LSLA
Prepared by Kysen PR

Date	23 June 2014
Publication	Law Society Gazette
Type of publication	Legal

The Law Society Gazette

Expert evidence under the spotlight

23 June 2014 | By Grania Langdon-Down

Topics: Legal aid and access to justice

Radical reform of funding and compliance has placed the relationship between practitioners and

expert witnesses under strain.

The Jackson and legal aid reforms are having a significant impact on the use of expert evidence across the civil, family and criminal courts.

The Ministry of Justice and the judiciary see controlling the use of experts as a critical factor in reducing costs and delays. New guidance instructing experts in civil litigation and new standards for experts in family proceedings relating to children are being formulated.

But do the changes in costs budgeting, proportionality and funding which affect expert evidence risk undermining both justice and the relationships between practitioners and experts? The threat of harsh sanctions for missed deadlines is clearly putting pressure on how the two work together.

A specialist section of the College of Occupational Therapists recently flagged up concerns that solicitors – both claimant and defendant – are sending out source material (such as draft reports and witness statements) but asking the expert either not to list or refer to the material in their report, or to remove dates of reports and witness statements to comply with tough, post-Jackson court deadlines.

The section's medico-legal forum warned its members that these demands are 'incompatible' with the Civil Procedure Rules and could damage their professional independence and integrity.

The forum's chair Alison Somek has acted as an expert witness for more than 30 years and is chief executive of medico-legal consultancy Somek & Associates, which provides expert witnesses for clinical negligence and personal injury litigation.

She says three barristers have endorsed the forum's guidance which, she stresses, is to raise awareness and not be a blanket 'no', as each report needs to be considered on its merits. It recommends members discuss concerns with their instructing solicitor.

'We really do sympathise with the pressure practitioners are under,' she says. 'We understand that a draft report doesn't have to be served and we don't have a problem with removing it if we have seen the final copy.

'But because solicitors are paranoid about missing deadlines they are asking us to make these changes in advance of receiving these documents. Old hands like me are prepared to stand our ground but I know others who are doing it.'

Mark Solon, managing director of expert witness trainers Bond Solon, says experts should seek guidance if they feel they are being asked to do something inappropriate, because their first duty is to the court, not their instructing solicitor. 'It may scupper future work with that particular solicitor,' he acknowledges, 'but it is better to check or say "no" as it is the experts' professional reputation on the line.'

This is a 'timescale' issue, says Stephen Webber, chair of the Society of Clinical Injury Lawyers and head of medical negligence at Cardiff-based Hugh James. He says: 'It is crucial experts don't refer to a final report they haven't seen. But I can see how problems can arise. There may

be eight experts who each have to see all of the reports, so the key is for the solicitor to have everything sorted out in good time.'

In the vast majority of cases solicitors are just trying to work pragmatically in a system where timelines are no longer flexible, says Amanda Stevens, a governor of the Expert Witness Institute (EWI): 'This is a cautious reaction by the forum because nobody wants their professional integrity questioned. I totally respect that and we need more dialogue about this.'

A Law Society spokesperson says the college has not raised its concerns directly with the Society, which is not clear how widespread the problem is. 'Solicitors obviously should not put experts in a difficult position,' she says. 'However, experts are able to discuss this with their instructing solicitor and should not be providing reports which breach their duties.'

Practitioners are hoping the new 'buffer' rules, which allow parties to agree limited extensions, and signs of a more flexible judicial approach to the *Mitchell* principles will ease some of the pressure.

But the consequences of an expert missing a deadline leading to crucial evidence being struck out remain huge in terms of satellite litigation and professional negligence claims, so practitioners are amending their letters of instruction, while both sides are reviewing their terms and conditions.

'What worries me,' says Webber, 'is the pressure this is putting on relationships between solicitors and experts. This is a very personality-driven industry. You build up trust in an expert because of their experience. It would be very difficult if you end up in a [row] over whose fault it is if a deadline is missed.'

Geoff Owen, a specialist in catastrophic injury and now a consultant with defendant practice Greenwoods, agrees. He says: 'A minority of experts are trying to impose terms and conditions that say if we are late with a deadline, you can't claim very much from us. But we are saying we will be looking to you for redress.'

What is needed, he says, is a 'new generation of experts who have the expertise but do not have a backlog of work or expectation of fees that some of our existing or past experts have had'.

The EWI is training experts on the reforms. 'Some experts are suspicious that it is just solicitors turning the screw to maintain their own profitability because they do not understand the complex legal system post-Jackson,' Stevens says. 'But experts also have a lot of war stories about solicitors only giving them partial instructions or only half the documents.'

Somek says her consultancy is chasing court-set dates. 'We wrote to every one of our claimant and defendant clients with open cases – 900 – asking for copies of the court orders. We had about 250 by return which we hadn't previously received.'

For Francesca Kaye, immediate past-president of the London Solicitors Litigation Association and a partner at Russell-Cooke, the key is to have enough judicial resources so case management conferences are the 'humdingers' of hearings envisaged by Jackson, identifying the key issues and what experts and reports are needed.

Judges, on the other hand, are complaining that case management conferences are taking too long – on average 90 minutes – which is clogging up court lists. 'They should have thought of that before,' Kaye remarks.

Where judges are more consistently focusing on proportionality and limiting the number of experts, or pushing for single joint experts, is in the county courts, she says: 'Judges are certainly much more comfortable with saying "no" than before, which isn't necessarily a bad thing.'

One option Owen would like to see is a panel of independent experts which parties would go to on a single joint basis, 'but most people think that dream will be never achieved'.

Another challenge experts face is cost budgeting. 'We have always provided fee estimates for the initial piece of work,' says Somek. 'But to say the work will cost X at the outset is a nonsense – we don't know whether there will be part 35 questions, whether there will be three or 33 documents to assess, whether there will be surveillance evidence. In one case we had 10 DVDs to review.

'I use a spreadsheet and cover everything so the total fee is way more than we have ever charged on a case.'

Another area where the courts are still feeling their way is over proportionality. Webber describes a case where a baby died a few days after birth and his firm instructed four highly specialist experts. The claim was potentially worth around £40,000 because, five years on, the mother still couldn't return to work.

'The experts were all instructed pre-Jackson and the defendants admitted liability,' he says. 'But I can see a judge now saying that is a mismatch and you can't have all those experts. But I have a family whose lives have been devastated. The danger is that defendants will start thinking a claimant won't get their case through on proportionality and so they will sit back and wait for it to fail.'

He believes it will take another one or two years before the full impact becomes clear. 'We will start getting cases where the judge says it is not proportionate to have this expert, and then you don't prove your case and your client misses out on compensation.'

As the focus on proportionality increases, practitioners and experts will have to work out priorities. Somek says her consultancy offers the option of a condensed report where the expert may bullet-point some of the assessment. Its experts can also do a limited screening report to give clients a steer on whether there is a case and, very rarely, a 'desk top' report without seeing the client. But, she stresses, the expert will make the limited scope of the instruction absolutely clear and 'put riders all over the report'.

With legal aid now limited to birth-injured babies, another pinch point is over the Legal Aid Agency's rates for experts.

Webber understands issues around austerity but says the fees have been set too low in some specialist fields. He wants the MoJ to give blanket approval for practitioners to top up fees so they can take cases on legal aid and get the experts they want. The alternative is to take the

success fees and after-the-event insurance.

'Do you risk going with a cheaper expert or opt out?' Webber asks. 'I have never made a deduction in these cases on legal aid – the claimant gets every single penny. But it is a massive quandary because if you can't get the experts you want on legal aid, you could be doing a better job for your client under a CFA.'

With all the additional pressures, the big concern is that experts may decide 'it isn't worth the hassle', he says, which will mean waiting lists get longer and delays increase.

'In medical negligence, you have to get the best,' Webber says. 'That expert will be sitting in the witness box on oath saying a colleague has committed professional negligence. Not only are they attacking someone else's reputation, they are risking their own. It's a real risk to their career and, while fees can't be open-ended, it is unrealistic to expect someone to do that on the current legal aid rates.'

The president of the Family Division Sir James Munby is so concerned about the cut in rates reducing the number of experts willing to accept instructions in 'baby shaking' and similar cases that he has raised it with the MoJ.

With the spotlight so strongly on experts, there was initial enthusiasm for the Australian concept of 'hot tubbing' – where all the experts go in the witness box together and are questioned by the judge. But that has 'gone a bit tepid', Solon says: 'It's still early days. But it appears judges and clients are keener on it than practitioners.'

None of Somek's experts have been asked to jump into a hot tub, but she thinks it could work: 'It is a good idea to have some independent questioning rather than cross-examination, which is designed to undermine your evidence. But the success or otherwise will be down to the way the judge handles it, and they will need training and preparation time.'

Without that training it can go 'horribly wrong', explains Kaye, who experienced a hot tub which was badly run and ended up a 'mishmash of factual and opinion evidence with one of the experts who used to be an arbitrator flipping into a quasi-judicial role'.

'The *Mitchell* flame has fanned us all into such highly defensive behaviour,' says Stevens, 'and that isn't fertile soil for a hot tub. But things will settle down, particularly with proportionality and budgeting, and hot-tubbing could help keep costs down.'

With so much going on, what is clear is that practitioners and experts will need to work on their relationships as the courts try to find the right balance between procedural compliance and justice.

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'Unconscionable' delays

Expert witnesses in criminal trials have come in for trenchant criticism from a Crown court judge.

Earlier this year, Mr Justice Coulson blamed 'unconscionable' delays by defence experts for causing the murder trial of a four-year-old boy to be adjourned three times.

He stressed it was not the fault of the defence legal team but argued it was 'high time' that the criminal courts adopted the same approach as the civil courts in requiring experts to stick strictly to court-ordered timetables.

However, Rodney Warren (pictured), former director of the Criminal Law Solicitors' Association, argues: 'I would personally be reluctant to see any change on the criminal side because the way proceedings operate is different to the civil side.'

He says the defence 'usually gets the blame', but delays can be caused by the prosecution failing to be clear about its evidence and by the need to seek prior authorisation for experts from the Legal Aid Agency.

He blames the government and the courts for becoming 'besotted' with managerial solutions. 'Justice is more complex than that,' he says. 'Attempts to speed up the process in one place just impact somewhere else. While it is important to comply with deadlines, if a judge sets an artificial timetable, it is just a pointless demonstration of his power.'

The cuts in legal aid rates are also affecting cases. 'The MoJ argues there is no evidence to suggest experts won't work at the lower rate just because they were paid more in the past,' Warren says. 'It has probably proved its point – experts are taking on instructions because they want the work. However, the time it takes to find them is a cost to us and eats into the profitability of a case.'

A recent BBC Panorama investigation secretly filmed expert witnesses offering to help clients hide the truth. Warren says it is 'disturbing' if experts don't truly understand their role, as anyone prepared to tailor their evidence would be in breach of their duty to the court.

When it comes to regulating expert evidence in criminal trials, the government decided the Law Commission's proposed statutory admissibility test went too far, choosing instead to tighten the Criminal Procedure Rules so judges are provided with more information at an early stage.

Courts are getting 'stuck'

Tighter restrictions on the use and funding of expert evidence in private and public law cases involving children have created problems.

The abolition of legal aid for most private law family cases and the cut in legal aid rates for DNA testing has seen laboratories – such as Manchester-based Trimega Laboratories, which also

The MoJ, working with the judiciary and Cafcass, is to run a pilot scheme in Bristol and Taunton where funding will be provided for these tests in children's cases.

Justice minister Simon Hughes says the scheme is intended to help avoid 'unnecessary delays', while the president of the Family Division Sir James Munby (pictured) hopes the pilot will 'quickly demonstrate both the need for and the viability of such a scheme'.

Munby has warned that the lack of funding for experts where the parties cannot afford the cost risks unfairness. He recently adjourned a contact case (Q v Q [2014] EWFC 7) because the father, a convicted sex offender, was unrepresented and unable to fund an expert to challenge the mother's evidence. He asked the MoJ to intervene to address the issue.

Elspeth Thomson, family partner with Newcastle-based David Gray and co-chair of Resolution's legal aid committee, says the issue will just become more acute with the increasing numbers of litigants in person. 'Courts are getting stuck,' she says. 'We had a temporary relocation case and the High Court wanted some expert evidence but nobody would pay for it so the child didn't go.'

In April, the Court of Appeal gave its long-awaited judgment in *JG v The Lord Chancellor* [2014] EWCA Civ 656, which found the Legal Services Commission (now the LAA) was wrong to refuse to pay more than one-third of an expert's fees because it believed the parents should have been required to pay the other two-thirds.

The Law Society intervened. 'The judgment is significant,' says Mark Paulson, head of family and social justice, 'because it means the LAA must now look at each case rather than adopt an absolute refusal to pay the fees in full.'

In April, the Children and Families Act 2014 put into statute the 2013 practice direction that an expert cannot be instructed in a children case unless the court is satisfied it is 'necessary' – and not just 'reasonably' required – to resolve the proceedings 'justly'.

The move, intended to reduce delays, was supported by the Law Society, whose templates for instructing experts in line with the practice direction have been downloaded 12,000 times.

Another development, says Thomson, is the 'chilling' new addition to case management orders which focuses on who is at fault if a public law children case goes over the 26- week deadline.

'We were lead solicitors in a recent case where the paediatric overview was late,' she says. 'I got a paralegal to do a chronology of all the times we had contacted the expert, what was sent when, and handed it up to the judge as I didn't want to be on the "naughty step".'

Last December, the MoJ reduced rates for experts in family cases by 20% but has said it will 'monitor its impact'.

'Part of the tension arises between the court saying no delays and us having to rummage round to find an expert who will work for the legal aid rates,' says Thomson. 'What also happens is the LAA will pay expert fees on account then, a year later when we get the final bill assessed, change its mind and say that the expert shouldn't have been paid. But we have already handed over the money so we have to take the hit.'

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