# Don't shoot the messenger

**Chris Pamplin** reviews the LSC proposals on the use of experts in publicly funded cases and argues that, if implemented, they would add to the ongoing erosion of access to justice for the most vulnerable in society

- quality—is there actually a problem, and would accreditation be feasible?
- price, procedures and the dangers of clamping down on costs

The Legal Services Commission (LSC) launched its long-awaited consultation on expert witnesses in November 2004 (consultation closed on 25 February 2005). In brief, *The Use of Experts: Quality, Price and Procedures in Publicly Funded Cases* proposes to:

- achieve a situation in which most experts are accredited by the Council for the Registration of Forensic Practitioners (CRFP);
- introduce fee scales in the civil arena linked to those already set for criminal cases;
- remove the system of assured payment through prior authority; and
- force LSC-specific contractual conditions into the contracts between lawyers and experts.

The consultation paper raises some basic questions about the use of expert witnesses. This article considers some of the key issues from the perspective of the expert witness.

**What does the LSC propose on accreditation?**

To improve the quality of experts instructed in publicly funded cases, the LSC will encourage solicitors to use accredited (quality assured) experts. That is, expert witnesses and interpreters who are:

- on the register maintained by the Council for the Registration of Forensic Practitioners (CRFP);
- on the National Register of Public Service Interpreters (NRPSI); or
- on the register of the Council for the Advancement of Communication with Deaf People (CACDP).

The LSC's long-term aim is for all experts who are regularly instructed in publicly funded cases to be accredited.

**Need for improved quality?**

The consultation paper makes the following assertion (para 2.2):

"We believe that solicitors should be encouraged to use accredited (quality assured) experts, ie experts who are on the register maintained by the Council for the Registration of Forensic Practitioners (CRFP)."

This raises three questions about the quality of expert witness work: Is there a problem with the current quality? What does quality assurance mean? Is accreditation feasible?

By seeking to achieve a position where all experts are CRFP accredited (para 2.3), the consultation implies that the quality of expert evidence, across the board, is in need of improvement. However, the writer would suggest that no evidence has been offered to demonstrate this assertion.

**The civil arena**

Before the advent of the Civil Procedure Rules (CPR), lawyers often tended to use expert evidence as part of their case management strategy. All too often, this strategy involved finding the most circuitous route to court—misuse of expert evidence being just one tactic. This has all been swept away. Following the introduction of the CPR in April 1999, the following changes were introduced to the civil arena:

- expert evidence was placed under the complete control of the court;
- a 'cards on the table' approach to litigation was adopted; and
- clear guidance was given to expert witnesses on their overriding duty to the court.

As Graham Bennett, a solicitor, puts it in his letter to *The Times* (30 November 2004):

"The present law requires the judge to satisfy himself that the witness is expert in the field in which the witness proposes to give evidence. This is done by reference to the witness's professional qualifications, his experience and, if need be, by questioning him as to his expertise.

"It is only if the judge considers that the witness is properly an expert, and that the witness evidence will assist the jury to make its findings, that such evidence can be allowed. Courts can and do refuse to allow evidence to be given by those who cannot prove themselves to be expert, so there is already proper scrutiny of the witnesses' credentials."

One effect of the CPR has been to develop a meritocratic system within the civil arena, with the occasional poor quality expert being readily identified.

**The criminal arena**

The recent high-profile miscarriages of justice in child death cases do not, the writer believes, reveal a general problem with the quality of expert evidence. In the Angela Cannings appeal (*R v Cannings* [2004] EWCA Crim 1), the court made it plain that the reason for quashing the conviction was not the expert evidence, but new evidence that had been identified—recent SIDS studies and the possibility of a genetic factor—that cast doubt on the medical evidence that had formed the basis of the Crown's case at trial. While the Court of Appeal warned experts of the dangers of being "over-dogmatic", it identified a significant problem with the way in which the courts handle conflicting expert evidence. The decision concluded:

"If the outcome of the trial depends exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed."

The Sally Clark case (*R v Clark* [2003] EWCA Crim 1020), which preceded *Cannings*, does provide an example of an expert who got it wrong. Dr Williams, the Home Office pathologist who prepared the autopsy reports, had failed to make reference to the laboratory report that ultimately led to Mrs Clark's release. This was a procedural error. Rather than explicitly stating that he had looked at the laboratory report and found it irrelevant, he misfiled it in with the other papers in the case. This, undeniably, had dreadful consequences.

But is this symptomatic of a wider problem of the quality of expert witness evidence? Professor Sir Roy Meadow, one of the main expert witnesses in *Clark*, was certainly vilified in the media for the evidence he gave at the Sally Clark trial. It was widely reported that:

- his 73,000,000:1 statistic was 'wrong' and consequently misled the jury;
- the application of 'Meadow's law' ran the risk of switching the burden of proof to the defendant; and
- he brought to the court an air of infallibility.

Meadow, writing a response (5/1/2002) to a *British Medical Journal* article, says in his own defence: "I testified that, in my opinion, neither child's death was an example of sudden infant death syndrome. As it quickly became clear that none of the other clinical or pathological experts believed that the deaths were examples of sudden infant death syndrome, discussion of its recurrence rate was irrelevant. In the judge's final summing up, which extended to about 170 pages, there were only a few paragraphs about statistics. In these, the judge advised the jury to treat the statistics with caution."

The Court of Appeal judgment made reference to the contradictory evidence presented by Meadow and Professor Berry, another of the expert witnesses at trial and co-author of a SIDS study used as evidence. The court acknowledged that the trial judge had directed the jury to treat the statistics with caution, but that Meadow's general aura, and use of a horse-racing metaphor in particular, could have overplayed the import of his evidence in the jury's mind.

Whatever view one takes on Meadow's evidence, the *Clark* case evidentially shares a common attribute with *Cannings*, that the court ought not to have allowed a criminal conviction where the "outcome of the trial depended exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts".

**No room for complacency**

Nevertheless, there is no room for complacency—even if there is no significant problem with expert witness evidence. Improvements in quality should always be sought. If a system of accreditation could achieve a real improvement in quality, then it ought to be considered. Does the LSC proposal offer the prospect of such an improvement?

The consultation paper implies that the accreditation of expert witnesses will achieve quality assurance. The writer does not accept this premise, for the following reasons:

- Accreditation does not prevent people 'having a bad day', a point accepted by the LSC (para 6.14).
- There is nothing to accredit in an expert's ability to bear witness to his or her opinions (see below).
- We know of no system of accreditation that would have excluded Professor Meadow or Professor Southall, who contacted police on suspicions about Mr Clark following a TV documentary. (I name these individuals simply to exemplify the point, not because I have reason to believe they ought not to have passed any system of accreditation.)
- If accreditation is to function as a gatekeeper, it can only improve quality by excluding those who fall below some agreed standard.

Quality assurance cannot be achieved through accreditation. Rather, it requires a system of quality assurance that operates at the level of each instruction. We already have such a system—the opposing expert, barrister and the judge.

**Feasibility—what to accredit**

In the current context, an "expert" is anyone with knowledge or experience of a particular discipline beyond that to be expected of a layman. An "expert witness" is an expert who is asked to form an opinion—based on the material he or she is instructed to consider—and bear witness to that opinion. There is, currently, no precondition imposed by English law on the qualities demanded of an expert witness. It is for the court to make a judgment of the individual's qualities and to weigh the expert's evidence in accordance with this judgment. It seems clear, therefore, that the only distinction between experts and expert witnesses is that the latter undertake to bear witness to their expert opinions.

What is there in a person's ability to form an opinion and bear witness to it that is susceptible to accreditation? The basic skills and knowledge specific to giving evidence are not particularly onerous, and are easily acquired through training. In fairness to the CRFP, even it does not suggest that such accreditation is possible. According to the CRFP literature, its expert checks take the following form: "Take all reasonable steps to maintain and develop [their] professional competence, taking account of material research and developments within the relevant field and practising techniques of quality assurance."

Is the CRFP better placed than extant professional bodies to check an expert's qualifications and understanding of current practice and new developments in the field? If there is nothing to accredit in an expert's ability to form and bear witness to an opinion, what is the driver behind the LSC's proposal to push most experts into the CRFP scheme? The reasons given in the consultation paper are inadequate.

The recent case of Barion Baluchi who fraudulently practised as an expert witness is also instructive. The LSC is proposing to adopt the CRFP accreditation system, whose checks centre on what the expert claims to be. Given that Baluchi had (fraudulently) registered with the GMC, checks by the CRFP with the GMC would not have revealed his lack of qualifications, unless the CRFP undertakes to investigate whether what it is told by professional bodies is correct.

**Expert fees: what does the LSC propose?**

- The proposals set out guideline rates for experts acting in civil cases. This means the LSC would abolish prior authority guarantees that the LSC will pay reasonable fees.
- The LSC is considering moving from the system of paying solicitors the expert's fee on a case-by-case basis for civil cases, to one where solicitors are given an annual fund.
- Where possible, the LSC wants to move to specifying guideline block fees, instead of hourly rates, for specific work by specific experts.

**Price**

The consultation paper also sets out proposals to deal with the increasing cost of expert evidence. The LSC is hampered in its approach to expert fees because it does not currently gather data to enable it to know its annual spend on experts. Since 1997, the *UK Register of Expert Witnesses* has undertaken a detailed biannual survey of the views, experiences and working practices of experts it lists. The sample size of all these surveys is above 2,700, with between 500 and 700 experts responding on each occasion. From these surveys, it is apparent that:

- the average hourly fee has increased by 26%, from £88 in 1997 to £111 in 2003;
- compounding an inflation rate of 2.5% across that 7-year period would account for an 18% increase, so the real-terms increase has been around 8%;
- charging rates have a bimodal distribu-

tion, with medical consultants and accountants charging something like 50% more per hour than other experts.

It is no coincidence that expert witness costs in civil cases have increased since April 1999. While one of the main aims of the Access to Justice Act 1999 was to decrease the costs of expert evidence, the changes have, in fact, had quite the opposite effect.

The CPR have been a source of major improvement in the conduct of civil litigation. However, one consequence has been that expert reports tend to be written as though they will be put before the court. Great care must be taken over the writing of such reports. This inevitably increases costs, and is one reason why the cost of expert reports has risen in recent years. However, the vast majority of cases never get to court—instead, they settle. In such cases, the expert's report is used as a negotiating tool between the parties.

**Fee bands**

The consultation paper proposes the introduction of fee bands in civil cases, linked to those currently set in the criminal arena. Based on the *UK Register*'s survey data, expert witnesses would lose roughly half of their current fee income in such cases.

There is already considerable concern within expert witness and judicial circles about the low level of expert fees in criminal cases. Consider, for example, the following extract from a review of the criminal courts, *A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld* (September 2001):

"The second matter that has been the subject of considerable complaint by defence solicitors and experts is the low level of publicly funded experts' fees. I have had a look at the current scales, and, without going into detail on the figures, they are meagre for professional men in any discipline. I am not surprised that solicitors complain that they have often had difficulty in finding experts of good calibre who are prepared to accept instructions for such poor return."

To propose imposing such 'meagre' fee scales across the board for expert witnesses in publicly funded civil cases seems calculated to create the same complaints in the civil arena. Supply and competition will be dented by the current proposals. However, there is clear potential in the civil courts to tackle some of the causes of high expert witness fees.

**Proportionality**

The consultation paper contains the proposal that the seriousness of the crime be taken into account when selecting an expert witness. This is closely allied to the question of proportionality in relation to quantum in civil cases, and the same basic considerations apply:

- expert witnesses should not be expected to work for no payment;
- expert witnesses are not competent to determine what aspects of a case can be omitted from consideration.

**Another way: staged instructions**

It follows, therefore, that if cost savings are required, they have to be realised through the solicitor instructions to the expert witness. But solicitors, who are, of course, not experts themselves, often have some difficulty knowing what can safely be omitted in pursuit of proportionality. The answer to this conundrum perhaps lies with greater use of staged instructions by solicitors.

An expert witness could be instructed to prepare an initial report. Its aim would be to conduct a 'reconnaissance' of the expert matters and to identify potential areas for more detailed analysis. If the quantum in the case, or the seriousness of the crime, warrants investigation of particular avenues of expert enquiry, further report stages could be sanctioned.

Is it necessary for reports used in this way to be as detailed as those that will go before the court? If not, then a reduction in costs could be achieved by ensuring experts are instructed to prepare an initial 'outline' report at an agreed cost, proportionate to the (likely) quantum of the case, which would allow the parties to seek a negotiated settlement. Only in the small number of cases that do not settle would the additional expense of a fully detailed report, for use in court, need to be incurred.

This approach, already adopted by many experienced litigation lawyers in the civil arena, has the benefit of breaking potentially large expert witness assignments into smaller, more easily managed stages. Each stage of reporting acts to inform the next stage.

The LSC has failed to produce cost-saving proposals that are sufficiently targeted, or neutral in terms of supply and competition, to be broadly accepted by expert witnesses instructed in civil cases. If, however, budgetary factors force the LSC to adopt these proposals, it is likely that quality, competition and supply will all be adversely affected.

The LSC needs to work together with the DCA, CJC and others to engage in an honest and open discussion with experts on the factors that contribute to the cost of experts. If this can be managed, several features of the current litigation landscape could be identified that, if tackled, would not only drive down costs but also enhance access to civil justice and promote its better administration.

**Procedures**

Of the various changes to procedures proposed in the consultation paper, two are of particular significance for expert witnesses.

*Removal of prior authority*

'Prior authority', the guarantee that a fee is reasonable and the LSC will pay it, is one of the reasons expert witnesses stay in the publicly funded market, despite low fee rates. The LSC engages in a circular argument when it notes, as a justification for removing prior authority, the fact that it is uncommon for experts' fees to be adjusted on costs assessments [10.7]. Prior authority, of course, prevents such interference on costs assessment.

Staged instruction of experts would also help LSC case workers make informed judgments on applications for prior authorities. Initial expert reports would be modest affairs attracting a modest cost. If the initial report revealed the need for a further reporting stage, the LSC case worker would have the benefit of that initial report to inform the decision.

*LSC-specific terms of engagement*

Based on the *UK Register* surveys, the number of expert witnesses who use written terms of engagement has increased from 32% in 1995 to 47% in 2001. The *UK Register* is regularly asked to help expert witnesses with payment problems resulting, in part, from the lack of written terms of engagement and has published suggested written terms.

Any encouragement the LSC can give to increase the use of terms of engagement is to be welcomed. However, it is doubtful that many expert witnesses will be attracted by the terms proposed, which will not make commercial sense to many experts. For this reason, any such terms should be optional.

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