Your Witness

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Fixed fee confusion

I have had a number of calls on the *Register* helpline from medical experts who have been invited by solicitors to conclude that the introduction of fixed fees in fast-track personal injury cases has some impact on the amount they, as experts, can charge.

It is possible that the solicitors in question may have been just a little confused. So to help you help them understand the position better, let's look at what is *actually* being proposed.

The change in question is to Part 45 of the Civil Procedure Rules (CPR). It is anticipated that this Rule will be extended in the September update to the CPR. A new Section II will deal with **fixed recoverable costs** in some very specific circumstances, namely in disputes where:

- the originating event was a road traffic accident
- the damages are in respect of property or personal injury
- the damages are less than £10,000
- the dispute is settled without a court action actually starting
- the claim, if issued, would have been allocated to the fast track.

Now these may seem pretty specific criteria, but they catch in their net a very large number of fast track personal injury claims.

In such cases, it has become fairly common for arguments about the legal costs to take on a life of their own. The change to Part 45 is designed to stop this 'secondary' cost-only litigation from running out of control.

The important points for experts to remember are that:

- the fixed costs are those of the *lawyers*, not the expert
- medical and engineering experts' fees are treated as *disbursements* allowed *on top* of the fixed fee
- no restriction is set on the level of the expert's fee.

So, there you have it. Whatever your instructing solicitor might invite you to believe to the contrary, the changes being proposed for October have no impact on the fees experts can charge. These remain a contractual matter between the expert and the instructing solicitor.

No new lessons

We reported in the last issue of *Your Witness* that the Foundation for the Study of Sudden Infant Death (FSID) is strongly recommending that only specialist paediatric pathologists carry out post-mortems on infants suspected of having died as a result of abuse.

It seems, however, that the FSID is taking a path others have already trodden. Ann MacDonald, a nurse expert witness, wrote to bring the 1994 Allitt Inquiry to my attention.

> *I was interested in the call for specialist post-mortems in SIDS cases.*
>
> *In 1994 the Report of the Allitt Inquiry was published. As the nurse member of the Inquiry team I can clearly recall our 3rd Recommendation:*
>
> *'We **recommend** that the provision of paediatric pathology services be reviewed with a view to ensuring that such services be engaged in every case in which the death of a child is unexpected or clinically unaccountable, whether the post-mortem examination is ordered by a Coroner or in routine hospital practice'.*
>
> *If such services had been engaged in the case of Sally Clark the outcome may have been different. It is indeed unfortunate that recommendations from major Inquiries are overlooked and the same mistakes are made.*

I heard Mike Mackey, a member of Sally Clark's defence team, speaking at the Spring *Society of Expert Witnesses* conference. He stated that 'there are no new lessons to be learnt from the Sally Clark case'. Sadly, the failure to implement the Allitt Inquiry recommendations serves to underline the veracity of Mr Mackey's observation.

Acknowledgement of Terms

In this issue of *Your Witness* we repeatedly come back to the importance of Terms of Engagement if experts are properly to set out their commercial stalls. One all too common problem is that solicitors completely ignore requests to confirm their acceptance of the expert's terms. Where does this leave the expert?

It is a basic precept of English contract law that silence cannot be used to indicate acceptance of an offer. However, subsequent conduct of the parties might be taken as an indication of acceptance of notified terms. This is especially so where it can be demonstrated that the solicitor had prior notice and yet still went on to instruct the expert without giving any indication that the terms were not acceptable.

This is not cast in stone, and the solicitor's failure to acknowledge the terms will still leave the expert with the evidential burden of showing that the terms were notified and implicitly accepted.

Chris Pamplin

Inside

Issue 33

Expert witness survey 2003

Average number of reports increases after 4 year decline

There was an excellent response to the questionnaire enclosed with the June issue of *Your Witness*. Well over 500 forms were returned, accounting for some 16% of the readership. I extend my thanks to all who took the trouble to complete them. Their data have contributed to the fifth survey of its kind in 8 years.

The experts

Profession

Of the 543 experts who returned questionnaires by mid-August, 230 were medical practitioners. Of the remaining 313 experts, 79 were engineers, 37 had scientific, veterinary or agricultural qualifications, 42 were in professions ancillary to medicine, 24 were surveyors or valuers, 26 were accountants or bankers, and 27 were architects or building experts. The substantial 'others' category totalled 78, of whom 12 were psychologists.

Work status and workload

Of the 543 respondents, 277 (51% of the total) work full time, and another 209 (38%) work part time. Only 9% describe themselves as retired. These figures reveal a significant shift of some 15% away from full-time work to part-time work in the last 2 years.

Overall, expert witness work accounts, on average, for just 37% of their workload, a figure unchanged since 2001. Clearly, these individuals are much involved in expert witness work but have an even more extensive commitment to their professions – which is, of course, exactly as it should be.

Experience and outlook

We also asked respondents to say for how long they had been doing expert witness work. From their answers it is apparent that they are a very experienced lot indeed. Of those who replied, 91% had been practising as expert witnesses for at least 5 years, and 63% had been undertaking this sort of work for more than 10 years. Furthermore, most of the respondents (57%) saw expert witness work as an expanding part of their workload.

There is currently debate about whether experts should continue to enjoy immunity to suit for their expert witness work. So we asked whether the loss of such immunity would stop them undertaking expert witness work. Only 10% of our respondents said that such a change would force them to remove their services from the marketplace altogether, whilst 56% were certain that they would continue to accept instructions; 32% weren't sure.

SJE work highly sector specific

Their work

Reports

In all five of our surveys we have asked those taking part to estimate the number of expert reports they have written during the preceding 12 months. The 2001 survey was the first to show a fall in output. Furthermore, it dropped for both reports prepared for use in court and those written solely for the advice of the instructing solicitor and the client. The experts who took part in our 1999 survey were averaging per year 48 of the former and 19 of the latter. In 2001 these average annual totals dropped to 41 and 12 respectively. In the current survey, the first average has climbed back up to 45, whilst the second has dropped further to 11.

One possible factor in this slight recovery in the average number of reports written is that, while the downturn in civil court business brought on by the Woolf reforms continues (there was a 6% fall in county court claims between 2001 and 2002), there was an increase of nearly 4% in the number of criminal committals.

Single joint experts

One of the biggest changes we found in 2001 was the increased use of single joint experts (SJEs). At that time, 80% of experts had been instructed as SJEs, and on average each expert had received 12 such instructions in the year.

The equivalent average this time around shows a small increase, with experts being instructed in this capacity some 14 times a year. Of course, while every case where one expert is instructed in place of two contributes to the overall reduction in demand for expert witness services, there is now a recognition that SJE work is more involved and experts need more time, and command higher fees, for this type of work than when appointed by just one of the parties.

Court appearances

Another change over the years that many experts will find more welcome is the reduction in the number of cases for which they are required to give their evidence in court. It is now altogether exceptional for experts to have to appear in court in 'fast track' cases, and it is becoming less and less likely in those on the 'multi-track'. In 1997 we recorded that the average frequency of court appearances was 5 times a year; some 4 years later this had dropped to 3.8; it now stands at 2.6.

Variation by specialism

These averages, however, hide a lot of variation by specialism (see Table 1). For example, the reporting rate for medics is three times that of all other specialisms (75 versus 24 reports per annum on average). Furthermore, SJE appointments are much more common in medical and surveying cases, where each expert has 18 such appointments on average each year. This compares with the other specialisms, where the average drops to just 4 SJE instructions per year.

Court appearances are similar in all areas except the sciences. This may reflect the use of forensic science in the increasing criminal

caseload, as revealed in the Department for Constitutional Affairs publication *Judicial Statistics 2002*.

Their fees

Which brings us to the detail everyone wants to know. How much are fellow experts charging for their expert witness services? This information is summarised in Table 2.

For each professional group the table gives average hourly rates for writing reports and full-day rates for attendance in court. In each instance, the rate is followed by the corresponding amount taken from the survey we conducted in 2001.

Given the small size of some of the groups, it would be unwise to read too much into the changes revealed by these pairs of figures. It is apparent, though, that on average the rates for report writing have increased by less than the prevailing rate of inflation. However, those for appearances in court have risen by around 6% per year.

In 2001, we were intrigued by the trend-bucking drop in the charging rates of accountants and bankers. We speculated that they may well have priced themselves out of their market. Well, this year they appear to have made a spectacular recovery – which just goes to underline how dangerous it is to get carried away with a sample size of just 26 respondents!

Once again, the figures in the final column demonstrate the extent to which officially determined allowances fall short of the fees experts are free to negotiate for themselves. For example, the most that a consultant medical practitioner can count on being paid for giving evidence at a criminal trial is £500 a day – well under half the average fee such an expert might charge for an appearance in a civil court.

Speed of payment

Here there is at least some improvement to report, although the general situation remains grim. In this survey, 62% of respondents said that their invoices were being settled more promptly than 2 years ago, versus 13% who reckoned they were being settled more slowly. On the other hand, only 39% could claim that bills were being paid on time in even half of the cases on which they worked, a statistic that has changed little over the years.

Against this background, it is depressing to report a drop in the number of experts who use a written form of contract when accepting instructions from a solicitor. The proportion of those who now do so stands at 42%, as against 47% 2 years ago, 38% in 1999 and 32% back in 1995. Without a solid contractual basis, experts are making their credit control much more complex than it need be. *Factsheet 15: Terms of Engagement for Experts* provides a basic written contract that experts may adopt for their own use. Somewhat more encouraging is that more experts are now stipulating in their terms of engagement how soon after invoice they expect to be paid, up 1% to 66%. This action cannot guarantee prompt payment, but it is at least a move in the right direction towards securing it.

Professional group	Reports	Court appearances	Advisory reports	SJE instructions
Medicine	75	2.5	15	24
Paramedicine	39	1.7	2	12
Engineering	17	2.6	11	3
Accountancy, banking	16	1.6	6	3
Science, agriculture	36	7.3	17	2
Surveying, valuation	31	1.1	8	17
Architecture, building	8	1.2	7	3
Others	21	2.4	7	8
Total averages	*45*	*2.6*	*11*	*14*

Table 1. The average number of reports, court appearances, advisory reports and SJE instructions by specialism.

Professional group	*n**	Average rate (£)			
		Writing reports (per hour)		Court appearances (per day)	
		2003	2001	2003	2001
Medicine	230	153	149	1,041	927
Paramedicine	42	91	100	749	718
Engineering	79	86	85	694	663
Accountancy, banking	26	151	133	1,105	895
Science, agriculture	37	82	78	690	648
Surveying, valuation	24	121	104	984	787
Architecture, building	27	92	84	744	712
Others	78	109	127	802	622
Totals	*543*	*123*	*119*	*893*	*798*

** n is the total number of respondents in each professional group in the 2003 survey.*

Table 2. Average charging rates.

If all else fails, experts can, of course, sue for their fees – or at least threaten to so do. Obviously, this should be the option of last resort, if only because it is likely to lose the expert a client. But experts are increasingly finding it necessary to take such action. Of those who took part in our 1999 survey, 24% claimed to have sued for their fees on at least one occasion. In 2001 that figure had risen to 31%, but has dropped back slightly in this survey to 30%.

Chris Pamplin

The Proceeds of Crime Act 2002

New Act covers all criminal conduct, however minor

For several years, lawyers, accountants and other professionals who deal, as a matter of course, with clients' money have been aware of their duties and responsibilities under the various pieces of legislation designed to trace and confiscate the proceeds of organised crime and terrorism.

The Act

The provisions introduced by the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003 have brought about a fundamental change. Most notably, the Act extends money laundering offences to cover the proceeds of **all** criminal conduct, however minor.

Criminal conduct is defined in the Act as any conduct that constitutes an offence in any part of the UK, or conduct that would constitute an offence if committed here[1]. The draftsman has been anxious to close any possible loophole, and the wide definition given to 'criminal property' by the Act encompasses, for example, such activities as theft, tax evasion and benefit fraud. In theory, this includes evasion of a train fare.

The Act lays down new rules governing money laundering offences. It imposes harsh penalties for those failing to report an offence and introduces prohibitions against 'tipping off', i.e. telling the person you suspect of your suspicion.

The duty to report falls upon anyone working within the 'regulated sector', and Schedule 9 to the Act and Regulation 2(2) give a broad definition to the regulated sector. It almost certainly includes all those who, in the course of their business, might deal with or give advice on investments, taxes or other specified financial matters. The regulated sector specifically includes those who provide services 'which involve participation in a financial or real property transaction (whether by assisting in the planning or execution of transactions or otherwise by acting for, or on behalf of, a client)'. If, in the usual course of your professional life, you are involved in this kind of work, you will need to establish whether you are in the 'regulated sector'. If you think you might be, then you probably are. The most obvious group to be affected is accountants. However, others, such as estate agents and some surveyors, dealers in stocks and shares, pensions advisors and experts in banking might also be affected.

Harsh penalties for those who fail to report suspicions

Key provisions

Before considering whether expert *witnesses* are affected, it is useful to appreciate the broad scope of the Act.

The provisions of the Act that create the criminal offence and are going to be of most interest to experts include:

- concealing, disguising, converting or transferring criminal property or removing it from the jurisdiction[2]
- entering into or becoming concerned in an arrangement which facilitates the acquisition, retention, use or control of criminal property[3]
- acquiring (other than for valuable consideration), possessing or using criminal property[4].

Conviction of an offence for any of these will carry a maximum penalty of 14 years' imprisonment and/or an unlimited fine. It is also an offence to do anything that constitutes aiding, abetting, counselling or procuring any of the above offences.[5]

It appears that the threshold at which charges can be brought is very low. Mere suspicion that an arrangement involves criminal property, or arises from criminal activity, is sufficient to incur liability. Similarly, an individual can be charged with the offence of aiding and abetting if he or she suspects that criminal property is being retained and does nothing about it.

Key defence is authorised disclosure

Defences to a charge of money laundering under the key provisions include the making of an authorised disclosure[6]. This must be made to a Money Laundering Reporting Officer, police constable, customs officer or the National Criminal Intelligence Service (NCIS). The Act provides for voluntary disclosure by persons working outside the regulated sector. You can find more on NCIS at http://www.ncis.co.uk.

Reasonable grounds

If this were not already bad enough, the Act creates a further class of offence[7]. This provides that an offence will have been committed if someone knows or suspects, or has reasonable grounds for knowing or suspecting, that:

- another person is engaged in money laundering
- the information was found in the course of business in the regulated sector
- the required disclosure was not made as soon as practicable after the information came to light.

Conviction of this offence carries a maximum penalty of 5 years' imprisonment and/or a fine.

The 'reasonable grounds' element introduces an objective test for whether a person knew or suspected, or should have known or suspected, that another person was engaged in the prohibited activity. In other words, if a reasonable person in possession of the same information as you would have concluded or suspected that money laundering was involved, then you, too, will be deemed to have had reasonable grounds for such knowledge or suspicion.

It should also be noted that, for professionals in the regulated sector, the knowledge or suspicion is not confined to information about their clients. It applies equally to knowledge or suspicions about any person – for example, the other party in defended court proceedings.

A privilege defence – well almost!

There is a defence to a 'reasonable grounds' offence which is afforded to 'professional legal advisors'[8]. This provides that no offence is committed by failure to disclose if the information came to the advisor in privileged circumstances. Privilege will apply where information is given by a client in connection with the taking of legal advice from the advisor or in connection with legal proceedings or contemplated proceedings. However, there is a sting in the tail. Privilege cannot be claimed where the information is given with the intent of furthering a criminal purpose.

It is difficult to envisage a situation where information given is not intended to further a criminal purpose. Take, for instance, the case of a small businessman who, for years, has been making dubious VAT returns. The business runs into difficulties with its creditors. It is being sued for its debts and is considering a voluntary arrangement. An accountant is instructed by the solicitors to consider the books and advise the client. Note that, in this case, the accountant is working as an expert *advisor*, not an expert *witness*. The business wants to avoid, so far as it can, the claims of its creditors and minimise its losses. In continuing to conceal its untruthful VAT returns, the businessman is furthering an illegal purpose. The solicitor cannot claim privilege and neither, therefore, can any expert advisor who has been instructed. Failure to disclose in these circumstances will almost certainly constitute a money laundering offence.

Tipping off?

The Act also makes it an offence[9] if, knowing or suspecting that a disclosure to NCIS has been made, you make a disclosure to the client or a third party which might prejudice any investigation. This carries a penalty of up to 5 years' imprisonment and/or a fine.

These provisions throw up a further difficulty. Consider the situation of an expert advisor on tax matters. The expert becomes aware from information given by a defendant that a money laundering offence might have been committed. Let us say that the case involves a complicated matrimonial dispute or proceedings between two business partners, the result of which might be an order for a transfer of property. The expert is within the regulated sector and is obliged to report any suspicion. Having then made the report, could the expert continue to act as an expert advisor? What does the expert tell the instructing solicitor? Is anything the expert says likely to fall foul of the tipping off provisions?

Does the Act affect expert witnesses?

In the foregoing, the examples involving experts have been restricted intentionally to experts working as expert *advisors* (i.e. experts employed by a party to advise that party). Whilst working as an expert advisor, the expert is executing normal professional duties and, if within the regulated sector, will have a duty to make reports. The crucial question is: Will expert *witnesses* also be affected by the Act?

Expert advisors are definitely affected by the Act... but are expert witnesses?

The primary purpose of the Act is to stop professionals in the finance and associated industries from assisting in money laundering. It does this by requiring the entire personnel in the regulated sector to act as spies and report suspicions. But can an expert witness be a target for such legislation? The expert witness is handed a portfolio of evidence and asked to opine as to its proper interpretation. It is no part of that function to either believe or disbelieve the evidence or to advise anyone. Is it really possible, in such circumstances, to hold that the expert witness is capable of forming a reasonable suspicion of wrongdoing?

The position in relation to legal privilege may be instructive here. The legal privilege defence is blown wide open by the provision in the Act that the defence is void if the information concerned is given with the intent of furthering a criminal purpose. It is difficult to think of a situation where information given is not so intended. Such a broad attack on the cherished principle of legal privilege may show that the intention of the Act is to cast its net as far and wide as possible. If so, expert witnesses, regardless of the peculiarities of their role, may be caught by the Act.

Report or be damned

Police feedback suggests that 50% of all money laundering offences must involve an accountant or a solicitor. And it is certain that the new regulations will give rise to a dramatic increase in the number of reports made to NCIS, which is already running at about 7,000 per month.

In America, where similar provisions have been in place for some time, many accountants and lawyers report their clients as a matter of course. This blanket approach is less likely to develop here because our reporting form is more searching than its transatlantic counterpart, in that it requires the reporter to give details of what has aroused the suspicion.

For such a wide-ranging piece of legislation, it leaves many questions unanswered, and many bodies, the Law Society amongst them, are seeking clarification from the Government. In the meantime, experts in the regulated sector need to be alive to the need to protect their own interests should they find themselves in the position of suspecting someone of dealing with the proceeds of crime. When working as expert advisors, their duty to report is clear. When working as expert witnesses, many experts may conclude that the risk of making the wrong call is so great that they file reports simply to protect themselves.

Perhaps the draftsmen will consider theirs is a job well done!

Footnotes

[1] s.340(2)
[2] s.327(1)
[3] s.328(1)
[4] s.329(1)
[5] s.340(1)
[6] s.338
[7] s.330
[8] s.330(6)(b)
[9] s.333

Getting paid

Late payment of fees remains one of the most frequently encountered subjects in correspondence received and is a subject guaranteed to raise the temperature at any expert witness conference. Here, we examine ways in which the risk of late payment can be minimised and look at the practical steps that can be taken for fee recovery in the worst cases.

Solicitors have personal responsibility for experts' fees

The legal framework

The relationship between an expert witness and the instructing solicitor is a contractual one, whether or not it has been reduced to writing. It follows that if, for example, the expert's fee (or the basis on which it is to be calculated) and the timing of its payment have been agreed, the solicitor is **personally** responsible for paying that fee in full and within that time span. This is so even if:

- the solicitor has not at that stage been paid by the client (or whoever else is funding the litigation), or
- the solicitor should eventually receive less than the full amount from one or other of them.

Furthermore, there can never be an implied term that the expert witness will be prepared to accept either what is allowed on assessment of the costs of the case or on assessment of the expert's fees by the Legal Services Commission (LSC). Nor can the expert be deemed ready to wait for settlement of the bill until (say) the solicitor has received a payment from the LSC. Only by having expressly agreed with the expert in advance can a solicitor disclaim:

- personal responsibility for the fees
- responsibility for fees beyond those allowed on assessment, or
- the need to pay the fees regardless of whether the firm has been put in funds.

Unless the solicitor has reached such an agreement, it follows that if an expert's fee, or the full amount of it, is not allowed on assessment of the costs of the case, the solicitor must bear the deficit personally.

These responsibilities are made plain (in England and Wales) by the *Law Society Guide to the Professional Code of Conduct of Solicitors*, which states at Principle 20.01:

> *'Duty to pay agents' fees. A solicitor is 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'.*

Experts should adopt a written form of contract to secure their fees

The contract

According to our series of expert witness surveys, the number of experts who use a written form of contract when accepting instructions from a solicitor has, sadly, dropped in 2003 to 42%, after reaching a high in 2001 of 47% (for more detail, see the article on pages 2 and 3). That leaves well over half of all experts claiming not to use any form of written contract.

Experts who have become used to waiting in wistful hope of payment, but who do not have clear terms for payment embodied in written terms and conditions, would do well to address this omission. Written terms do not guarantee that you will be paid on time, but they do make clear to the solicitor your expectations and requirements. Templates and precedents for standard terms of business applicable to experts are generally available (see *Factsheet 15: Terms of Engagement for Experts*) and may be adapted to suit requirements. Many professional bodies (e.g. RICS) produce sample terms of engagement for their members and issue codes of practice in relation to their use.

The contract should deal with all of the important terms you wish to incorporate in the agreement. It should include full details of charging rates and how they will be applied. It should also make provision for how fees are to be paid and when.

If your contract does define a payment period, consider including some incentive to the solicitor to make payment early. This will most often be in the form of a percentage reduction in the fee for prompt settlement. For example, a 10% reduction for fees settled within 7 days will serve to focus the mind of the solicitor on the advantages to the client. It could also give a healthy boost to your own cash flow.

Charging interest

The Late Payment of Commercial Debts (Interest) Act 1998 offers the expert a further weapon. Just as the reduction for prompt payment can act as a carrot, adding interest to the debt can provide the stick. Since 7 August 2002, the Act applies to *all* commercial debts. Provision is made for interest to be added at 8% over the official dealing rate, together with a lump sum (£40 on a debt below £1,000, £70 on those below £10,000 and £100 for those above). Interest starts to run once the contractual payment date has passed.

A few simple preliminaries

Sadly, it is too often the experience of experts that, despite taking all reasonable steps to ensure the timely payment of their fee, it is delayed to an unacceptable degree. Once payment is late, do not add to the problem by being tardy yourself. Write to the solicitor concerned and make a polite request for payment. Ideally, you should preface this by a telephone call. It is much harder to ignore a telephone call than it is a letter. If you can, extract a promise of payment and do not be afraid to ask 'You'll put that in the post to me today, will you?' when concluding the call. Such assurances can then be specifically alluded to in your letter of confirmation and in any follow-up calls that become necessary. All of this can be

done without upsetting your client, but it does make them feel much more uncomfortable if they continue to default.

Having cajoled and persuaded to no avail, the time has come to get tough. You might first consider a letter of complaint to the Office for the Supervision of Solicitors (OSS). Don't waste your time! Since July 1999 its remit has been narrowed to that of dealing with complaints from *clients* of solicitors. As a result, the only course of action now open to experts to secure their fees is to sue for them in the county court, and the cause of action lies in simple contract – which is why having a written contract is so important.

How to sue your solicitor – a simple guide

The CPR require that, before commencing proceedings, the parties should have taken reasonable steps to resolve the matter. For our present purposes it is assumed that the debt you are seeking to recover is neither disputed nor challenged by the solicitor. The spirit of the CPR will have been satisfied by a request for payment, possibly followed by a formal letter of complaint. The latter, if written to the instructing solicitor, should also be copied to the firm's senior partner (a step that often pays dividends). Finally, a formal 'letter before action' should be sent:

- identifying the debt by reference to date, invoice number and amount
- providing the details of any contractual or statutory interest to be claimed
- giving notice that, in default of payment within a certain time, court proceedings will be commenced.

A form of wording could be as follows:

> *Please note that in default of payment, or acceptable proposals for payment, within 7 days from the date of this letter, proceedings will be commenced against you without further notice. If such proceedings become necessary, my claim will include legal costs, court fees and statutory interest at 8 percent per annum from the date payment fell due.*

A solicitor will recognise a formal letter before action, and this will often prompt the firm into making payment. No solicitor wants to have a court judgment registered against them nor to suffer embarrassment at their local county court. Such letters might carry more weight if written by another solicitor. Most lawyers will do this for a modest fee.

The Claim Form

If this fails, you can proceed to the issue of the Claim Form. In claims for the recovery of a specified sum of money, you should use a standard court form numbered N1. This can be found on the Court Service web site (http://www.courtservice.gov.uk/cms/3516.htm) or can be obtained by visiting your local county court office.

The Claim Form requires you to submit your name and address and that of the defaulting solicitor. When suing a solicitor it is best to name the firm and not the individual.

Next is a brief description of the type of claim. An appropriate form of words would be *money due for services rendered.*

Below this, you must complete a statement of value. It tells the court to which track the claim will be allocated. For debts of £5,000 or less, you need only say *not more than £5,000*. The box on the lower right-hand side of the form allows you to enter the amount of the claim (inclusive of interest and VAT), together with fixed solicitor costs and the amount of the court fee (see side bar). Both fixed solicitor costs and the court fee are determined according to the value of the claim. Fixed solicitor costs, however, are generally available only to parties who instruct a solicitor to prepare the claim (see CPR 45.2). Litigants in person will usually leave this space blank.

On the reverse of the form is a section where you can give further details of your claim. You might word the text thus:

> *The claim is for:*
>
> *£… for the provision of services as an expert witness, full particulars of which are contained in the claimant's invoice number… dated… a copy of which is annexed hereto.*
>
> *£… for statutory interest at 8% per annum payable pursuant to s.69 of the County Courts Act 1984 and calculated from… to the date hereof and continuing at a daily rate of £… or at such rate and for such period as the court sees fit.*

The form concludes with a statement of truth, which you *must* sign. All you need do is take the form to your local county court office, together with a cheque for the court fee made payable to 'HM Paymaster General'.

The court will issue and serve the claim on the solicitor and will send you notice of issue, stating the date by which the defendant must acknowledge the claim or lodge a defence. The notice of issue will include a tear-off form that you can complete and return to the court if the defendant has neither defended the claim nor made payment within the time allotted. The court will then enter judgment in your favour and serve on the solicitor an order to pay. Enforcing the judgment is, of course, a separate matter, but unless there is a genuine dispute, most solicitors will settle before you have progressed that far.

A 'do it yourself' claim can be as simple as that. If in doubt, the court staff are usually happy to assist. Attending at your court office is not dissimilar to a visit to your post office. It is a step that most will take with reluctance, but it may be your best option when all else has failed.

Court fees

Claim value	Fee
<£300	£30
£300–£500	£50
£500–£1,000	£80
£1,000–£5,000	£120
£5,000–£15,000	£250
£15,000–£50,000	£400
£50,000–£100,000	£600
£100,000–£150,000	£700
>£150,000	£800

Recovery of fees through the Small Claims Court is straightforward

Factsheet Update

We are currently undertaking a thorough review of all the Factsheets and will announce updates as they become available via the *e-wire*.

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

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Leaving the common room

The adversarial nature of litigation is for neither the faint-hearted nor those lacking in preparation. When academics are called upon to assist the court, they should think carefully before leaving the cloistered world of academia and entering the hurly-burly of the courtroom.

A rewarding role…

Upon first consideration, the role of expert witness holds many attractions to the scholarly. It is, perhaps, one of the few occasions when research and knowledge can be put to immediate and practical effect.

Expert opinion can be, and often is, the pivotal evidence on which a case turns. Indeed, in high profile cases it can inform public debate, prevent miscarriages of justice and even influence changes in the law itself. And, of course, the role of expert witness has the capacity to improve one's academic and public profiles, and possibly lead to advancement amongst one's peers.

Acting as an expert can bring all of these things. But it can also make you an object of ridicule and severely dent your reputation.

… but a potentially risky one

In recent issues of *Your Witness* we have reported on a number of cases where experts have been savaged by lawyers, pilloried in the Press and roundly criticised by the judge. Far from receiving the plaudits of their peers and a hearty vote of thanks from the legal establishment, these experts will have suffered serious damage to their reputations and credibility. Indeed, in some instances, experts will have rendered themselves virtually unemployable. What's more, judicial criticism is decidedly one-sided, there being no right of reply!

Consider Sir Roy Meadow, the experienced paediatrician who gave evidence in the Trupti Patel and Sally Clark cases. He has first-hand experience of the problems that can flow from expert witness work. The Solicitor General has warned the Crown Prosecution Service that defence lawyers should be told about court criticism of his evidence (*The Guardian*, 1 July 2003). Sir Roy, now aged 70 and retired from medical practice, had continued to work as an expert and advisor. But the damage caused by the criticism and adverse publicity surrounding the cases makes one wonder whether he will be able to continue offering his expert services.

Preparation, preparation, preparation

The courtroom environment is, then, awash with dangers for the under-prepared and ill-informed. An expert who is to face perhaps several days of testing cross-examination must be of a robust disposition, must not shrink from combat and, above all, must prepare to an exacting standard.

Experts should be familiar with the nature and purpose of expert evidence. Risk of criticism will be reduced if the expert adheres to the following key points:

- Do not confuse the role of expert with that of advocate.
- Do not stray outside your area of expertise.
- Do not have unquestioned loyalty to your own opinion.
- Identify the basis for your assumptions in sufficient detail to allow challenge.
- Make observations, not judgements.
- Be familiar with the codes of practice for expert witnesses.

How lawyers ought to assess experts

The inexperienced expert is not always to blame when things go wrong. An expert's suitability and the fitness of their evidence should be assessed by the lawyer before trial. Penny Cooper, of the Inns of Court School of Law, suggests that a solicitor should ask questions regarding:

- qualifications, reputation and whether the expert has experience of giving evidence
- the extent to which the issues have been addressed and the facts considered
- whether sufficient reasons are given for opinions, and whether opinions are clearly expressed
- whether the expert appears unbiased
- whether the opinion seems unusual or different from the norm and, if so, whether the expert is confident in the opinion.

We have, in the past, advocated that the solicitor needs to go beyond this. We suggest that it is ultimately the responsibility of the instructing lawyer to ensure that the expert is familiar with protocols, codes of conduct and the form the expert report must take. In the case of a novice or inexperienced expert, it would be no hardship for the solicitor to provide the expert with a pack containing copies of relevant protocols and guides, together with standard instructions, to which any specific directions could be appended.

Truth or justice?

Forensic pathologist, Professor Peter Vanezis, declares that courts and universities are fundamentally different, and that's the way it should be. In academia, says Vanezis, you are looking at *truth*. In court, you are seeking *justice*. The two are different. In court you will be criticised, but your detractors may not actually believe what they are saying.

Amongst their other attributes, then, experts need to be fairly thick skinned. Not infrequently, experts will be harried and pressed by someone with no real understanding of the subject. Indeed, an expert's knowledge, experience and even integrity may be called into question with the sole intention of challenging the evidence.

In such cases, reputations are lost and won. However, all experts share one thing in common. By being properly prepared, they can reduce the risk of losing their heads on the chopping block that is the courtroom.