Your Witness

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

Damaging publicity for experts?

Bond Solon Training Ltd excels in the quality of the courses it runs and in the organisation of its expert witness conferences. It is also very adept in securing media coverage of its activities. I do wonder, though, at the wider effect some of this publicity (see News on page 3) may be having. It seems that it could result in a hardening of attitude towards experts on the part of both the judiciary and the Lord Chancellor's Department.

It may be that Mr Solon was misquoted by *The Independent*, the *Daily Telegraph* and *Legal Week*, but if so that is all the more reason for him to take greater care when talking to journalists. He may also happen to believe that there is no such thing as bad publicity, but in my view news stories of the kind he generated last month could impact badly on the very experts his firm seeks to train. Judges are understandably touchy about criticism of their behaviour, especially when they are as sweeping as *The Independent* made them seem, and the Lord Chancellor's Department is known to be keen on introducing fixed fees for all professionals involved in publicly funded litigation, including expert witnesses. The publicity Mr Solon garnered for his survey can have served only to demean the standing of expert witnesses and undermine their earning power.

No cases are 'dead certs'

It is frequently argued that conditional fee agreements work well in personal injury cases because the outcome is so much easier to predict than for other categories of civil litigation. Such generalisations can prove expensively misleading though, especially when claimants decide against accepting a defendant's offer and then fail to achieve as much by way of damages.

For a further illustration of the dangers of making easy assumptions we need look no further than the Accident Line scheme promoted by the Law Society. Since 1995 this scheme has provided after-the-event insurance for some 60,000 personal injury cases conducted under conditional fee agreements. For the whole of that period the premium rate for road traffic accident cases has been £92 and that for other kinds of claim a mere £155. On November 1, however, the underwriters of the scheme increased these premiums to £148 and £315 respectively, while at the same time withdrawing from solicitors delegated authority to enter into 'no-win, no-fee' agreements for claims worth more than £15,000. According to the scheme's administrators, the increases were inevitable in view of the failure of many firms to assess properly the risk of losing the cases they were undertaking on that basis.

The fact is, of course, that there is no such thing as a 'dead cert' case. All aspects of litigation require careful risk assessment by the solicitors concerned if the decisions to proceed are not to backfire disastrously. This gives added force to the points made by Bruce Widdowson and John Lord in their article on the subject, the second instalment of which appears on page 7.

Lord Woolf speaks out

At the recent Bond Solon Conference, Lord Woolf made plain his views on a number of important issues. On the thorny matter of the accreditation of expert witnesses he said 'It is neither possible nor appropriate to introduce a requirement for accreditation'. This is a sentiment that will be warmly received by those experts who attended the earlier conference of the Society of Expert Witnesses. These experts, learning of the absence of any lead from the Lord Chancellor's Department, expressed great concern over the risk of accreditation being imposed from above. They will no doubt be reassured by Lord Woolf's views on the matter.

Later in his speech Lord Woolf made it known that in his view the Academy of Experts and the Expert Witness Institute should merge to form 'one pre-eminent body [devoting] itself to promoting the skills of the experts'. Whilst not saying who should consume whom in such a merger, one expert at the conference was reported in *The Lawyer* (22 November 1999) to have seen this comment as meaning 'the Institute should swallow the [Academy]'. Certainly the comments of the respective bodies support that interpretation. The Institute's Company Secretary is reported as being in favour of such an amalgamation, whilst the Academy's Chairman Emeritus, Michael Cohen, was reported to be 'dismissive of the suggestion' of a merger, but quite 'happy' to talk about Institute members joining the Academy!

From a purely commercial perspective it seems most unlikely that the Academy would wish to take on the burden of debt revealed in the last two sets of the Institute's accounts. So, in all likelihood, the only ways in which Lord Woolf's ambition could be realised would be for the indebted Institute to mount a hostile take-over of the Academy or for it to wind itself up and send its members across to 2 South Square. Neither seems very likely! All in all, matters might have been simpler had Lord Woolf not launched the Institute in the first place!

Chris Pamplin

Inside

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News

Indications are that the downturn will be short lived

Downturn in the number of new claims

It is already clear that in the 6 months since the Woolf reforms were implemented there has been a substantial fall in the number of cases reaching the civil courts of England and Wales. Although evidence from the county courts is still largely anecdotal, it was revealed last month that proceedings issued in the High Court are down 35% compared with the same period last year.

A number of separate factors would appear to be involved here, and not all of them are likely to prove permanent. Thus, the start of many personal injury and clinical negligence cases may have been delayed by the need to comply first of all with their pre-action protocols. Similarly, the prospect of pro-active case management by judges may have deterred a lot of solicitors from 'going over the top' until they had got their cases into tip-top order. Then again, other solicitors whose clients were in no particular hurry to litigate may well have decided to wait and see how the reforms were working before getting their cases underway. One pundit has estimated that it may take as long as 3 years to eliminate 'learning curve' factors such as these.

Even so, when the reforms have finally bedded down, it seems unlikely that we will ever again see claims running at their pre-Woolf level. For one thing, the imminent withdrawal of legal aid from most categories of civil claim seems bound to have a deterrent effect, notwithstanding the availability of alternative methods of funding. On a more positive note, the pre-action protocols for personal injury and clinical negligence actions are already having the desired effect of encouraging litigants in such cases to settle their disputes before involving the courts in any way. The adoption of similar protocols for debt and professional negligence actions seems bound to accelerate that trend.

New system of support funding unveiled

Funding Code revised

In *Your Witness 15* we outlined the Legal Aid Board's proposals for determining which civil and family cases might continue to receive help from public funds once the present legal aid scheme is wound up. The Board has now published a report from its Research Unit on the impact the proposals would have on cases that have hitherto been eligible for legal aid. At the same time it has released a revised Funding Code that takes account of these research findings, the representations it received concerning its original proposals and certain directions that the Lord Chancellor is proposing to make under the Access to Justice Act.

Testing the Code: The Research Unit's investigation centred on the analysis of cost:benefit ratios. For this it collected information from the Board's files on more than 1,000 recently concluded cases. The researchers scrutinised the forecasts of success made by solicitors when applying for legal aid, and the estimates provided of likely costs to settlement and of anticipated damages. These they then compared with the outcomes of the cases, the bills of costs met by the Board and the actual damages received or paid by assisted parties.

The Unit's most striking findings concerned the 55% of cases solicitors had assessed as having a 60–80% prospect of success. In its draft proposals the Board had suggested that for such cases to secure funding in future the anticipated damages should exceed likely costs by 3:1. The researchers found, however, that barely 40% of the cases they examined in this category would have satisfied that requirement. In fact, they would have been less likely to receive funding than cases assessed as having a 50–60% chance of success!

The Unit concluded that the simplest way to remove this anomaly would be to reduce the required ratio from 3:1 to 2:1, and the Board has duly incorporated that change in its revised Code. This should have the effect of making many more cases in the 60–80% success band eligible for public funding after April 2000. Indeed, the Unit reckoned that it would increase the chances of getting funding from 42 to 65%.

The cost of personal injury cases: The Research Unit also sought to establish the conditions under which it might be desirable to continue funding personal injury cases when blanket support for such claims was withdrawn next April. For this purpose it analysed the records of more than 28,000 personal injury cases for which the Board's files had closed in the 6 months to August 1999. They involved gross expenditure by the Board in excess of £100 million, although more than four-fifths of that amount was recovered successfully from defendants. Indeed, while the average gross cost per case was around £3,600, the average net cost was just £638. What particularly struck the researchers, though, was the uneven distribution of case costs. While the 10% of claims with the lowest gross costs accounted for less than 1% of the Board's expenditure, the 10% with the highest costs accounted for 43% of it.

This presents a real problem for the Government, given the reliance it has placed on the wider use of conditional fee agreements (CFAs) to plug the gap left by the withdrawal of legal aid. It is wholly unrealistic to expect solicitor firms to invest (say) £5,000 in establishing whether or not it is worth proceeding with a case under a CFA, or for them to 'carry' costs which by the end of a case might easily amount to being 10 times as much. Recognising this, the Lord Chancellor has told the Board that he is now prepared to authorise the provision of support funding for personal injury actions. This will allow public and private funding of claims to be combined in cases where either the initial investigative costs or the overall litigation costs prove exceptionally high.

Something of this sort was mooted in the draft Funding Code published last January, but the criteria the Board is now proposing will be altogether easier to meet. Given that disbursements often account for one-third of investigation costs, and that a single expert's report might well cost more than £500, the Board is recommending that preliminary disbursements in excess of £1,000 should be eligible for support funding. Furthermore, once the decision has been taken to proceed with a personal injury case under a CFA, the Board is proposing that the solicitor may apply for top-up funding when the total disbursements reach £5,000 or the other costs of the case (including counsel's fees) exceed £20,000.

If implemented, these revised proposals should mean that, despite earlier fears to the contrary, some public money should be available from April 2000 to help pay for the investigation of complex personal injury claims, especially in circumstances where more than one expert needs to be instructed from the outset.

Experts in the dock

Experts may have been bemused last month by the coverage given in the national press to their alleged views on the competence of the judiciary. It all began with the release to the press of details of a survey that Bond Solon Training Ltd had conducted earlier in the autumn.

The Independent was first off the mark with an article in its November 3 issue headed 'Expert witnesses tell of dozy and sexist judges', which claimed that the overriding picture painted by the survey was one of 'a judiciary unable to follow complex, and sometimes not so complex, evidence'. It transpired that the whole piece was based on the answers to just one of the questions asked by Bond Solon, namely 'What is your most amusing experience as an expert witness?' *The Independent* went on to credit one of the partners in the firm, Mark Solon, with authorship of the survey and quoted him as saying, 'It may be the judges don't want to show that they have not understood what is being said. If the expert is particularly turgid, the judge might even have trouble staying awake after lunch.'

A week later the *Daily Telegraph* followed with another highly tendentious item entitled 'Cost of expert witnesses spiralling'. Its report began, 'Expert witnesses are charging so much for their evidence that some are earning more than £100,000 a year, often in cases when the accused is clearly guilty', and went on to claim that 'experts cost the State half as much as the entire county court system'. It is not clear from where the newspaper obtained these nuggets of 'information', because they do not appear in the published survey, but it did quote Mark Solon as saying, 'This area of evidence has only been created in the past 10 years or so. Courts used to rely much more on common sense.'

The following day *Legal Week* carried a lead article about the Bond Solon survey which, as befits a professional publication, was altogether better balanced. Even so, it credited the survey with showing that the increase in the cost of commissioning expert reports over the past 2 years had 'far exceeded' the rate of inflation. It quoted Mark Solon as saying, 'It seems that judges are controlling the number of experts and timetables, but have not been able to bite into experts' fees. If the concept of proportionality is to work, judges must control this.'

It was left to *The Times* and the Law Society's *Gazette* to record the upshot of this farrago of nonsense. In its issue of 13 November *The Times* reported that at a conference of expert witnesses the previous day Lord Woolf had deplored publication of the anecdotes, saying that they were misleading and did untold damage to the justice system as a whole. The *Gazette* described his comments as 'a withering attack on expert witnesses for being highly critical of judges and knocking the system'. It is ironical that the conference at which Lord Woolf made these remarks should have been organised by the very company whose survey had started the cafuffle in the first place.

Comment

The Lord Chancellor was in typically abrasive form when he appeared before the House of Commons' Home Affairs Select Committee last month. Claiming that legal aid was 'synonymous in the public mind with the bank balances of lawyers', he went on to assert that solicitors could not go on being paid by the hour as if on a meter. Asked how we would know that his reforms were working, he replied, 'When you hear the lawyers squealing.'

Lord Irvine's remarks are all of piece with his previous attempts to pillory 'fat-cat' members of the Bar, and they are bound to antagonise thousands of solicitors on whose co-operation will depend the success of the Government's plans for a Community Legal Service. While it is no doubt true that some solicitors may have milked the legal aid system, the great majority have done no such thing, and Lord Irvine knows it. After all, more than 90% of legal aid work is performed on fixed fees, and these have fallen so far behind inflation as to offer no scope at all for getting rich quick. Indeed, the latest Law Society survey shows the average salary of legal aid practitioners to be little more than £20,000 a year.

One wonders why the Lord Chancellor chose to use such inflammatory language before the Select Committee, knowing that his comments would be widely reported in the Press. Can it be that he was seeking to deflect attention away from the all-too-probable effect of his Access to Justice Act, which will be to deny access to justice to many of the least well-off members of the community?

Trainer's publicity ends in bad press for experts

Lord Chancellor waiting to hear lawyers squeal!

Medics as expert witnesses

90% of experts are still in practice

In the preliminary report on the survey we conducted last June (*Your Witness 17*) I noted that 249 medical practitioners had returned questionnaires and that this was a sufficiently large total to permit more detailed analysis of their replies. In fact the information they provided was both more substantial and more comprehensive than ever before. This is not just because the questionnaire we distributed was more detailed than that used in our earlier surveys. It is also because considerably more doctors responded. We are grateful to all who took the trouble to reply on this occasion.

Compared with other professions

The survey confirms that in several important respects medical experts differ little from those in other professions. It shows, for example, that in both groups over 90% of respondents are still actively engaged in the practice of their profession. This is a particularly significant finding in relation to doctors because counsel often seek to demonstrate that they are out of touch with the latest developments in their discipline. Our survey, on the other hand, indicates how unlikely this is to be the case for the great majority of them, and certainly no more so than for expert witnesses in general.

Furthermore, litigation work accounts, on average, for just 27% of the workload of the medical practitioners who took part in the survey, whereas for the other experts who did so the average was 36%. On this basis it might be supposed that medical experts are even more committed to the day-to-day practice of their profession than are other expert witnesses! Even so, they still manage to outdo the rest in the number of reports they provide for litigation purposes and the hourly rates charged for writing them. Only accountants and bankers can match their average rates for report writing or exceed those they charge for giving evidence in court. In both these respects, however, there are variations within the medical profession, as we shall see later.

Terms of engagement

Most still lax about terms

It is a constant refrain of reports of this kind that expert witnesses are lax about their terms of engagement, and it has to be said this is particularly true of medical experts. Although 69% of the doctors responding to our latest survey reported that they had terms of engagement which they notified to the solicitors instructing them, their answers to a further question reveal that barely half include in these terms a clause about timing of payment. This means that, overall, some two-thirds of the medics were neglecting to stipulate how soon they required their fees to be paid.

Legal aid versus conditional fees

In the survey we asked a number of questions that were designed to establish benchmarks against which we might hope to assess in future years the effect on expert witnesses of the imminent curtailment of civil legal aid. From the replies we received it was clear that while three out of four respondents had undertaken at least one legal aid case in the previous 12 months, the medical experts among them had dealt with many more than their colleagues in other professions. The extent of their greater involvement is apparent from Table 1.

Table 1. Percentage of legal aid instructions in the year ending June 1999.

Number of cases	Medical experts	Other experts
nil	20%	24%
1–10	29%	57%
11–25	18%	8%
26–50	15%	6%
>50	18%	5%

In itself, this finding is no surprise. Matrimonial and family cases apart, more legal aid certificates are issued for personal injury claims than for any other category of civil dispute. Furthermore, personal injury is also the largest category by far for which expert evidence is generally required, and it is mostly medical doctors who provide that evidence. In the last financial year, for example, it is reckoned that legal aid paid for some 110,000 medical reports in personal injury cases. In view of this, many of the medics who wrote those reports must be wondering what demand there will be for their services after April 2000, when most personal injury claims cease to qualify for assistance from public funds.

The Government, of course, contends that the gap in funding can be more than adequately filled by conditional fee agreements (CFAs), and it is a fact that around 60,000 personal injury actions have been launched on that basis over the past 4 years. Over the same period, though, at least five times as many such actions were granted legal aid, and it is anyone's guess whether even the majority of such cases could proceed as easily under CFAs. For one thing, many solicitors have yet to try this funding method, and a lot of them may well decide they do not want to incur the financial risk involved. By the same token, those who do start using CFAs are likely to be cautious about the cases they take on, at least for a while. For these reasons alone, the message for medical experts would seem to be that, if they hope to continue writing as many reports as before, they need to cultivate links with solicitor firms that already have the necessary experience to run personal injury cases successfully after April 2000.

Unfortunately, it would appear from our survey that few of the medical experts who took part in

it have the necessary contacts to do this. Only 40 of them were able to say that they had been instructed in CFA cases during the 12 months to June 1999, and in the short term at least that hardly augurs well for the other 200 or so developing links with solicitors who are already making a go of this method of funding.

Analysis by discipline

In one of the reports written on the survey conducted 2 years ago (*Your Witness 12*) I noted that generalisations about the level of fees that medical experts can command will be of little help to individuals wanting to know how much they should (or could) charge for litigation services. Medicine embraces too many specialities for that to be possible. On the other hand, even though the latest survey has generated much more information than its predecessor, it is still insufficient to permit meaningful analysis discipline by discipline – except, perhaps, for orthopaedic surgery and psychiatry. For the purposes of further analysis, therefore, we will be grouping respondents in the same way as last time, which at least has the advantage of facilitating comparison with the results of the 1997 survey.

Analysis of workload

Just as we found 2 years ago, orthopaedic surgeons stand out in a number of ways. For those of them who took part in this year's survey, litigation work accounts for almost half their total workload; as Table 2 shows, this is a much higher proportion than for other groups of medical experts. Orthopaedic surgeons write on average three times as many reports as do other medical practitioners and appear in court more frequently. At the other end of the scale, consultant physicians produce half the average number of reports.

Readers will note that the data on reports are spread over three columns of the table, but comparative figures are provided for only the last of these. This is because the questionnaire we used in 1997 did not distinguish between reports written for the advice of solicitors and those intended for exchange and possible use in court. It will be interesting to see to what extent future surveys reveal a greater demand for reports of an advisory nature.

In the meantime, we can only wonder about the significance, if any, of the decrease over the past 2 years in the average number of reports produced by consultant physicians and psychiatrists and the substantial increase in the number written by general practitioners. For the psychiatrists and GPs it may be nothing more than a wayward attribute of sample size, but this seems an unlikely explanation for the lower output of consultant physicians. Are consultant physicians finding that they are receiving fewer instructions than formerly and, if so, can anyone suggest why?

Another question asked for the first time in this year's survey concerned appointment as a single joint expert (SJE). As can be seen from the final column in Table 2, 100 of the 249 medical experts who returned questionnaires had acted as an SJE during the previous 12 months. As a proportion this corresponds well enough with the claim made at a recent expert witness conference that 45% of all experts had acted as SJEs since the new Rules took effect in April 1999. Lord Woolf, indeed, seemed to think this meant that such appointments were fast becoming general. Our data, though, suggest otherwise. Although 40% of the medical doctors taking part in the survey *had* acted as an SJE, most had done so on fewer than four occasions in 12 months, during which period they would have prepared, on average, 20 times as many reports on behalf of just one party. Indeed, from their replies it would appear that only two of our respondents were doing mostly SJE work. On this showing it will be a while yet before that becomes the case for many more of them.

Orthopaedic surgeons still the busiest experts

Continues on page 6

Table 2. Analysis of medical experts' workload in the year ending June 1999.
(with comparable totals or averages from our 1997 survey in parentheses)

	No. of replies received	Average workload	Average no. of reports for advice	Average no. of reports for use in court	Average no. of reports in total	Average no. of court appearances	Average no. of SJE instructions
Orthopaedic surgeons	23 *(23)*	47%	48	273	321 *(317)*	7.5	16
Other surgeons	67 *(51)*	26%	56	73	129 *(111)*	4.2	28
Consultant physicians	82 *(54)*	21%	14	35	49 *(76)*	3.0	22
Psychiatrists	47 *(16)*	29%	20	85	105 *(154)*	3.7	27
All specialist respondents	219 *(144)*	27%	32	82	114 *(135)*	4.0	93
General practitioners[†]	30 *(25)*	29%	23	86	109 *(51)*	3.9	7
All medical experts	249 *(169)*	27%	31	83	113 *(123)*	4.0	100

[†] *includes 11 dentists*

Continued from page 5

SJE accounts for less than 5% of all instructions

Fees

Table 3 summarises the average charging rates of the different groups of medical experts responding to our survey. It can be seen at a glance that, for report writing at least, the rates are pretty consistent across the whole range. However, this was even more the case 2 years ago. What would appear to have happened in the meantime is that surgeons have increased their hourly rates by rather more than other medical experts. Their average rates for report writing are 26% up on 1997, compared with an increase for all medics of 11%.

Table 3. Medical experts' charging rates.

	Report writing[1]	Court appearance[2]
Orthopaedic surgeons	£140	£1026
Other surgeons	£156	£864
Consultant physicians	£131	£889
Psychiatrists	£123	£831
All specialist respondents	*£137*	*£886*
General practitioners[†]	£125	£919
All medical experts	*£136*	*£889*

[†] includes 11 dentists [1] average rate per hour [2] average rate per day

By way of contrast, the fees charged by surgeons for spending a day in court now average out at 3% less than they did 2 years ago, while those for medical practitioners as a whole show an increase of 2%.

The one group of medical experts who would appear to have bucked the general trend on fees is that of psychiatrists. On admittedly a much smaller sample in 1997 than this year, their average rates show decreases of 8% for both report writing and giving evidence in court.

Charges for cancelled hearings

One of the hoped-for benefits of the Woolf reforms is that cases which are going to settle before trial will do so at a much earlier stage. If this comes about, the incidence of cancelled hearings ought to be reduced sharply. In the meantime, though, cancellations are still with us, and all experts should keep under review the charges they make in such circumstances.

Hourly reporting rates up 11% in 2 years

As Table 4 indicates, almost two-thirds of the medical experts among our respondents make some charge when given less than 7 days' notice of the cancellation of a hearing, and at least one-third do so when the notice they get is of between 8 and 14 days. It would appear, too, that most of those making a charge would levy their full fee if given less than 24 hours' notice of the cancellation, and between half and two-thirds of it if the notice was between 1 and 7 days.

As with our other findings on fees, there is little variation between the different groups with regard to charging for cancelled hearings. From the data, however, it would seem that psychiatrists are somewhat less inclined to make a charge than are other medics, although those psychiatrists who do so tend to invoice for a rather higher proportion of their normal fees.

Table 4. Charges for cancelled hearings.

Amount of notice	Percentage of respondents making a charge	Percentage of full fee charged
<24 hours	75%	91%
1–7 days	61%	58%
8–14 days	35%	40%
15–28 days	12%	25%

It is another matter, of course, whether instructing solicitors would be able to persuade a court to sanction recovery of cancellation charges. That is very much a matter within the discretion of the court. However, one senior taxing master is on record as saying that, in the High Court at least, solicitors might hope to recover 50% of an agreed fee if the notice of cancellation was less than 1 week and 25% if the notice was of between 1 and 4 weeks. Experts instructed in multi-track cases take note!

John Lord

Festive interlude

Draft entries

We will be sending out the draft entries in early January (we laugh in the face of the millennium bug!). Based on feedback from experts we have redesigned the order form that accompanies your draft entry to make it clearer. As always, we would be very grateful if you could check and return your draft as quickly as possible.

Telephone number changes – again!

We have automatically updated our databases to reflect the changes Oftel are making in May 2000. However, it is possible that some numbers have escaped us, so please do check all telephone and fax numbers on your draft carefully.

'Christmas crackers'

After all the expert bashing we have been reporting in this issue, we thought you might be amused by the following:

Q: Why should lawyers be buried 20 feet under?
A: Because deep down they are really nice people!

Q: In what ways are lawyers like nuclear bombs?
A: If one side has one, the other side has to get one, once launched you can't get them back and when they land they screw up everything for everyone.

Q: Why does the Law Society prohibit sex between lawyers and their clients?
A: To prevent clients being billed twice for essentially the same service!

Risk assessment and the new legal landscape

Bruce Widdowson's previous article (*Your Witness 17*) dealt with the use of risk gradings at the scene of an incident where both physical hazard and probability need to be assessed. It also looked at the assessment of probabilities alone – as, for example, at the scene of a road traffic accident. In this second article, we will be considering some further applications of the concept of risk assessment that could affect experts.

The new legal landscape

When the Legal Services Commission comes into being next April it will assume the responsibility for public funding of civil cases that is currently exercised by the Legal Aid Board. Unlike the Board, however, the funds at its disposal will be cash-limited, and it will be required to direct them to cases where the need is greatest. For most claims for money or damages, the criteria to be satisfied to secure public funding will be very tough indeed.

These criteria are to be set out in a Funding Code, a revised draft of which has just appeared (see News on page 2). For our purposes the point to note is that, under the Code, funding for legal representation will be refused unless the application for it meets certain cost:benefit criteria. In future, solicitors making such applications will be required to quantify both their estimates of a case's prospects of success and of the ratio of its anticipated damages to likely costs.

Another feature of the current scene is the growing use of conditional fee agreements (CFAs) as a means of funding litigation. Here the solicitor has to make what is, in effect, a commercial decision: Is he or she sufficiently confident of the case's chances of success to accept it on a 'no-win, no-fee' basis? Solicitors have always had to make assessments of the winnability of the cases they handle. It is only recently, though, that there has been any need for them to express these assessments in mathematical terms.

A new role for experts?

Now we come to the crux of the matter. What assistance can experts provide to help solicitors make the kind of assessments they will be increasingly required to make, and at what risk to themselves? Certainly, there is potential here for the enhancement of the expert's role, but what of the consequences should the advice given prove wrong?

Under the new Civil Procedure Rules it seems likely that experts will become involved in litigation at ever earlier stages. Indeed pre-action protocols virtually ensure that experts will have been brought on board before proceedings are issued. In such circumstances, when assessing the prospects of success of a case – whether for the purpose of applying for public funding or deciding whether to take the case on under a CFA – a solicitor is bound to want to avail him- or herself of any preliminary advice from an expert. But as we all know, experts giving advice (as distinct from opinions for use in court) are liable in negligence for the advice they give – a clear argument, surely, for them to bolster the advice they give with a mathematical calculation.

Risk assessments can bolster your advice

Two cases in point

Consider, for example, the recent case of *Stanton -v- Callaghan* (*Your Witness 13*). It concerned a civil and structural engineer who had advised clients that a building should be fully underpinned. At the subsequent meeting with the expert for the insurers of the building he departed from that advice, agreeing with the other expert that a less expensive solution was feasible. In the end, this was proved not to be the case. A clear instance, one might think, for the use of percentage grading. It would be interesting to know what probability of success each of the experts in the case might have expressed for their recommended method of repair. I would like to think that had both provided them, the insurer's expert would have had a harder task to justify his figure, and as a consequence the client's expert would have been much less likely to have changed his mind.

Each profession will have to consider the best approach to the mathematical assessment of probabilities. Structural and civil engineers ought to be well versed in the use of a variety of calculations. The concept should not be new to doctors, either. It was broached by Bryant and Norman in a paper published as long ago as 1980. They examined the verbal terms of probability used by 16 physicians and then obtained from them a mathematical likelihood for over 30 of these expressions. The scale used was the textbook one for assessing probability of 0 to l. Some examples of their findings included 'moderate risk' at between 0.2 and 0.8 (i.e. 20–80%) and 'low probability' from 0.0 to a staggering 0.8 (0–80%)! There could not be a clearer justification for such assessments to be made on a numerical basis.

A concluding word. Consider the case of *St Albans Court Ltd -v- Daldorch Estates Ltd* (1999). The judge made it clear that counsel should not assume that they will have the option of taking the judge through the papers at the hearing. The relevant documents should therefore be dealt with in skeletal argument. Clarity in the expert's report will assist here, and a mathematical grading will be an obvious target for inclusion on the list of extracted highlights.

Bruce Widdowson ACII AIRM with John Lord

Potential to enhance the expert's role

Factsheet Update

Four new factsheets will be available from 20 December:

ID	Factsheet title
19	The 1999 SEW Autumn Conference
20	The 1999 Bond Solon Conference
39	Expert Witness Survey 1999
40	The 1999 EWI Conference

The faxback number is (01638) 565809.

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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

Conference reports

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29 September 1999, The Law Society's Hall, London
Theme: Experts in the new legal world

The President of the EWI, the Rt Hon Lord Mustill, opened the conference with an up-beat review of the implementation of the reforms. The Rt Hon Lord Bingham then spoke on the subject of forensic experts – past, present and future, drawing out the origins of the single joint expert (SJE). The main conclusion of speakers from both the high and county courts was that, despite delays encountered on the IT front, cases were being processed with greater speed. Moreover, where the services of an SJE were required, thus far most parties seemed able to agree on such issues relatively easily.

From the expert's perspective, Professor Sir Roy Meadow (a paediatrics specialist) concluded that working as an SJE was not ideal – it removed the opportunity to have opinion challenged by other experts, a process often beneficial to justice. After presentations by two solicitors, David Body and Michael Napier, Roger Clements (medical expert) warned that the pressures imposed by the Civil Procedure Rules (CPR) would result in the greater use of inexperienced experts.

The afternoon session began by examining the experience of the Family Division where many of the practices introduced in the civil courts by the CPR have long been the norm. The discussion, whilst enlightening, concluded that much of the progress achieved within the Family Division is difficult to replicate elsewhere because of the non-contentious nature of such work.

Much of the remainder of the afternoon was devoted to a discussion on the Draft Code of Guidance for Experts led by Sir Louis Blom-Cooper, who is chairman of both the Draft Code Working Party and the EWI.

Society of Expert Witnesses Autumn Conference

15 October 1999, Manchester Conference Centre
Theme: A retrospective on CPR and the accreditation of expert witnesses

The day began with a plenary session in which contributors gave their personal views on how the Woolf reforms were affecting their work.

District Judge Jeremy Rawkins said that the reforms, rather then being an end in themselves, were actually just the beginning of the change. He contended that it is not only procedures but rather a whole culture that would be required to change as part of this process. He also advised experts not to accept any instruction unless they have a copy of the Rules and Practice Directions. Michael Black QC asserted that not only would there be two kinds of expert but also two sets of experts – but only where the litigants could afford it. In a welcome return, Tony Cherry (a defence solicitor) noted the zeal with which the new Rules are being applied, both in spirit and to the letter. He gave examples of cases where expert evidence was not allowed due to breaches of the Rules. Andrew Ryan (a claimant solicitor) had noticed that defence solicitors were more willing to discuss matters pre-trial and to disclose more documents. He also noted an increase in the use of ADR.

The afternoon session dealt with the topic of accreditation. Following a number of short statements on its pros and cons, conference divided into four groups to consider various issues arising. The overall consensus of these groups was that accreditation *per se* should be vigorously resisted. The idea of training was, however, warmly received, perhaps under a unified programme organised by the three expert bodies. Clearly, many delegates were concerned about the risk of accreditation being imposed from above rather than implemented in consultation with themselves.

Bond Solon Conference

12 November 1999, Church House, Westminster
Theme: The effect of the CPR on experts

Although the general point was made that it is too early to draw any definitive lessons, the general consensus was that implementation of the CPR was going well. In his keynote address, Lord Woolf reiterated his belief that experts would find the change in culture supportive of their role. At the same time, though, he welcomed the trend towards greater use of SJEs. Both Lord Woolf and the next speaker, Judge Paul Collins, confirmed that the judiciary was embracing the changes wholeheartedly.

Kerry Underwood gave his usual ebullient performance on advocating the wider use of conditional fee agreements, warning that in his view (which runs counter to the advice of the professional bodies) experts must be prepared to act on a 'no-win, no-fee' basis.

The afternoon session began with Roger Clements reporting that attitudes in clinical negligence litigation were already improving, with more meetings of experts occurring and ADR gaining ground. He remained concerned, however, about the lack of oral evidence in fast-track cases. Nick Whitaker, a forensic accountant, noted that fewer cases were coming through – a trend that, if continued, would be bound to drive down fees. Master John Hare stated that, when costs came to be assessed, his experience was that fees charged by experts were allowed in 80% of cases. The CPR were unlikely to change that position, but they could reduce experts' earning capacity. Finally, Ali Malek QC warned experts to be wary of accepting appointments as SJEs when the evidence they would be giving concerned issues crucial to the case. Subject to the requirements of proportionality, Mr Malek thought that the courts ought to respect parties' wishes as to the witnesses they called.