary proceedings.**

The CJC is already looking to develop an industry-based agreement for 'fixed/guideline' fees for medical experts in all personal injury cases in a revised fast track of £25,000. The distinction between 'fixed' fees and 'guideline' fees is, of course, highly significant. While it is proposed that there be safeguards built into the scheme (referred to as 'escape routes'), it is unclear from the final report how this distinction is to be applied. 'Guideline' fees might bring report fees within the boundaries of

predictability; 'fixed' fees, on the other hand, are redolent of capping.

In its paper *Improved Access to Justice – Funding Options and Proportionate Costs* published in August 2005, the CJC has made a number of further recommendations (see box overleaf), many of which will be of particular relevance to experts.

### **CJC report has a 'hollow ring'**

The comparative failure of the CPR to control the increasing cost of legal proceedings must be viewed as a considerable disappointment to its draftsmen and its procreator, Lord Woolf. Whilst the courts continue to develop the practice of capping and proportionality and are able to exercise procedural control over the conduct of legal actions, these are largely insufficient to deal with the levels of costs that are actually incurred by litigants. Neither do they address the fundamental problems arising out of the way in which many cases are now funded. The recommendations in *Improved Access to Justice* mark the beginning of a new initiative that will seek to give the civil courts a tighter grip on the reins. Just how effective they will be is open to question. Richard Langdon, Vice-President of the Association of Personal Injury Lawyers, says that over the last 5 years claimant lawyers have spent 'a disproportionate amount of time trying to recover legitimate costs' and are beginning to wonder whether they should be involved in this kind of work at all. In his view, the CJC's report has 'a hollow ring where it could have restored some sanity to the situation.' He bemoans the lack of consultation and expresses his disappointment that the possibility of unanimous support by all stakeholders concerned appears to have been missed. We think that this is a view that will be shared by many expert witnesses.

### **Harbinger of gloom**

Expert fees, like other properly incurred disbursements, are difficult for the court to control. However, the concepts of detailed budgeting for cases, the predictable costs scheme, fixed fees for expert reports in some cases and guidelines on costs arrived at 'by industry consensus' are all harbingers of firmer restrictions on the amount experts will be able to charge for their services. It is true that a solicitor will remain free to negotiate a fee with the expert. But no solicitor is going to bind him- or herself contractually to paying a fee that there is no realistic prospect of recovering in full from one source or another. Indeed, the solicitor would have a duty to inform the client and give a costs warning if the amount recoverable on assessment was unlikely to cover the full sum of the expert's fees. Insurers and third-party funders, too, will be less than anxious to pick up the tab when solicitors have clearly overstepped the mark by agreeing expert fees that fall outside guidelines.

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*CJC agrees to hide the cost of MRO mark ups, a significant factor in increased costs*

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*Doctors may have to face GMC if medical records not consulted*

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**CJC recommends fast track limit for RTA cases to rise to £25,000**

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Of most concern to experts must be the currently unresolved mechanism for arriving at a consensual, fixed fee figure for medical reports in those classes of case foreseen by the CJC recommendations. One cannot help but cast a wary eye at the meagre fees and allowances on offer in criminal courts. We hope those charged with building a consensus will recognise that if good experts are to be attracted, then the rewards must be both realistic and a true recognition of the expert's skill, specialist knowledge and time. No doubt implementation of the recommendations will be monitored closely. If successful, it is possible that we shall see moves to introduce similar restrictions on expert fees in other types of civil proceeding.

### Conclusion

Few experts will regard civil litigation as a dripping roast at which they can 'cut and come again', as Robert Louis Stevenson put it. The vast majority of experts charge a fee that is reasonable, proportionate and a fair reflection of their time and

labour. While fixed fees for expert reports might be a perfectly sound option in some cases (provided there is both proper consultation and periodic review), they are certainly not appropriate in cases where unforeseen circumstances arise or those involving complex or novel areas of expertise. The suggestion that the fast track limit for RTA cases (and possibly all PI claims) be extended to £25,000 must be a particular concern. Claims at such a level often involve significant injuries that might call for ongoing medical reports and the involvement of more than one expert – in our view making them highly unsuitable for the fast track or for any fixed or 'guideline' fee scale. If greater control is to be exercised, we would prefer to see a budgeting scheme that (i) provides for early scrutiny and approval of intended costs and disbursements and (ii) allows for a measure of flexibility by experts, lawyers and judges alike – an approach we are recommending in our submission to the various consultations reported elsewhere in this issue.

## Key recommendations from the Improved Access to Justice report from the CJC.

### Recommendation 2

#### *Fast Track Limit for Personal Injury Cases*

The Fast Track Limit for personal injury cases should be increased to £25,000. There should be an opt-in option for cases up to £50,000 in value.

### Recommendation 3

#### *Personal Injury Cases in the Fast Track*

The Predictable Costs Scheme (CPR Part 45 Section II), currently restricted to RTA cases below £10,000, should be extended to include all personal injury cases in the [increased level] fast track and should include fixed costs from the pre-action protocol stage through the post issue process and including trial with an escape route for exceptional cases. Fixed success fees, fixed/guideline after-the-event premiums and fixed/guideline disbursements should also be part of the scheme.

### Recommendation 4

#### *RTA Claims below £10,000*

The vast majority of RTA claims fall below the £10,000 value threshold. The CJC recommends that in the vast majority of such claims where liability is not an issue speedy and prompt resolution would be assisted by a less resource intensive pre-action protocol that would reduce unnecessary transactional costs. This should include:

- i) the presumption that the claimant's lawyer will obtain a medical report from an appropriate medical practitioner, at a fixed fee, to be paid promptly by the third party insurer
- ii) the development of a 'tariff' database for the valuation of general damages
- iii) in cases where a police report is necessary, the agreement of a national standardised format, fixed fee and target timescale for delivery
- iv) a priority objective that all professionals involved in the claim should have regard to rehabilitation of the injured claimant in accordance with the APIL/ABI Rehabilitation Code.

### Recommendation 16

In addition to the presumption relating to the provision of medical reports in RTA cases below £10,000 (Recommendation 4) further work should be conducted by the CJC to develop an industry based agreement for fixed/guideline fees for medical experts in all personal injury cases in a revised fast track of £25,000.

### Recommendation 20

A Costs Council should be established to oversee the introduction, implementation and monitoring of the reforms we recommend and in particular to establish and review annually the recoverable fixed fees in the fast track and guideline hourly rates between the parties in the multi-track. Membership of the Costs Council should include representatives of the leading stakeholder organisations involved in the funding and payment of costs and should be chaired by a member of the judiciary.

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**Costs Council made up of funders only!**

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# A 'cruel and unusual' prosecution

In *Your Witness* 42 we reported briefly on the pending case of *R -v- Campbell*. Mr Campbell is a Consultant Neurospinal Surgeon who, some time ago, joined the *Society of Expert Witnesses*. In his CV, however, he mistakenly claimed to be a member of the *Institute of Expert Witnesses* – a body which, incidentally, does not exist.

According to Mr Campbell, the mistake arose out of a typing error by his secretary, where the word 'Institute' had been substituted for the word 'Society'. You may think this to be nothing more than a simple and honest mistake, and something to which no real significance attaches. This was not, however, the view taken by Trading Standards. Following a complaint, they launched a public prosecution of Mr Campbell.

The prosecution was heard in the Leeds Crown Court on 8 February 2006 and we are delighted to report that the judge ordered that the prosecution be stayed.

The court heard of the circumstances that had led to the unwitting inaccuracy in Mr Campbell's CV. The secretarial error had been made 5 years previously and the secretary concerned had since retired. The court was told that the error had, in fact, already been corrected, prior to the prosecution and prior to the complaint having been made.

According to Mr Campbell, Trading Standards Officers had failed to follow proper procedures prescribed by their own practice guidelines. It appears that Mr Campbell received no proper approach from Trading Standards that identified the alleged breach and detailed the steps he was required to take to remedy it. 'I was not interviewed or given any opportunity to correct the mistake' said Mr Campbell, even assuming that the mistake had been a continuing one – which it clearly was not.

Mr Campbell claims that neither was he issued with a formal enforcement notice warning him of the consequences of any future occurrence of the alleged breach. Prosecutions by Trading Standards Officers will normally follow well-defined steps clearly identifying the substance of a trader's failure and stating precisely what must be done to correct it. If the trader fails to comply, the next step will be to issue an enforcement notice. Usually, it will be only after repeated and flagrant breaches that a prosecution will be mounted, and this must be done within prescribed time limits.

Counsel for Mr Campbell told the court that, in this case, Trading Standards Officers had failed to observe their own guidelines. Had they done so, it would have become apparent to them at once that the misdescription in the CV was as a result of an innocent error that had since been corrected.

Not surprisingly, the judge was fairly firm in the views he expressed at the conclusion of the hearing. In ordering that Mr Campbell's costs be met from public funds, he remarked, said

Mr Campbell, that the prosecution had been 'an obvious abuse of process' that served 'no public interest'. No one had been hurt by the error, said the judge, other than Mr Campbell himself. The judge, it appears, went beyond this and referred to the action by Trading Standards Officers as amounting to 'a cruel and unusual prosecution'. Mr Campbell is now taking legal advice in relation to this.

Whilst Mr Campbell is relieved at the outcome of proceedings, he feels understandably aggrieved that he was put in this unenviable position in the first place. Such prosecutions might have far-reaching consequences for any expert witness with regard to their reputation with their peers and those who instruct them. Prosecution may also result in serious further action by the expert's own professional body.

It appears to us that the prosecution of Mr Campbell was not only wasteful of his time and that of his witnesses, but was also an unnecessary drain on public funds and resources. It does serve to illustrate, however, that all experts must continue to exercise extreme caution in drafting any CV or promotional literature.

Bearing in mind the way the General Medical Council (GMC) reacted to Professor Meadow's 'misguided belief...', maintained throughout the period in question and indeed throughout the [GMC] inquiry', one wonders if Mr Campbell would have chosen to plead guilty if his motion to stay the proceedings had failed for fear of what the GMC would subsequently make of his 'self-denial'!

It is a truism that anyone can make an honest mistake, and experts, like everyone else, are not immune in this respect. At least the decision of the judge in Leeds Crown Court restores some reason to a world we might otherwise suspect had gone stark staring mad.

## CVs On-Line: a free service

If you can find a quiet moment or two, perhaps it would be wise to get out your CV and give it the once over with a fresh critical eye. Once amended, please consider sending it through to us for free inclusion on the on-line and software versions of the *UK Register of Expert Witnesses*.

Expert CVs can be accessed directly by lawyers through the *Web Register*:

- in Adobe Acrobat format (i.e. a .PDF file)
- via a link to a web page containing the expert's CV.

To lodge your CV against your on-line entry, simply:

- e-mail it in .PDF format to [cv@jspubs.com](mailto:cv@jspubs.com), or
- e-mail the web address of your on-line CV, together with identification information.

Submission using either of the above methods incurs no charge. To ensure the printed *Register* accurately reflects the availability of your CV or profile, please act before 10 March.

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*CV typing error  
causes headache  
for expert*

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*Check your CV  
carefully and  
e-mail it to us*

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# MRO charges under fire

As reported previously in *Your Witness*, there has been controversy over the nature of the commission charged by medical reporting organisations (MROs), both in the way that this element of the cost should be interpreted by the courts and the 'hidden' nature of what is often a considerable mark up on the clinician's fee.

In *Your Witness* 42 we examined the case of *Earle -v- Centrica plc*. In that case, District Judge Bazley-White held that MRO fees could not be claimed as a disbursement. Effectively, they represented work done on behalf of the instructing solicitor that could just as easily have been done him- or herself. Consequently, MRO mark ups should be viewed as part of the solicitor's profit costs and should not be recoverable inter-parties.

## A growing trend?

The decision in *Earle* was influenced by an earlier county court decision in *Stringer -v- Copley* (2002, Kingston-upon-Thames County Court). In *Claims Direct Cases Tranch 2 Issues* (2003), Senior Costs Judge Hurst agreed with the view expressed by Judge Cook in *Stringer*: 'there is no principle that precludes the fees of a medical agency being recoverable between the parties provided it is demonstrated that their charges do not exceed the reasonable and proportionate costs of the work if it had been done by the solicitors.' He did, on the other hand, refer to the judgment in *Stringer* as being 'trite costs law'. Nevertheless, it appears that the decision in *Earle* has been echoed in at least one other recent case in the High Court. Master Seager Berry in *Wollard -v- Fowler* (so far unreported) appears to have confirmed that MRO agency fees are not separately recoverable, this being despite indications to the contrary that the Civil Justice Council (CJC) had given on their website.

According to a message posted there on 1 February, it seems that the question is now to be referred to the Chief Executive of the CJC. We wait to see what advice (if any) is to be given.

The particular difficulty with MRO fees is that, unlike other types of agency fee, they are often bound up inextricably in the charge made for the medical report. Were this not so, then the rules in relation to solicitors and agency costs would require little clarification.

## The 'normal' handling of agency costs

CPR Costs Practice Direction 4.16(6) states that:

*'Agency charges as between a principal solicitor and his agent will be dealt with on the principle that such charges, where appropriate, form part of the principal solicitor's charges.'*

This echoes the position prior to the CPR as contained in *Practice Direction No. 2* of 1992 at Paragraph 1.18. This states that 'agents' charges should be charged as part of the solicitor's fees.'

Furthermore, it has been incorporated into the Law Society's *The Guide to the Professional Conduct of Solicitors* 1999 that the solicitor be

*'personally responsible for paying the proper costs of any professional agent or other person whom he or she instructs on behalf of a client, whether or not the solicitor receives payment from the client, unless the solicitor and the person instructed make an express agreement to the contrary.'*

The logical conclusion from these authorities is that, for the purposes of assessment, agency fees form part of the solicitor's profit costs and should not be recoverable from the other party. Why, then, should the MRO agency fees be treated any differently?

## CJC fudges the issue

There was a further meeting at the CJC in June 2005 when doctors's representatives expressed opposition to the suggestion in the draft proposal that there should be 'no enquiry by the paying party into the breakdown of the cost of obtaining a medical report where the clinician does not provide the report direct.' However, it appears that the other groups represented took the view that there was no benefit to be had from any breakdown of the fee.

The CJC appears to have fudged the issue. In its final report and recommendations published in August 2005, it recommends that there should be a 'presumption that the claimant's lawyer will obtain a medical report from an appropriate medical practitioner, at a fixed fee, to be paid promptly by the third party insurer.' The presumption is, therefore, that the fixed fee is intended to be recoverable in its entirety from the paying party. This does not sit easily with the principles expounded so carefully by DJ Bazley-White in *Earle* or with the provisions contained in the CPR on the costs of agents.

Although *Earle* was a decision of the county court, it does provide a fairly firm lead on precisely why MRO fees should not be allowed inter-parties in predictable fee cases. We can only conjecture that the reason the CJC was originally so keen on the idea – that there should be no breakdown showing the medic's fee and the agent's fee – is that to do otherwise would be to complicate the nature of the proposed single fixed fee. Any breakdown of the fee would, of course, provide ample scope for satellite litigation on whether the agent's fee was reasonably recoverable. And this is precisely what the CJC proposals are so anxious to avoid.

## Hoping for a trend

It appears to us that the only alternative to this would be for the MROs to render an entirely separate bill to the instructing solicitor. This would lift the rather murky veil that currently shrouds these costs. It must be hoped that the *Earle* and *Wollard* cases are not just a couple of judicial blips, but rather the start of a trend to drive solicitors away from MROs in order to protect their fees!

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**Warning: MRO fees should be part of the solicitor's profit costs...**

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**... so lawyers shouldn't claim them as a disbursement**

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# A trio of consultations

## Carter Review – civil supplement

Expert witnesses were presented, late in 2005, with an opportunity to set out in detail how they would like to change the way they are used in Legal Aid cases. The aim of Lord Carter’s Review of Legal Aid Procurement, with respect to expert evidence, is to seek more efficient and effective use of expert witnesses.

In December 2005, following a consultation exercise conducted amongst the 3,000+ expert witnesses in the *Register*, we sent our submission to Lord Carter’s team (see *Your Witness* 42). We wrote:

*‘The core problem for the Legal Aid system is how it can pay “proper” fee rates to expert witnesses and thereby retain experienced expert witnesses willing to provide opinion evidence. Based on the analysis of the UK Register of Expert Witnesses, the answer seems to lie in a combination of early involvement of experts, staged instructions and pre-trial assessment of expert evidence.’*

Having read our submission, Lord Carter was moved to ask the *UK Register of Expert Witnesses* to make a further submission, looking in particular at legal aid procurement in the civil justice system. We made a supplementary submission on 19 January 2006. It was based on work undertaken in 2005 and drew together contributions from 238 expert witnesses listed in the *Register*.

We began by going back to November 2004 and the consultation paper on the use of experts put out by the Legal Services Commission (LSC). That consultation put forward proposals on expert fees. However, based as they were on guesswork, these proposals failed to arrive at a convincing analysis of the current position. We provided evidence from our own bi-annual surveys of expert witnesses that fees have increased by less than 10% above the rate of inflation since 1997.

From their poor groundwork, the LSC arrived at proposals that carried with them a significant danger of reducing the pool, and overall quality, of experts willing to work in publicly funded cases. We feel that this negative effect is likely to be most acute for the Community Legal Service. Indeed, we predicted a serious impact on supply and competition within the expert witness marketplace for civil cases if the ‘meagre’ fee scales on offer in the criminal arena were imposed on expert witnesses in the civil arena. This prediction was supported by 92% of our expert contributors.

We went on to identify a number of inflationary pressures flowing from the *Access to Justice Act* 1999, and offered suggestions – involving a staged approach to the instruction of experts – for how the effects of these pressures might be ameliorated.

The LSC proposed removing the system of prior authorities. Whilst appreciating the difficulties of assessing applications for prior

authorities, we considered its removal would have a serious impact on the supply of expert witnesses, a view endorsed by 82% of our expert contributors. We suggested that a staged approach to the instruction of experts would offer a way for the LSC to make more informed decisions on applications for prior authority.

The LSC identified problems arising from experts working without having adopted written terms of engagement. We welcome, as do 89% of our expert contributors, any pressure that can be applied to ensure expert witnesses adopt clear, written terms of engagement.

## Criminal Procedure Rules

An interesting feature of our submission to Lord Carter’s Review of Legal Aid Procurement was the extent to which improvements in the use of expert evidence will rely on changes to the governing rule. It was, then, particularly welcome that at that very moment the Criminal Procedure Rules (CrimPR) Committee decided to consult on the rules that govern expert evidence in the criminal justice system.

The *UK Register of Expert Witnesses* put together a number of resources to help expert witnesses get to grips with the issues. Based on this, and previous research, we prepared a submission to the Criminal Procedure Rules Committee urging them to consider some quite radical steps to show, through Part 33, that the real reasons for past problems in criminal trials have been recognised and addressed.

Many of the problems with expert evidence in criminal trials – which have been the focus of much high-profile media coverage in recent years – reveal a systemic failure of the criminal justice system to properly handle conflicting expert opinions. The drafting of Part 33 of the CrimPR provides the opportunity to address these systemic failings. Doing so will, we believe, improve the administration of justice because it will help to overcome the current reluctance of many expert witnesses to contribute to a justice system that can leave them unfairly exposed to public, press and peer pillory.

Our submission to the Criminal Procedure Rules Committee drew together 488 contributions from expert witnesses listed in the *Register*. Based on an analysis of the proposed text of Part 33, the rules governing expert evidence in the Civil Procedure Rules, and 18 years of experience working with expert witnesses from all disciplines, our submission made the following recommendations:

- All the rules of procedure that expert witnesses are expected to know, understand and apply should be brought together into Part 33.
- Expert evidence should be brought under the complete control of the court – without such power, any attempt to improve the use of

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*Lord Carter asks  
for more...*

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*... CrimPR urged  
to deliver more!*

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## Factsheet Update

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expert evidence in the criminal courts will be severely undermined.

- There should be a clear statement that the duty the expert witness owes to the court overrides any duty to anyone else, and that experts have a duty to independence and objectivity.
- Consideration should be given to whether 'reconnaissance' reports and staged instructions are desirable and capable of being inculcated into the Rules.
- The power to put written questions to expert witnesses, similar to that provided under CPR 35.6, should be considered.
- The strong support amongst expert witnesses for the use of pre-hearing meetings of experts suggests that, in the interests of clarity, the Rules Committee should retain rules 33.4 and 33.5 as drafted.
- Consideration should be given as to whether it is desirable to formulate additional rules to bring Daubert-style (*Daubert -v- Merrell Dow Pharmaceuticals Inc* (1992) 509 US 579) assessment of scientific evidence into the criminal justice system.
- Although recognising the radical nature of such a move, allowing for pre-trial agreement of expert evidence could help to remove experts from the trial stage, thereby avoiding any tendency towards a 'cult of personality' and improving the handling of complex expert evidence.
- Court-appointed expert assessors would be a more natural role to introduce to the criminal justice system than would be the single joint expert.
- The majority of the guidance in CPR 35 PD and the Experts' Protocol should be included within the ambit of Part 33.

Coming, as they do, 6 years after the Civil Procedure Rules, the Criminal Procedure Rules have the opportunity to both learn from and improve upon the rules governing expert evidence contained in CPR Part 35. Modelling Part 33 on CPR 35 is an excellent starting point, but there is scope to consider some radical new powers.

We strongly urged the Criminal Procedure Rules Committee to take this unique opportunity to show, through Part 33, that the real reasons for past problems have been recognised and addressed.

### VAT on medico-legal work

We were asked by HM Revenue & Customs (HMRC) to contribute to their *Review of the Scope of the VAT Exemption for Medical Services*. Our area of interest is that of medico-legal reporting. Our submission sought to communicate those issues that are of most importance to medical expert witnesses.

In December 2005 we invited the 1,700 medical expert witnesses listed in the *UK Register of Expert Witnesses* to consider the consultation documentation. To help medical doctors, for many of whom VAT is foreign territory, the

*Register* prepared a number of resources. We were asked to have responses back to HMRC by mid-January 2006.

We told HMRC that medical expert witnesses are generally unaffected by the considerable confusion that appears to surround the type of medical work that will be liable for VAT. All medico-legal reporting will attract VAT.

Furthermore, HMRC is wrong to assume that most medical consultants are already VAT registered. Almost none are. However, according to our own data on fee income for medico-legal work, only about 30% of medical expert witnesses would be required to register for VAT on the basis of turnover.

We found that there is a major need for medical doctors to be educated about VAT. Most doctors have spent many years cocooned within the NHS, far removed from the commercial realities faced daily by business people. Indeed, the large numbers of doctors who have suffered financial loss at the hands of the medico-legal reporting organisations is testament to this sector's lack of commercial acumen. Accordingly, these VAT changes should not now, after a 2 year hiatus, be rushed into effect.

We suggested that HMRC should consider a minimum of 1 year's notice be given for the introduction of VAT on medico-legal reporting, i.e. April 2007. This will permit:

- long-running contracts to be adjusted in an orderly fashion to include VAT
- doctors to choose when to begin their VAT registration (by voluntarily registering at a time in the year that suits their own accounting year)
- doctors to focus their minds on understanding the VAT system once a clear deadline has been set.

### The time for action has arrived

Since the European Court of Justice (ECJ) issued its judgment in the case of *Dr Peter d'Ambrumenil and Dispute Resolution Services* (C-307/01), the *UK Register of Expert Witnesses* has been helping doctors come to terms with VAT. You can find out more about the tax and some of its finer points using the resources we have created on the *Register* website. Just point your web browser at [www.jspubs.com](http://www.jspubs.com), click the *HMRC Survey* link and look for the *Guide to VAT* option.

### The Business Support Helpline can also help

If you have registered at our *Professional* service level, you can also call the independent Business Support Helpline (BSH), run by Croner Consulting on our behalf, for professional advice on VAT. If you aren't sure which service level you opted for, just visit [www.jspubs.com](http://www.jspubs.com) and click *My options* in the blue Member data box. If you can't see the Member data box you may need to log in as a Member first with the username and password shown on the letter accompanying this issue of *Your Witness*. You will also find the BSH contact details on the *My options* page.