

Paying up!

If an expert charges more than the Legal Aid Agency's fee cap, who covers the shortfall? **Dr Chris Pamplin** reports

Severe cuts in public spending have restricted legal aid, led to a cap on how much experts can be paid from legal aid, and created inequalities. If an expert charges more than the cap, who covers the shortfall? What happens when one party is legally aided and the other not? Should some parties, such as local authorities, be expected to pay more?

Workings of the expert fees cap

The Legal Aid Agency's (LAA's) guidance on the remuneration of expert witnesses (see bit.ly/4d8NI2m) outlines the maximum rates for various types of expert witness, the process for applying for prior authority, time guidelines, benchmarks for working 'unusual' hours, standards for expert witnesses in family cases, and arrangements for specific experts (eg independent social workers, and those conducting risk assessments, drug and alcohol testing, and DNA testing).

Under the Remuneration Regulations (the Civil Legal Aid (Remuneration) (Amendment) Regulations 2013, SI 2013/2877 and the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013, SI 2013/2803), the LAA cannot pay fees in excess of those specified unless they fall under the definition of 'exceptional circumstances' (see the Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422, reg 10 and Sch 5, para 2), and the LAA has granted prior authority to exceed them. The expert's evidence must be key to the client's case, and exceptional circumstances are where either:

- the complexity of the material necessitates an expert with a high level of seniority; or
- the material is of such a specialised and unusual nature that very few experts are available to provide the necessary evidence.

Creating inequalities

From the moment of their inception, however, the remuneration provisions have been troublesome. As early as 2014, the Legal Aid Practitioners Group pointed to difficulties over who has responsibility

for paying expert fees when one party is legally aided and the other is a litigant in person. Examples were given of instances where judges had ordered an expert's report and certified the costs were reasonable, but the LAA subsequently declined to pay for the report or would pay only a half share. In such cases, the LAA often insisted that it did not have to accept what was ordered and was not bound to make any payment.

Similarly, and because of this reluctance on the part of the LAA, there was a tendency for the costs of instructing an expert to fall disproportionately on one party, or even on a party's solicitor. Often, the financial burden fell on the party deemed most able to pay, and this was particularly so in the case of local authorities, public bodies, insurers and the like. In the eyes of many, this approach was fundamentally unfair.

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Refusal to pay expert ruled unlawful

In *JG v Lord Chancellor* [2014] EWCA Civ 656, the appellant child (J) appealed a decision holding that the Legal Services Commission (LSC) was not required to fully fund an expert report ordered in private law proceedings under the Children Act 1989. After J's parents (M and F) separated, F applied for a number of court orders. J, who had public funding and was represented by a solicitor and guardian, was made a party to the proceedings. M and F acted in person. A psychological assessment of the family was ordered, with the district judge directing joint instruction but requiring J to fund the report. The LSC (now the LAA) argued that funding the full cost would breach s 22(4), Access to Justice Act 1999 (now s 30, Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012)). J sought judicial review after M and F were unable to



IN BRIEF

► The Legal Aid Agency (LAA) enforces strict caps on expert witness fees, only allowing exceptions in rare, complex cases. This often leads to unfair cost burdens on better-resourced parties like local authorities.

► In *JG v Legal Services Commission*, the Court of Appeal ruled that the LAA's refusal to fund a court-ordered expert report was unlawful, highlighting the need for case-by-case assessment rather than rigid application of funding rules.

► The Family Court, led by Sir Andrew McFarlane, has clarified that local authorities should not routinely cover shortfalls in expert fees. Updated LAA guidance now outlines stricter criteria and a checklist for seeking prior authority, aiming to ensure fairness and transparency in funding decisions.

contribute. The review judge dismissed the application, holding that the LSC had acted lawfully and, save in exceptional cases, was not obliged to fully fund such reports. J appealed.

Sitting in the Court of Appeal, Lord Justice Richards held that, under the Family Procedure Rules 2010, r 25.11, the court could direct evidence from a single joint expert, and r 25.12(4) allowed directions on payment of the expert's fees. The intention was that an expert should not be seen as belonging solely to the instructing party. In J's judicial review, the judge assumed that expert costs are normally shared equally, and J's challenge would only succeed if exceptionality was shown. When J was joined to the proceedings and a guardian appointed, it was the guardian who proposed the expert assessment, which the district judge approved. Initially, there was no issue with attributing the cost to J, as the evidence was for her benefit.

Later, the district judge had made an order for joint instruction, but the hearing notes indicated no input from the parents regarding the expert. Despite the joint instruction, the judge was effectively continuing a process initiated by the guardian to serve J's interests. That others might benefit from the report did not shift responsibility for the cost. The key issue was substance: the expert was instructed on the guardian's initiative, so the order did not breach s 22(4). Although the LSC and reviewing judge viewed the cost order as a workaround for the parents' inability to pay, the Court of Appeal held this was incorrect. J's appeal was allowed, and the LSC's refusal to fund the report was declared unlawful.

Richards LJ said the question raised a significant issue in private law children proceedings, given limits on public funding. However, the court concluded there is no one-size-fits-all rule—each case turns on its facts. Consequently, although the case of *JG* was persuasive, it did not provide a precedent to be followed in all cases, and gave only limited clarification to some of the issues identified in matters of public funding.

Reflecting on *JG*, the LAA argued that s 30(1), LASPO 2012 provides that the existence of legal aid cannot affect a court's general approach. Consequently, the LAA took the strict view that responsibility for a disbursement could not be transferred to a legally aided party simply because they were legally aided.

Note that in private law cases, the LAA considered any deviation from the equal apportionment of costs between parties to be unusual. As ever, practitioners were strongly advised to seek prior authority from the LAA before agreeing to obtain an expert report.

The president takes an interest

A review of some of the issues was carried out recently by a subgroup of the President's Experts Working Group (the Family Court President's Experts Working Group was established by the president of the Family Division, Sir Andrew McFarlane, in 2018 to address the shortage of medical expert witnesses in the family courts). As a result of their recommendations, changes have been made to the latest version of the LAA's guidance on the remuneration of expert witnesses (April 2025). The effect of these changes was considered by Sir Andrew McFarlane in *Re K and another (Legal Aid: Experts' Fees)* [2025] EWFC 100.

The cases of *S* and *K* both involved injuries to children. The local authority in each case was the London Borough of Barnet. Permission had been given for the instruction of experts, including a paediatrician, a paediatric radiologist and a geneticist. The fees for each exceeded the LAA authorised rate, and the London Borough of Barnet was directed to

make good the shortfall.

Following receipt of the reports, the court approved the instruction of a further geneticist, who was acknowledged to have greater expertise. The judge gave a short judgment explaining why a second expert witness opinion was required and why it was necessary to instruct the particular expert who had been named.

At a preliminary hearing in October 2024, it was agreed that Barnet would cover the expert's fee shortfall, with legally aided parties reimbursing the local authority if they later secured extra funding from the LAA through review or court order. However, none sought a review, so the shortfall remained unchanged at the final hearing.

“Often, the financial burden fell on the party deemed most able to pay”

Shortly before the main hearing, the LAA revised its stance, agreeing a higher rate on the grounds that exceptional circumstances applied in the case. The court was informed that, if a fresh review application was submitted, the LAA would reconsider the case, unusually accepting that the local authority should not bear the shortfall.

Barnet sought the court's endorsement of a set of 'general principles' at the final hearing. Counsel for the LAA said that they had not been aware of the widespread practice of legally aided parties persuading local authorities, or courts ordering local authorities, to make up the difference when there was a shortfall in the payment of the fees of an appointed expert. The LAA submitted, however, that neither the importance of the underlying proceedings, in general terms, nor the importance of the issues in question to the overall proceedings, is a factor that the Remuneration Regulations allow the LAA to take into account when determining whether there are exceptional circumstances.

Citing the recently amended guidance, McFarlane P said that the position now is that it is not the LAA's intention that local authorities should make up a shortfall in expert fees (other than in unusual circumstances). The guidance makes clear, at para 2.2 and para 2.3, the criteria (exceptional circumstances) that have to be met for the LAA to grant prior authority to instruct an expert where the fees or hours exceed those set out in the Civil Legal Aid (Remuneration) Regulations 2013 or the guidance. The guidance includes (at para

3.23 and Annex 6) a checklist to ensure that all relevant information is submitted to the LAA. Finally, at para 3.22 and para 3.27, the guidance explains that, while there is no formal appeal following a decision on prior authority, the LAA operates a system whereby it could be asked informally to review the decision.

The general principles

McFarlane P highlighted the general principles endorsed by the working group as follows:

- ▶ Those seeking to instruct an expert must make all efforts to identify an expert with the requisite experience and expertise who works within the prescribed rates and the prescribed number of hours and could report within an acceptable timeframe.
- ▶ If such an expert can be identified, then that expert should be preferred by the court absent of any exceptional reason.
- ▶ A local authority should not routinely be considered a source of funds to make good any shortfall in the payment of an expert.
- ▶ A local authority should only be ordered to pay for any shortfall where the court is satisfied that:
 - ▶ there had been proper exploration of other experts who could have completed the work within the prescribed rates;
 - ▶ the application for prior authority considered by the LAA had been argued fully and included all material relevant to the LAA's decision-making;
 - ▶ the parties (including the local authority) had given proper consideration to the possibility of a claim for judicial review against the LAA; and
 - ▶ the reason given by the LAA for refusing to approve the application for prior authority was full, and enabled the court and the parties to understand the reason for refusal.

The judge confirmed that a template standard order had been agreed by the LAA for court orders made when approving the instruction of an expert where the hours or rates would exceed the LAA hours/rates. This template should be used to record the decision in such cases in a uniform manner compatible with the need to give the LAA relevant information when considering any application for prior authority.

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