Your Witness

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

Solicitors who fund expert reports

With the cuts to legal aid funding, many solicitors will have to fund disbursements, such as expert fees, under the new costs regime. This will be the case, in particular, in personal injury claims. The effect is that solicitors could now be considered to have a personal interest in the litigation and its outcome. And this gives rise to the possibility that they may be liable for non-party costs orders.

From 1 April 2013, an already complex situation has been made still more complex by changes meaning that a successful party in civil litigation is no longer able to recover from the unsuccessful party all sums connected with the funding arrangements. The sums that will cease to be recoverable are all or part of any success fee payable under a conditional fee arrangement (CFA), and all or part of an after-the-event (ATE) insurance premium. In addition, from 1 April 2013, qualified one-way costs shifting is introduced for personal injury cases. (The basic concept here is that the claimant will not be required to pay the defendant's costs if the claim fails, but the defendant must pay the claimant's costs in the usual way if the claim succeeds.)

In *Flatman -v- Germany* [2013] *EWCA Civ* 278 (10 April 2013), solicitors in an unsuccessful personal injury claim had acted under a CFA and the claimant had no ATE insurance. The defendant's insurer suspected that the claimant solicitors had agreed to fund disbursements themselves on the understanding that, if the claim failed, they would not look to their client to pay them. If true, argued the insurer, the claimant solicitors would have become commercial funders of the litigation and so liable for the defendant's costs. The defendant's insurer therefore applied for orders for disclosure and for provision of information about the claimant's funding arrangements and, in particular, the extent to which the claimant solicitors had funded their disbursements.

The claimant's solicitors and the Law Society opposed the application on the grounds that the definition of a CFA specifically envisaged an agreement under which the disbursements would not be payable if the claim failed and that it could not be stepping outside the role of a solicitor to do precisely what Parliament had authorised solicitors to do. This argument depended upon establishing that 'expenses' included disbursements, an interpretation that the Court of Appeal had already accepted in relation to part of the CFA Regulations 2000. It was also argued that there was a distinction between a solicitor who is entitled to charge his client for disbursements but elects not to because he knows his client cannot afford to pay, and a solicitor who simply agrees at the outset not to charge for them. The Court accepted those arguments and held that solicitors who fund disbursements cannot, for that reason alone, be ordered to pay costs. That alone did not make them a 'real party' to the action nor make them a 'commercial funder'.

The decision in *Flatman* is one that will be greeted with some relief by solicitors who will be required to fund disbursements under the new costs regime. But there is probably some advantage to experts, too, because it removes a strong disincentive a lawyer would have had not to instruct an expert at all.

Sharing the cost of an expert

In *JG -v- LSC* (*Law Society Gazette*, 15 April 2013), the High Court was asked to rule on a claim for judicial review of a decision by the Legal Services Commission (LSC) – now the Legal Aid Agency (LAA) – not to fund in full the costs of an expert report.

The report had been ordered by the court in Children Act proceedings involving a 10 year old girl. The LSC had agreed to fund only one-third of the cost of the report because the other two parties (the child's mother and father) were not legally aided. The LSC argued that all parties benefiting from the report should share the cost and that, under s 22(4) of the Access to Justice Act, costs cannot be awarded against one party alone simply because it was in receipt of public funding.

Both the Law Society and the Justice Secretary intervened in the case. Arguments were advanced that the paramount interests of the child should demand that the costs of a report should be met from public funds, but the LSC said that it was 'only fair that the costs are shared equally between those involved'. The Court held that the LSC had not acted unlawfully and that it was only in 'rare cases' that the child's rights would require that funding of a report be met in full by the taxpayer.

However, this ruling leaves something of a dilemma. In cases involving legally aided children where there are other adult parties who are privately funded, or simply unrepresented, what happens if the court asks for an expert report but those other parties refuse to contribute to the cost? As matters stand currently, this could deny vulnerable children and the judge access to expert opinion that may be vital when making important decisions regarding a child's future. When did the view of jobbing civil servants in the LAA become more important than the view of a judge regarding what evidence is required to allow the Court to administer justice properly?

Chris Pamplin

Inside

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Expert Witness Survey 2013

On average, 40% of workload is expert witness-related

Enclosed with our June 2013 issue of *Your Witness* was a survey questionnaire, the tenth of its kind over the past 18 years. By the end of August 2013, some 340 forms had been returned, accounting for some 16% of the membership. A big thank you to all who took the trouble to take part and contribute data.

The experts

Of the 340 experts who responded by the end of August 2013, 154 were medical practitioners. Of the remaining 186 experts, 48 were engineers, 15 were in professions ancillary to medicine, 14 were accountants or bankers, 32 had scientific, veterinary or agricultural qualifications, 19 were surveyors or valuers and 10 were architects or building experts. The substantial 'others' category totalled 48, of whom 22 were psychologists.

Work status and workload

Of the respondents, 54% work full time and 35% work part time. Only 11% describe themselves as retired. This split has been fairly stable since 2003, when the full-time figure was 51%.

Overall, expert witness work accounts, on average, for 40% of their workload. This figure was 37% in 2003 and rose steadily to 46% in 2009 and 45% in 2011. This year's figure suggests a reduction in the amount of expert witness work being undertaken at present.

It is clear, though, that those individuals who responded are still 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 have been undertaking expert witness work. From their answers it is apparent that they are a very experienced lot indeed. Of those who replied, 95% have been practising as expert witnesses for at least 5 years, and 85% have been undertaking this sort of work for more than 10 years. Two years ago, well over half of the respondents (60%) saw expert witness work as an expanding part of their workload, despite the increasing pressures on expert witness work and the then recent removal of expert witness immunity. But in our 2013 survey that optimism has decreased somewhat. Now we observe 47% of expert respondents expecting expert witness work to be a growth area in their business.

47% expect expert witness workload to increase

Nature of the work

For the first time we asked how an expert's workload is partitioned between the various courts. Our respondents state that, on average, they perform 79% of their expert witness work in civil courts, 5% in family courts and 14% in criminal courts. This dominance of civil matters over the other courts is a long-standing feature of the make up of the *Register*'s membership.

We also enquired about publicly funded work. It is no surprise that with civil work dominating, 46% of our respondents undertake no publicly funded work. Of those who do accept such work, it averages 38% of their workload – 7% lower than a year ago. A further 8% drop is predicted by our respondents for 2014 if the Legal Aid Agency introduces a further 20% cut in fee rates for experts.

When it comes to accepting instructions from litigants in person, 58% of our respondents do not agree to such instructions. Of those who are prepared to accept such instructions, the vast majority take just a handful each year.

Their work

Reports

In all 10 of our surveys we have asked how many reports the experts have written during the preceding 12 months. The averages for the last six surveys are given in Table 1. The three types of report are advisory reports not for the court, court reports prepared for one party only and single joint expert (SJE) reports.

Single joint experts

A dramatic rise in the number of SJE instructions between 1999 and 2001 (a jump from 3 to 12 instructions a year as a result of the Woolf reforms) then levelled off. Now, 57% of experts have been instructed as SJEs (it was 73% in 2011), and on average each expert receives eight such instructions in the year – but that is barely half of the average in our 2009 survey.

Since the removal of expert witness immunity in January 2011, the role of the SJE has become even more fraught. Working for both parties in a dispute may well lead to a disgruntled instructing party, and that party can sue the instructed expert! Indeed, we have heard from experts – even those who until now have been very supportive of the SJE approach – who say that they will no longer undertake such instructions. This is one metric we have been watching closely, and the decline in SJE instructions is beginning to look more like a trend rather than a blip.

Court appearances

Another change over the years has been the reduction in the number of civil cases that reach 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 five times a year; some 4 years later this had dropped to 3.8; it now stands at 2.7. Of course, this survey does

Report type	2003	2005	2007	2009	2011	2013
Advisory	11	13	17	19	15	18
Single party	45	54	54	57	56	55
SJE	14	15	14	15	9	8

Table 1. Average number of full, advisory and SJE reports per expert over time.

not separate civil cases from criminal and family cases (in which most will reach court), and so the number of civil cases reaching court will be much lower even than 2.7.

Variation by specialism

However, these averages hide a lot of variation by specialism (see Table 2). For example, the reporting rate for medics is much greater than in all other specialisms. Furthermore, SJE appointments are much more common in medical cases than in the other specialisms.

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 3.

For each professional group the table offers average hourly rates for writing reports and full-day rates for attendance in court, with the 2011 data for ease of comparison. 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.

In terms of annual income from their expert witness work, 30% of our respondents earn less than £20k per year, 29% earn between £20k and £50k per year and 38% earn over £50k per year.

Cancellation fees

Fees due as a result of cancelled trials continue to be a source of friction. The average percentage of the normal fee experts charge is generally controlled by the amount of notice they receive of the cancellation. In this survey, 37 respondents charge on average 33% of their fee if notice is given at least 28 days before the trial was due (the other 303 make no charge), 95 respondents charge 42% on average with 14 days notice, 162 charge 58% on 7 days notice and 211 charge 83% if just 1 day's notice is given.

The right to cancellation fees is one that has to arise from the contract between the expert and the lawyer, although the Ministry of Justice has made claiming them very difficult in publicly funded cases. This ought to act as yet another spur to all experts to put in place clear, written terms of engagement.

Speed of payment

In this survey, 87% of experts report that the promptness with which invoices are paid has not deteriorated – but that really means matters could not get much worse! One measure of the problems experts have in securing prompt payment is the number of bills settled on time. In this survey, the number of experts reporting their bills are being paid on time in even half of their cases is only 46%. On average, 32% of solicitors pay within 8 weeks, 23% pay between 9 and 12 weeks and 30% pay between 13 and 48 weeks.

Against this background, it is depressing to note that while 88% of experts say they stipulate terms, still just 52% use a written form of contract. Mind you, that is a 10% point improvement on a decade ago, so the message must be getting through – slowly! Without a solid contractual basis, experts are making their credit control much more complex than it need be. All experts listed in the *UK Register of Expert Witnesses* are free to access our Terminator service on our website to create personalised sets of terms. See page 7 for details.

The ultimate solution?

If all else fails, experts can sue for their fees – or at least threaten as much. Obviously this should be the option of last resort, if only because it is likely to lose the expert a client.

Of those who took part in our 1999 survey, 24% claimed to have sued for their fees on at least one occasion in the preceding 5 years. That figure had risen to 29% in the 2009, and in this survey it is 33%. Given the recent economic difficulties, that perhaps isn't such a bad outcome.

If you are considering suing for your fees, our Little Book on *Expert Witness Fees*[1] has a chapter dedicated to getting paid. But it is important to recognise that the basis for any such suit is in contract. If you have not built the instruction upon a firm contractual footing, winning in court may well prove more difficult than it need be.

Number of SJE reports now at half the rate of 2007

All experts should use written terms

Professional group (*n = number of respondents*)	Reports	Court appearances	Advisory reports	SJE instructions
Medicine (*n = 154*)	83.6	2.4	28.7	12.9
Paramedicine (*n = 15*)	99.7	4.0	13.8	2.6
Engineering (*n = 48*)	16.4	1.8	8.0	2.1
Accountancy (*n = 14*)	12.7	2.0	10.0	2.6
Science (*n = 32*)	37.8	5.9	13.9	3.3
Surveying (*n = 19*)	10.6	0.9	10.6	3.8
Building (*n = 10*)	13.0	2.0	10.1	1.4
Others (*n = 48*)	42.2	3.5	8.4	9.4
Aggregate averages	55.5	2.7	18.2	8.2

Table 2. Average number of reports, trials, advisory reports and SJE instructions by specialism.

Professional group (*n = number of respondents*)	Average rate (£)			
	Writing reports (per hour)		Court appearances (per day)	
	2013	2011	2013	2011
Medicine (*n = 154*)	207	201	1,554	1,210
Paramedicine (*n = 15*)	142	139	1,180	1,127
Engineering (*n = 48*)	145	131	1,112	1,076
Accountancy (*n = 14*)	193	220	1,652	1,476
Science (*n = 32*)	134	143	961	925
Surveying (*n = 19*)	152	159	1,422	912
Building (*n = 10*)	157	144	1,004	1,084
Others (*n = 48*)	164	119	1,058	828
Aggregate averages	177	169	1,329	1,102

Table 3. Average charging rates for report writing and court appearances by specialism.

References

[1] *Pamplin, C F [2011] Expert Witness Fees. 2nd Edition J S Publications ISBN 1-905926-11-4 Order line (01638) 561590*

Terms of Engagement in Scotland

Modify our template Terms for Scottish work

Our on-line template *Terms of Engagement for Expert Witnesses* (and Factsheet 15) summarises the main clauses the expert should consider when drafting a written agreement with a solicitor in England or Wales. But what about the application of our template Terms in Scottish law and the fundamental differences in contract law north and south of the border? (Point your web browser at *www.jspubs.com* and click the *Factsheets* link on the right of the home page to access our Factsheets. We looked in depth at our template Terms in *Your Witness* 68, June 2012. Go to *www.jspubs.com* and click the link to *Your Witness* on the right of the home page to access past issues.)

Our template Terms recognise the fact that the majority of our member experts work mainly or exclusively in the courts of England and Wales. They will wish the agreement and any dispute or claim arising from it to be governed by and construed in accordance with the law of England and Wales. Consequently, at paras 16(a) and 16(b) our template Terms give exclusive jurisdiction to the courts of England and Wales to determine any dispute.

Where this is not so, European law makes little distinction between the jurisdictions of any of the UK courts. The Civil Jurisdiction and Judgments Act 1982 Schedule 4 Section 3 provides that a person domiciled in one UK jurisdiction can be sued in contract or tort in whichever jurisdiction the performance of the contract or the breach of duty took place. However, Section 12 (1) states that if the parties have agreed that a court or the courts of a part of the UK are to have jurisdiction to settle any disputes that have arisen or may arise in connection with a particular legal relationship, and, apart from Schedule 4, the agreement would be effective to confer jurisdiction under the law of that part, then that court (or those courts) shall have jurisdiction.

Which jurisdiction should be adopted?

Our template Terms also make provision for disputes to be submitted to the English courts which are to be governed by a foreign law as the governing law of contract. As pointed out in Factsheet 15, the English courts are experienced in applying foreign laws when determining disputes before them, but the foreign law must be pleaded and proved as a fact, usually by witness evidence from a qualified lawyer in the relevant jurisdiction. The court's application of a foreign governing law may give rise to problems, such as conflicting expert evidence on the foreign law or its interpretation. Furthermore, the process of instructing foreign lawyers to give evidence can add significantly to the duration and costs of the litigation. However, where the nature of the obligations in the contract or the bargaining power of the parties necessitates a choice of foreign law, the English courts have no objection in principle to deciding a dispute on this basis.

The Scottish courts, too, are perfectly competent and well used to dealing with questions of English contractual law when called upon to do so. There is really no reason, therefore, why Terms should not be so framed as to be subject to English law but without the need for exclusive jurisdiction by the English courts. Giving exclusive jurisdiction to the 'courts of the United Kingdom', for example, would extend jurisdiction to all courts within the UK while retaining English law as the basis for determination. However, we suggest that to split legal interpretation of the contract from legal jurisdiction is not, perhaps, a very satisfactory solution.

In Scotland, as in England and Wales, it would be necessary to prove disputed points of foreign contract law by calling expert evidence, with the same disadvantages just outlined. In any event, no matter how carefully worded the Terms, there are likely to be legal, peripheral or procedural matters that will be dealt with in a fundamentally different way according to the jurisdiction used.

There is one other point to be made in relation to exclusive jurisdiction clauses. It concerns the application of the *forum non conveniens* test. This is a doctrine that can be applied by the court to determine whether there are any exceptional reasons for departing from the clause. It involves the court considering in which forum the case should most suitably be tried in the interests of all the parties and the requirements of justice. The existence of connected proceedings is regarded as one of the factors the court may take into account when considering the question of *forum non conveniens*. Although there is a strong public interest in having the dispute disposed of by one court, that factor is unlikely to outweigh the private interests of the parties, in particular those not bound by the jurisdiction agreement. Experts should also consider other factors such as their own indemnity insurance, which may contain a separate requirement that disputes be dealt with exclusively in one or other jurisdiction. Departing from this may invalidate an expert's indemnity insurance altogether.

Does it matter where the case is heard?

Where a case is heard may have a significant impact on the cost, conduct and even the ultimate outcome of the proceedings.

The following considerations, which are generally applicable to all foreign and overseas jurisdictions (not just England, Wales and Scotland), may be relevant:

- Where are the potential witnesses and evidence located? If they are in a different jurisdiction, bringing them to court may be expensive.
- Will it be necessary to compel production of documents or attendance of witnesses?

- Will either party need pre-trial disclosure or depositions from witnesses, and will it be available?
- Will pre-emptive interim measures be required, such as freezing orders or orders to preserve evidence, and will they be available?
- Will judicial assistance from foreign courts be necessary to obtain evidence and are such measures available in the relevant jurisdiction?
- Is there any issue about the competence of the foreign courts or their local lawyers, especially in complex or technical matters, or about their integrity?
- How long will the proceedings take in the different jurisdictions? Will there be delay and what will be the consequences of the delay?
- Does the claimant or defendant need public funding for their legal costs, in which case will it be available?
- Can the court make adverse costs orders?
- Where are the assets located against which a judgment will be enforced?
- Will a foreign judgment be readily enforceable in that jurisdiction?
- What final remedies are available, including the level of damages and punitive damages?

Scottish law for Scottish disputes

We recognise that some experts who work in Scottish courts will find certain advantages in making their Terms of Engagement subject to Scottish law and for disputes to be determined by the Scottish courts. Solicitors in practice in Scotland, who might be unfamiliar with English contract law, may well insist upon this. If such a course is to be followed, the expert should be aware of the major differences that will be encountered in the two jurisdictions.

The Terms of Engagement are, of course, a contract between the expert and the appointor. Contract law is included in the definition of Scottish private law in the *Scotland Act* 1998, which includes, amongst other things, the law of property and the law of obligations. Private law is within the legislative competence of the Scottish Parliament. Consequently, both the existing and the developing law of contract are distinguished in Scotland from that in England and Wales. Having said that, there is an important caveat to be considered, namely the effect of Supreme Court judgments.

The supreme civil court of Scotland is the Court of Session, which sits in Parliament House in Edinburgh as a court of first instance and a court of appeal. However, the ultimate appeal in a civil case originating in Scotland is to the Supreme Court of the United Kingdom. It should be noted that the Supreme Court is, of course, also the final court of appeal for England and Wales and Northern Ireland, but in those jurisdictions no appeal lies automatically without the permission of the first instance court or of the Supreme Court itself. However, in Scotland permission is not generally required for appeals from the Court of Session. Except where leave of the Court of Session is required by statute, an appeal from any order or judgment of a court in Scotland lies as of right from that court to the Supreme Court of the United Kingdom.

Although lower courts are distinct, the UK shares one Supreme Court

Even in cases that are not the result of an appeal from the Scottish Court of Session, decisions of the Supreme Court (or House of Lords prior to 2003) bind all other courts in the UK, including, of course, those in Scotland.

It will be self-evident, therefore, that many of the important issues the Terms of Engagement are designed to cover will be as applicable and relevant in Scotland as in England. For example, the clauses dealing with the expert's liability, limitation thereof and insurance against risk all stem from the removal of an expert's immunity from suit by *Jones -v- Kaney*[1]. Being a decision of the Supreme Court, it is as much applicable in Scotland as elsewhere in the UK.

However, there are still subtle differences to be found in those areas dealing with an expert's instructions, report preparation, payment and duties and responsibilities. Our template Terms of Engagement for Experts in England and Wales reflects the specific requirement and obligations imposed by Part 35 of the Civil Procedure Rules (CPR) and Part 33 of the Criminal Procedure Rules. There are no such analogous rules applicable in Scotland. Instead, experts practising in the Scottish courts are regulated by a body of case law and guidance provided by a Code of Practice issued by the Law Society of Scotland.

Solicitor's instructions

Clauses 3 and 4 of our template Terms set out the obligations of the appointor in providing full, timely and clear instructions. We suggest that, with minor amendments as may be necessary, these will serve equally for agreements that are to be governed by Scottish law and are to reflect the duties imposed on the expert working under the Scottish jurisdiction. The Law Society of Scotland's Code of Practice (LSSCP) states that:

Obligations of the instructing party are similar

> *Experts should ensure that they receive clear instructions from solicitors (in writing unless this is not practical) specifying the solicitor's requirements, which should cover:*
>
> *(a) Basic information such as names, addresses, telephone numbers, dates of birth, and dates of incidents;*
>
> *(b) The type of expertise which is called for;*
>
> *(c) The purpose for requesting the report, and a description of the matter to be investigated;*
>
> *(d) Questions to be addressed;*

An expert's obligations are similar

(e) The history of the matter, identifying any factual matters that may be in dispute;

(f) Details of any relevant documents:

(g) Whether proceedings have been commenced or are contemplated, the identity of the parties, and whether the expert may be required to attend to give evidence;

(h) Whether prior authority to incur the estimated fees needs to be obtained by the solicitor before the instructions can be confirmed;

(i) In the case of medical reports: where the medical records are situated (including, where possible, the hospital record number); whether or not the consent of the client/patient to an examination and disclosure of records has been given; and whether or not the records are to be obtained and provided by the solicitor;

(j) In cases concerning children, a note that the paramountcy of the child's welfare may override the legal professional privilege attached to the report and that disclosure might be required.

These are not dissimilar to our template Terms and can be merged therein, but some small changes might be required, e.g. the clause dealing with single joint experts and the reference to Rule 35.7. We suggest that this clause should exclude reference to the rule but should read:

'... whether the Expert is being instructed on the Appointor's own behalf or that of one of the parties to the dispute or as a Single Joint Expert. If as a Single Joint Expert, the appointor shall confirm that the agreement of all parties has been sought and confirmed in writing.'

Obligations of the expert

Our template Terms (at clause 5) sets out the obligations of an expert under the Civil or Criminal Procedure Rules and stresses the expert's primary duty to the Court. As has been mentioned, an expert's duties and obligations in Scotland are not codified to the same extent. However, there is a body of Scottish case law that has established similar principles of independence and impartiality. Cases such as *McTear -v- Imperial Tobacco*[2] have reflected the broad standards expected of experts as laid down in the English *Ikarian Reefer*[3] case. These standards are reflected in clauses 11–15 of the LSSCP, which state as follows:

Scotland does not have court rules governing the form of the expert report

11. Experts will bear in mind that:

(a) When giving evidence at court, the role of a witness of fact, or an expert witness, is to assist the court and remain independent of the parties;

(b) A solicitor must not make or offer to make payment to a witness contingent upon the nature of the evidence given.

12. Experts will disclose to solicitors at the start of each project any personal or financial or other significant circumstances which might influence work for the client in any way not stated or implied in the instructions, in particular:

(a) Any directorship or controlling interest in any business in competition with the client;

(b) Any financial or other interest in goods or services (including software) under dispute;

(c) Any personal relationship and/or professional relationship, and the nature thereof, with any individual involved in the matter;

(d) The existence but not the name of any other client of the expert with competing interests;

(e) Whether the expert has worked with the expert instructed by the opposing party (if known).

13. Any actual or potential conflict of interest must be reported to the solicitor as soon as it is raised or becomes apparent and the assignment must be terminated.

14. Experts should consider whether there is a need to see the client, visit a site, etc., and if so, agree the practical arrangements with the solicitor in advance.

15. In the case of medical reports:

(a) If the doctor has treated the patient before, ensure that the patient's consent has been obtained to the release of the information contained in the notes and that such consent is informed consent;

(b) If the doctor has not treated the patient before, ensure that the patient's consent is obtained to the examination and to the disclosure of their records to the doctor; and, where practicable, consent of the other doctors involved in the care of the patient should be obtained before releasing information held by them.

Report

In Scotland there is no rule of court that requires an expert's report to be provided in any particular written form, or indeed in writing at all. Consequently, the format and structure of a report is essentially at the expert's discretion. It is normal, however, to set matters out incorporating the following aspects and structure:

- the qualifications, experience and expertise of the writer
- the documentation made available
- the facts upon which the opinion is given or any assumptions made
- the specific questions being asked
- the answers to each of those questions
- the reasoning that led to those answers
- any further comments that occur to the writer (whether asked or otherwise)

- documentation referred to (for example, research publications or other documents that support the opinion being tendered which must be produced where it is practicable to do so and where the article is being relied upon by the expert).

Para 16 of the LSSCP provides that the report should cover:

- basic information such as names and dates
- the purpose in presenting the report, and a description of the matter investigated
- the history of the matter
- any methodology used in the investigation
- the facts ascertained
- any inferences drawn from the facts, with reasoning.

It also provides that plain English should be used and any technical terms explained (LSSCP para 17), and that copies of any document or papers referred to in the report should be provided. It should be noted, however, that any items referred to may be subject to recovery by commission (disclosure) in any court proceedings, and experts should ascertain from instructing solicitors whether or not, in view of that, it is appropriate to refer to documents provided by the solicitor. Note that it is unnecessary to copy widely and easily available documents (LSSCP para 18).

LSSCP para 19 also provides that the expert's final report should be dated and signed by the individual(s) who will, if required, give evidence in support of it.

In relation to both the expert's obligations and the content and form of the report, the Terms of Engagement for use in Scotland need not, therefore, depart significantly from our template Terms. We suggest that they be amended to remove references to the CPR and, instead, reworded to conform to the LSSCP guidance.

Fees

Clauses 7, 8 and 9 of our template Terms deal with the expert's fees, cancellation fees and disputed fees. In Scotland, pursuers (the claimant under CPR) commonly seek to have an expert's fees payable at conclusion of the case, at which point they will seek to recover that expense from the opposition, assuming they are successful. Such proceedings can take years to conclude, and that is a matter the expert may wish to bear in mind. We suggest that Terms of Engagement for use by expert witnesses instructed to work under the Scottish jurisdiction should include clear contractual obligations establishing the appointor as having responsibility for the expert fees and clear provisions for payment and interim payment as considered to be suitable and necessary.

Experts should also be aware that in Scotland they might be required to attend court for the whole or a substantial proportion of the proof (the trial). While it is normal practice for witnesses who are giving evidence not to be present in court (other than for their own testimony), there is an exception made in the case of expert witnesses who can, with the court's authority, hear the evidence of prior witnesses and, in particular, the claimant. Consequently, in such cases, an expert witness may be required to attend for the evidence of other witnesses. This can last for several days, greatly adding to the costs for the expert. Experts in Scottish courts would be wise, therefore, to establish at the outset whether court attendance is likely and to make necessary provision in the Terms of Engagement.

Experts in Scotland can expect to see more of the court

Conclusions

As will be apparent from reading this far, the duties, responsibilities and potential liabilities of an expert in the Scottish courts are, with certain exceptions, not markedly different from those for experts operating in courts in England and Wales. Moreover, the matters the Terms of Engagement are designed to cover are no less relevant in Scotland as elsewhere. Whether the governing law of the contract is construed according to English or Scottish law, the court will act to give effect to the terms of the agreement as they appear on the face of the contract and as they were understood by the parties to it. Consequently, it should be possible to adapt our template Terms with relative ease but bearing in mind that the Scottish courts are not subject to the CPR or a codified equivalent, and also that the amount of work and the days of attendance at court that the expert might be expected to undertake may be greater in Scotland than in England or Wales. However, the prudent expert who wishes to make his Terms of Engagement subject to Scottish law or Scottish jurisdiction would likely wish to consult a Scottish contract lawyer first.

Philip Owen

Use Terminator to jump-start your terms

According to the results of our 2013 Expert Witness Survey (see page 2), still barely half of member experts use a form of written contract. As every lawyer knows, setting out clear Terms for any contract, at the outset, is essential if subsequent problems are to be avoided. The contract between expert and instructing lawyer is no different.

The Terminator section of our website enables experts listed in the *UK Register of Expert Witnesses* to create personalised sets of Terms based on the framework set out in our Little Book on *Expert Witness Fees*. (Point your web browser at *www.jspubs.com* and click the link to *Terminator* on the right of our home page.)

If you wish to create a set of Terms specific to Scotland and the Scottish jurisdiction, taking an initial set of Terms from Terminator as your starting point will speed up the process.

References

[1] *Jones -v- Kaney* [2011] *UKSC* 13.

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