Your Witness

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MedCo review

The Government has brought forward its review of the operations of MedCo, the system the Ministry of Justice (MoJ) put in place in April 2015 to try to fix the problems created by medical reporting organisations (MROs) in the low-value road traffic accident personal injury sector. In the view of a Government minister, '*... the MedCo portal allows competition and movement in the market as well as breaking the potentially unhealthy links between those who commission medical reports and those who write them.*'

No sooner had the scheme begun, than the MROs started busying themselves 'innovating'. They did so to such an extent that, according to Edward Faulks QC, it has '*... become apparent that a number of new business practices have developed in this sector with the potential to undermine both the Government's policy objectives and public confidence in MedCo*'. Hence the need for an earlier than planned review.

It is my opinion that MROs are not an inevitable part of litigation, they are, rather, an aberration created by the current rules of court. Prior to the Woolf Reforms, there were no MROs – it was the rule changes then introduced that led to their creation and growth. A simple amendment now to the rules could cut public costs and put a halt to MRO shenanigans.

In his interim report in 2009, Lord Justice Jackson reported on the parasitic nature of MROs and suggested a solution – a simple, low-cost and highly effective remedy involving just a minor rule change. But the powerful MRO lobby proved too much for Jackson, so that the simple fix was not proposed in his final report.

Creating MedCo to counter some of the worst abuses of the system is, doubtless, well meaning. However, in its current form, it is doomed to fail because it works counter to human nature and commercial ambition. The latest examples of the 'many innovative organisations and individuals' in the MRO industry creating ways to maintain their income while undermining Government policy show why this is so.

I am, frankly, amazed at the accommodating stance the MoJ has taken towards MROs. Should that continue? I think not. In light of the current national economic situation, and with a new Secretary of State in post – one who has shown in his stint at the education department a willingness, and ability, to tackle entrenched vested interests – I believe the time has come to change tack, to save significant sums that would reduce noticeably motor insurance premiums and to remove entirely the distorting effects of the MROs.

How can this be achieved? As Jackson LJ suggested initially, **leave the cost of expert evidence as a recoverable item but make the fee of any intermediary MRO unrecoverable**. If, for internal operational reasons, law firms wish to make use of intermediaries to source expert medical reports rather than employ their own staff for that task (as happened in the past), then that commercial decision should be a matter for the law firm.

Someone needs to take on the vested interests surrounding MROs. Does the MoJ have what it takes? I urge Michael Gove to step up to the mark and bring the skills he honed against 'The Blob' in education to solve the MRO problem in the justice arena.

Fixing costs in clinical negligence cases

According to Andrew Ritchie QC writing in his blog, in 2014/15:

- the NHS Litigation Authority operating costs fell by 27% – a saving of £732 million
- the number of claims was down by 4%, and
- the sum paid out in damages – £774 million – was 8% lower than the previous year.

It will come as no surprise, then, to regular readers of *Your Witness* to learn that it is in the face of all this positive news that the Department of Health has decided now is the time to consult on introducing fixed recoverable costs (FRC) for clinical negligence claims in England and Wales. The intention is to apply FRC to all cases up to £100,000, although its 'pre-consultation consultation' wonders whether to set the limit at £250,000 when it goes to public consultation.

The fixed costs in question include those of expert witnesses. The initial thinking seems to be that the cap on expert fees will be:

- £1,200 + VAT on cases up to £25k
- £2,250 + VAT on cases up to £50k, and
- £3,500 + VAT on cases up to £100k.

Based on early discussions with experts in the relevant fields, it is clear that these fees would not cover the cost of an assessment in the claimant's home (which many consider essential) to report on their needs, taking into account pre-existing condition, lifestyle, current needs and projected future needs on the basis of medical opinion.

The public consultation is due to start in November 2015 and end before Christmas. I am collating information on interested parties so we can try to coordinate our input in an effort to achieve maximum effect on these proposals. Do let me know if you are interested in feeding into this consultation in that way.

Chris Pamplin

Expert Witness Survey 2015

Enclosed with our June 2015 issue of *Your Witness* was a survey questionnaire, the eleventh of its kind over the past 20 years. By the end of August 2015, some 400 forms had been returned, accounting for some 20% of the membership. A big thank you to all who took the trouble to take part and contribute data.

On average, 56% of workload is expert witness-related

The experts

Of the 408 experts who responded by the end of August 2015, 198 were medical practitioners. Of the remaining 210 experts, 51 were engineers, 51 were in professions ancillary to medicine, 27 were accountants or bankers, 30 had scientific, veterinary or agricultural qualifications, 20 were surveyors or valuers and 23 were architects or building experts. The small 'others' category totalled 9.

Work status and workload

Of the respondents, 43% undertake expert witness work full time, with 42% part time. Only 15% describe themselves as retired. Between 2003 and 2013 this split was fairly stable, with the full-time figure at around 50%. It appears, then, that in 2015 more experts are having to mix their forensic work with other activities.

Overall, expert witness work accounts, on average, for 56% of their workload. This figure was 37% in 2003 and rose to 45% in 2011. This is the first year that the figure has been over 50%.

It is clear, then, that those experts who responded are much involved in expert witness work but still have a strong commitment to their professions – 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, 96% have been practising as expert witnesses for at least 5 years, and 88% have been undertaking this sort of work for more than 10 years. Four 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 our 2015 survey supported the conclusion from our 2013 survey that this optimism is decreasing. Now we observe 44% of expert respondents expecting expert witness work to be a growth area in their business.

44% expect expert witness workload to increase

Nature of the work

The way the workload of these experts is partitioned between the various courts is little changed from 2013. Our respondents state that, on average, they perform 77% of their expert witness work in civil courts, 6% in family courts and 13% in criminal courts. Over 60% of these experts exclusively undertake civil work. This dominance of civil matters over the other courts is a long-standing feature of the make up of the *Register*'s membership.

When we asked about publicly funded work in 2013, it was no surprise that with civil work dominating, 46% of our respondents undertook no publicly funded work. This time the majority – 54% – say they do no publicly funded work. Of those who do accept such work, it averages 36% of their workload – 9% lower than a year ago. These data show just how financially unattractive the Ministry of Justice is making publicly funded work for expert witnesses.

When it comes to accepting instructions from litigants in person, 60% 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. One of the difficulties that can come with litigants in person is apparent in the increase in the last 2ˆyears – from 38% to 54% – of experts who require payment on account in such cases.

Their work

Reports

In all 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, 58% of experts have been instructed as SJEs in the past 2 years (it was 73% in 2011), and on average each expert receives eight such instructions in the year – 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.

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

Report type	2005	2007	2009	2011	2013	2015
Advisory	13	17	19	15	18	16
Single party	54	54	57	56	55	56
SJE	15	14	15	9	8	8

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

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 1.9. Of course, this survey does 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 1.9.

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 2013 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, 29% of our respondents earn less than £20k per year, 26% earn between £20k and £50k per year and 40% 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, 68 respondents charge on average 30% of their fee if notice is given at least 28 days before the trial is due (the other 340 make no charge), 121 respondents charge 44% on average with 14 days' notice, 213 charge 58% on 7 days' notice and 266 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, 85% 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 48%. On average, 22% of solicitors pay within 8 weeks, 13% pay between 9 and 12 weeks and 19% pay between 13 and 48 weeks.

Against this background, it is depressing to note that while 91% of experts say they stipulate terms, still just 50% 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* have access to the *Terminator* service on our website (see page 8) to create personalised sets of terms, and our Little Book on *Expert Witness Fees*[1] has a chapter dedicated to terms.

The Jackson Reforms

We have asked about the Jackson Reforms in our last two surveys. When it comes to the 'hot tub', barely 10% of our respondents have 'dipped their toe in the water', up from 8% in 2013. But more than 80% of these think the approach is an improvement over traditional methods.

In 2013, 40% of respondents had been asked to provide a costs budget. This has increased to 53% in 2015. But experts continue to find it a challenge to generate accurate budgets at the outset of an instruction.

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 = 198*)	83.2	1.6	20.3	12.0
Paramedicine (*n = 51*)	49.0	3.2	16.3	7.8
Engineering (*n = 51*)	25.9	1.5	11.8	4.8
Accountancy (*n = 27*)	15.6	1.6	7.0	7.4
Science (*n = 30*)	38.3	5.6	17.0	4.3
Surveying (*n = 20*)	11.7	1.0	6.2	3.4
Building (*n = 23*)	13.6	0.5	10.6	2.6
Others (*n = 9*)	35.7	0.2	5.0	0.9
Aggregate averages	55.7	1.9	16.1	8.5

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)	
	2015	2013	2015	2013
Medicine (*n = 198*)	218	207	1,524	1,554
Paramedicine (*n = 51*)	135	142	1,074	1,180
Engineering (*n = 51*)	142	145	1,142	1,112
Accountancy (*n = 27*)	241	193	1,833	1,652
Science (*n = 30*)	118	134	963	961
Surveying (*n = 20*)	188	152	1,396	1,422
Building (*n = 23*)	150	157	978	1,004
Others (*n = 9*)	129	164	1,145	1,058
Aggregate averages	185	177	1,353	1,329

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 New edition due Autumn 2015 Order line 01638 561590*

Judicial guidance on weasel words

When the lawyer says the claimant will be paying...

The friar in Chaucer's *The Summoner's Tale* says to the recalcitrant Thomas, a man not minded to make a donation to the friar:

> *'You'd like to have our labour all for naught,*
> *Yet God on high who all this world has wrought*
> *Says that the workman's worthy of his hire.'*

If you agree with the friar, then you must believe that you, as an expert witness, are worthy of your fee. And it would be nice to think that those who instruct you are of the same belief. But these days many lawyers seek simply to pass on the responsibility of payment to someone else. A case in point arose in a debt recovery case taken on by *Debt Collection for Expert Witnesses* (see below).

Background

After much toing and froing, the case was heard eventually in the county court this summer, sitting (thanks to an initiative launched by the new Justice Minister, Michael Gove, to use every nook and cranny of the court buildings he isn't closing down) in Court 26 at the Royal Courts of Justice in The Strand.

The crux of the case was the following phrase in the letter of instruction to the expert:

> *'We confirm that the Claimant will be responsible for your reasonable fees for this service'.*

In other correspondence the instructing solicitor advised that '*the family are very credible people*'.

The expert undertook the instruction, completed the report and sent the solicitor a fee note for several thousand pounds. The solicitor referred the expert to the letter of instruction saying that he had made it clear that payment of the fees was nothing to do with him. The expert responded by saying he thought the words meant that the solicitor would get the fee from the lay client and pass it on. The solicitor went on to say he had no idea what a reasonable fee would be. When the solicitor's client was brought into the discussion, it turned out she had only agreed to pay a fee limited to £500; no payment was ever made.

Key points

... the prudent expert will seek payment on account

The first point to consider is what the word 'reasonable' meant in the context of the letter of instruction. Did it simply exclude unreasonable fees or was it a representation to the expert that the lay client was a reasonable person who would pay a reasonable fee note? After all, refusing to pay cannot be described as reasonable conduct. And if it was a representation, then, as matters turned out, was it negligent? The solicitor had met the client and family and had been in a far better position than the expert (i) to judge what sort of people they were, and (ii) to have some understanding of the family's financial position.

The second point is whether the words used in the letter set up a contract between the expert and the lay client. The answer depends on whether, when writing the letter, the solicitor was acting as his lay client's agent or on his (firm's) behalf. Furthermore, when a solicitor employs a scheme whereby he takes no responsibility for either paying the expert himself or making enquiries as to whether monies are available to meet the expert's fee note, is he in breach of a duty of care to the expert?

On The Strand

Dealing with all these issues engaged the parties in a 2 hour hearing. The final decision was that the solicitor's client had liability to pay the expert's fees; the solicitor had no liability.

There are clear lessons here for any expert who is invited to accept instructions from solicitors who intend their lay client to be the paymaster. As the judge observed, in such cases it is perhaps unseemly for the expert to contact the lay client 'out of the blue' demanding cash on account, but he thought that approach was the only safe course of action. The judge suggested that a more professional alternative may be for the solicitor to undertake the task of extracting funds so that monies were available in the client account to meet the expert's fees. The judge conceded, though, that where the solicitor had made no enquiries as to what reasonable fees were likely to be, there were obvious practical problems to overcome!

Conclusion

Faced with a letter of instruction containing words to the effect that the expert's paymaster will be the instructing solicitor's lay client, what steps should a prudent expert take?

1. Decide on a fee in advance for the work requested.
2. Write to the instructing solicitor advising of the fee and declining instructions unless the solicitor obtains monies on account from the client. After all, with no knowledge of the financial means of the client, and the lack of any regulatory framework controlling the client's behaviour, to do otherwise would run a significant risk that the expert will have laboured 'all for naught'.

About Debt Collection for Expert Witnesses

Debt Collection for Expert Witnesses has been set up, and is run by, Barry Pamplin, the father of the editor of the *UK Register of Expert Witnesses*. It offers a no-nonsense way to deal with recalcitrant solicitor debtors for debts greater than £750 where you have tried the usual debt collection processes without success and don't particularly want future instructions from the solicitor.

The debt collection fee is based on results – usually a flat 18.5% of fees recovered. If the collection is unsuccessful, you don't pay a thing.

E-mail *info@dcew.org.uk* if you wish to discuss any invoices you think could be suitable for this service.

When opinion goes unchallenged

The cross-examination of experts can be an exacting process, as many may recall ruefully. Indeed, the right or necessity to cross-examine is a topic that has been aired frequently in the appeal courts. But what is the position when there has been no cross-examination, or only limited cross-examination, of an expert witness? **Is the court bound to accept expert evidence that has not been challenged?**

This question was considered recently in *Various claimants -v- Giambrone & Law and Others*[1]. The case was a very complex multi-party, multi-claim action involving the proposed 'off-plan' purchase of apartments by a number of individuals in an Italian development in Reggio Calabria. It had been anticipated that the development would be complete by the summer of 2009. However, in each of the cases with which these proceedings were concerned, the proposed transactions were never completed. As a result of this failure to complete, it was said that each proposed purchaser had made a financial loss.

In the course of proceedings, expert evidence was taken from a number of individuals. In the main, the evidence concerned Italian law and practice, but it also included issues such as Italian planning procedures, and even the suspected involvement of the Mafia and organised crime in the Italian building industry!

The proceedings were lengthy and the evidence given, including the expert evidence, was extensive. At the conclusion of the case, lawyers for the parties made various assertions in relation to the expert evidence given. On the one hand, they called into question whether certain of the expert witnesses were suitably qualified to opine on the points of Italian law at issue; on the other, it was argued that the judge was bound to accept the testimony of expert witnesses who had not been challenged or called into question in the course of cross-examination.

A judge not in a bind

Mr Justice Foskett said that he regarded each expert as having been properly qualified to assist him and had no particular criticism of their qualifications or the manner in which their evidence was given. He went on to deal with the question of whether he was bound to accept expert evidence that had not been challenged specifically in cross-examination.

The judge stated that he did not see it as his duty to simply accept, or reject, the whole of the opinion of each expert witness. Judicial duty is not so coarse grained as that.

He pointed out that it was entirely possible that an expert might be right about many things but wrong about others. Furthermore, some of the relevant remarks concerned issues that were outside the scope of the proceedings, and the judge was in no position to say whether or not they were correct.

In particular, evidence was given by one expert witness who stated that his firm was involved in transactions '*in about 52 developments in Calabria*' and that he believed that '*over 90% of the Calabrian property transactions in which that firm was involved had completed successfully.*' Lead counsel for the defendants said in his written closing submission that this evidence was unchallenged. But the judge surmised that if that point was intended to suggest that he was bound to accept that evidence as a matter of fact, he would say unequivocally that he was simply in no position to judge. The current proceedings had not been about those 52 other developments in Calabria – their relevance to the developments in question was unknown. Whether or not that evidence was correct, it was not a matter upon which he could make an express finding. In fact, he did not regard himself as bound to accept what an expert said regardless of whether or not the evidence had been challenged.

A measured and proportionate approach

Mr Justice Foskett made a further point: had every potential issue of fact or opinion in dispute been the subject of sustained cross-examination, the trial would have taken even longer than it had already. As a result, there would have been a risk that the claimants would not have been able to recover the associated increased costs even if they had won, or that the defendants, who were individuals, would find themselves personally liable for the costs.

It is necessary, said the judge, to take a view of this kind of contention. Of course, the general credibility and reliability of a witness must be considered when making an assessment of the value of the evidence given, e.g. someone who says something particularly, although not exclusively, of a general and expansive nature which is 'unchallenged'.

In relation to one particular witness, Mr Justice Foskett had observed that the expert was often keen to set the agenda for his questioning rather than to focus on and answer directly the questions posed. His answers were often lengthy and expressed quickly. Throughout the case, the judge had felt that this was a witness for whom some credible supporting evidence was required before he could safely accept what the expert was saying. Consequently, he had approached everything that expert witness had said with a significant degree of caution, whether or not the evidence had been met with a specific challenge from another party to the proceedings.

Conclusion

Fairness requires that some specific allegations (such as dishonesty) must be put expressly to a witness. However, any suggestion that the court is bound to accept expert evidence simply because it has not been challenged as being untrue or misguided is rejected absolutely.

A judge does not have to accept opinion evidence simply because it hasn't been challenged

References

[1] *Various claimants -v- Giambrone & Law (a firm) and Others* [2015] *EWHC* 1946 (*QB*).

LAA refusal to pay was unlawful

When the Legal Aid Agency (LAA) refused to pay the full cost of an expert witness instructed in a family case by the child's solicitor, it acted unlawfully, says the Court of Appeal.

LAA ignores the direction of the court...

Austerity context

The decline and fall of the legal aid system in England and Wales has been seen in legal circles as one of the most lamentable episodes in law reform in recent years. Dubbed by *The Guardian* as '*the forgotten pillar of the Welfare State*', legal aid has been firmly in the firing line since 2010 when Kenneth Clarke, the then Justice Secretary, promised to cut civil legal aid by a further £350 million by 2015.

What the Ministry of Justice calls 'reforms' have seen whole categories of law taken out of scope for legal aid funding. One such category is family law, where legal aid is now only available with evidence of domestic violence, forced marriage or abduction. As a result, two thirds of parties to family law proceedings now represent themselves.

The debate rages on about how far this is a positive or negative change for our justice system. What is clear, though, is that parties denied professional legal representation or access to qualified expert opinion press on under their own steam. The undeniable effects of this are long delays and a thoroughly 'clogged up' family court system. It's prompted Resolution, the national organisation for family lawyers, to warn that we are now 'at breaking point'.

Even for those cases for which legal aid is still, in theory, obtainable, the LAA is under pressure to minimise costs to the Exchequer. Indeed in some cases the LAA has refused to pay expert witness costs or has ruled that they be shared between the party in receipt of public funds and other parties who are not. In other instances, the LAA has declined to make interim payments of expert witness fees or has delayed payment until long after conclusion of the proceedings. It appears that the budgetary pressure had reached a point where the LAA had felt itself entitled to override the implied, or indeed expressed, wishes of the court or the strict interpretation of the court's orders.

... and substitutes its own view instead

A child instructs an expert

Expert witnesses who have acted in publicly funded family law cases will, no doubt, applaud the decision of the Court of Appeal that, in one case at least, the refusal by the LAA to pay an expert witness's fees in full was unlawful.

In *JG -v- The Lord Chancellor and Others*[1] the Court of Appeal was asked to rule on the refusal of the LAA to pay for an expert witness report ordered for a child by the Family Court. The case involved an application under Section 8 of the Children Act 1989 by a father for a child arrangements order stipulating when and with whom the child should live and have contact. The child lived with the mother. Neither parent had public funding and acted in person throughout the proceedings.

The child was joined as a party to proceedings, was granted a public funding certificate and was represented by a solicitor and a children's guardian. At the suggestion of the child's guardian, an expert psychotherapist was instructed to analyse the impact on the child of the ongoing dispute between the parents. The child's solicitor identified an expert witness, prepared draft instructions and served them on the parents.

Permission to adduce expert evidence

At a hearing in October 2008, the district judge gave permission for expert evidence to be put before the court. In the intervening period, the child's guardian went on long-term sick leave and a new guardian was appointed in January 2009. Further directions were given at a hearing in April 2009 directing parties to jointly instruct the expert witness to prepare a report about the child and the family dynamics. The new guardian was directed to lead the expert's instruction and the costs of the report were to be funded by the child. The psychotherapist duly produced the report and sent her bill to the child's solicitors, who then submitted a claim for costs, including the expert witness fee, to the Legal Services Commission (LSC; the predecessor of the LAA).

Payment is not forthcoming

While this was pending, the court directed the expert witness to produce an addendum report. It ordered that the costs of this report were to be met by the child's public funding certificate. However, the expert refused to undertake work on the addendum report until she had received payment for her first report.

The LSC declined to pay the expert witness costs in full claiming, instead, that they should have been shared between the parties because all parties benefited from the report. The LSC argued that any right to public funding conferred on the child should not affect the rights or liabilities of other parties to the proceedings or the principles on which the court's discretion is normally exercised under Section 22(4) of the Administration of Justice Act 1999.

An impasse was reached, during which little or no progress could be made until the funding issue had been resolved.

Although the court noted the impact this was having on the child's welfare, the final hearing scheduled for June 2012 was vacated because it was clear that the case could not be concluded without the expert evidence requested. In the light of this, the child's solicitor applied for a judicial review of the LSC's refusal to fund in full the expert report ordered by the court. Both the Law Society and Lord Chancellor intervened in the proceedings.

Judicial review of LAA refusal

The judicial review was conducted by Ryder J (*JG -v- The Legal Services Commission and Others*[2]), who held, at first instance, that the costs should be shared and the LSC had been right to refuse to meet the entire costs of the expert report. The judge said that where a joint expert is instructed, the parties are jointly and severally liable for fees and expenses unless the court directs otherwise. It seemed to him that this was clearly the position in this case: all the parties could benefit from such evidence, it would inform their positions, and each had an interest in making it available to the court. While this principle of equal apportionment is not an absolute rule, Ryder J considered that the court should depart from it in exceptional cases only. It could not, he said, be right that in every case the State should bear the entire cost of expert evidence in which non-legally aided parties had an equal interest.

The child's solicitor appealed against this decision on two grounds:

1. the decision by the LSC had been fundamentally **unlawful**, and
2. the child's solicitor had a **reasonable expectation that the LSC would pay for the expert witness report in full**.

At the Court of Appeal

Dealing with the first head of the appeal, the Court of Appeal noted that the court had given permission for expert evidence to be adduced at the directions hearing in October 2008. The suggestion of a psychological assessment had been made by the child's guardian and, on her instructions, the child's solicitors had drafted a schedule of issues for the expert to consider. The report was clearly intended to benefit the child, and there had been no input from or involvement by the parents. Had matters stopped there, there could be no objection to the cost of the report being attributable to the child's funding certificate because it would have been the child who sought the evidence, the child's solicitor who instructed the expert and the child who was placing the evidence before court.

However, the subsequent direction given by the court at the hearing in April 2009 had confused matters. The Court of Appeal admitted to being somewhat puzzled by what had happened in the interim, and by what had led to the subsequent order that all three parties should jointly instruct the expert witness, with the guardian taking the lead role. There was nothing to suggest that either parent was seeking to have any involvement with the expert witness.

The Court of Appeal decided that the proper interpretation of the order made in April 2009 was that this was merely intended to complete the process begun by the first guardian resulting in the earlier order of October 2008 for the expert evidence to be produced. It was apparent that the expert's report was ordered by the district judge at the guardian's request to consider issues that needed to be addressed in the interests of the child. The mere fact that the other parties to the proceedings had an input into the report did not convert it to their report or make them liable for its costs. The Court of Appeal was in no doubt that it was the substance of the events that mattered, and it was necessary to consider the driving force behind the report's commissioning, why it was required and whose purpose it was intended to serve. In this case it was clearly the child's guardian who was instructing the expert witness. Therefore it was entirely proper that the full costs should be met by the child's funding certificate. Consequently, the decision by the LSC, that the expert witness costs should be apportioned between the parties, was unlawful.

Having reached this conclusion, the Court of Appeal did not consider it necessary to rule in relation to the second head of the appeal.

General principles

Given the severe restriction of public funding in proceedings relating to children, the Court was quick to recognise that its decision in this case was one that would be of '*very considerable importance*'. It was a matter of some regret to the Court that such an important issue had, at first instance, been dealt with by way of judicial review and that, consequently, the Court's comments on the general question did not form part of the basis for the Court's decision on the facts of the specific case. Nevertheless, the Court of Appeal took the opportunity to give some general guidance in relation to the payment of expert witness fees from public funds.

In reaching its decision, the Court of Appeal made it clear that when it comes to whether expert witness costs should be met from public funds, '*everything will depend on the facts of the case under consideration*'. The case highlights that in coming to its decision a court should consider:

- **who had first sought the instruction** of the expert witness
- the **reasons the report had been requested**, and
- **whose purpose the expert evidence would serve**.

Although the court has powers to require the appointment of an SJE, there is no *requirement* for it to do so. Had both parties sought an expert witness report on the same issues, then of course the court would have been entitled to make an order that the costs be shared and, no doubt, that an SJE be appointed.

This could not apply in the stated case because the expert evidence had been sought by one party, the child. So the full cost of the report was payable from the child's public funding and it was not open to the LSC to depart from this or to impose its own decisions in relation to whom else might have benefited from the report or whether or how the cost should be apportioned.

Court of Appeal distinctly unimpressed!

References

[1] *JG -v- The Lord Chancellor and Others* [2014] *EWCA Civ* 656.

[2] *JG -v- The Legal Services Commission and Others* [2013] *EWHC* 804 (*Admin*).

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