

THE LEGAL SERVICES COMMISSION (LSC)

**THE USE OF EXPERTS
QUALITY, PRICE AND PROCEDURES IN PUBLICLY FUNDED CASES**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL01/05)**

FEBRUARY 2005

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

Colin Ettinger	President, APIL
Allan Gore QC	Vice President, APIL
Richard Scorer	Child Abuse Special Interest Group (SIG) Co-ordinator, APIL
Alison Brooks	Member, APIL
Tracey Storey	Member, APIL

Any enquiries in respect of this response should be addressed, in the first instance, to:

Miles Burger
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 958 0885

E-mail: miles.burger@apil.com

THE USE OF EXPERTS

Executive Summary

- APIL firmly believes there is no need for additional accreditation in terms of experts engaged in publicly funded personal injury cases.
- APIL considers expert accreditation to be unnecessary, as experienced personal injury solicitors already take extensive measures to ensure that any expert they instruct is appropriately qualified. In addition, many experts already belong to professional organisations which require them to be accredited in their particular field. Therefore there seems to be little need for additional accreditation.
- APIL considers that further accreditation may dissuade many experts from continuing as expert witnesses, due to the additional burdens of qualifying for and maintaining such accreditation.
- The financial implications of providing accreditation for expert witnesses, APIL suggests, would add a further layer of costs and red tape to the legal process; a process which is already criticised for being too expensive and complex.
- APIL firmly believes that any attempt to limit, or cap, experts' fees within publicly funded personal injury cases will lead to a significant reduction in an injured claimant's access to justice.
- APIL predicts that the capping of civil expert fees at the low rates proposed by the Legal Services Commission (LSC) will lead to the majority of personal injury experts either not acting as expert witnesses altogether or simply abandoning claimant work for more profitable defendant work. In addition, APIL is concerned that those experts who are prepared to work for the rates proposed are likely to be less well

qualified or experienced, and may take less care and time to prepare reports.

- APIL considers that the consequence of experts withdrawing from acting as witnesses is that there would be fewer specialist experts in a field where there is already only a small and scarce group of them. This will limit the ability of injured claimants to present a full and fair case, therefore restricting their access to justice.
- APIL has continually stated that the financial burden of personal injury cases on the legal aid budget is small and the current system works effectively and efficiently. This point is illustrated via the fact that expert fees are not currently an issue of dispute within publicly funded personal injury litigation and are rarely challenged by defendants.
- APIL feels that the LSC's proposal that "[e]xperts' fees in Commission-funded cases, like lawyers' fees, must be subject to control¹" fails to take into account the current measures already in place to control experts' fees, such as case management conferences (CMCs).
- APIL considers that running a case without appropriate funding for experts places a claimant at a significant "*disadvantage*" in comparison to a defendant, who is entitled to employ experts without the restriction of a cost cap. APIL feels that this is in direct conflict with the 'equality of arms' doctrine within Article 6 of the Human Rights act.
- APIL reiterates that within civil cases the burden of proof is on the claimant, which means the solicitor must present the strongest case possible in order to win. Restricting the ability of the claimant solicitor to choose an expert most appropriate for the demands of the case puts the solicitor in direct conflict with this professional obligation to his client.

¹ Consultation document – page 5, Proposal 2.5

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Legal Services Commission's (LSC) consultation on the use of experts. It should be noted, however, that the consultation deals exclusively with the use of experts in publicly funded cases. As there is no public funding for the majority of personal injury cases, APIL's response will focus on the areas of litigation where legal aid is still available, namely clinical negligence cases, child abuse cases and large group actions.

Quality Assurance

2. APIL firmly believes there is no need for additional accreditation in terms of experts engaged in publicly funded personal injury cases. Indeed, we suggest that the primary motivations for such proposals are the recent high profile publicly funded criminal and family cases in which the evidence of expert witnesses was widely criticised. APIL is specifically referring to the bad publicity which surrounded the acquittals of Sally Clark, Angela Cannings and Trupti Patel due to the flawed expert evidence provided by Sir Roy Meadow. In the report following these acquittals by Baroness Helena Kennedy QC, however, she acknowledges that it is often in the criminal court where “[b]arristers for the Crown hate the words ‘I don’t know’”² and experts are sometimes “pushed into certainties where there are none”. APIL feels it is inappropriate for personal injury (PI) experts to be tarred with the same brush as those in other legal areas, such as crime and family, especially as there appear to be few, if any, problems in the PI field.
3. APIL considers expert accreditation to be unnecessary, as experienced personal injury solicitors already take extensive measures to ensure that any expert they instruct is appropriately qualified. The process of finding and selecting an expert is very detailed. For example, in order to locate

an appropriate expert the solicitor will often contact a specialist database. This database may be held within the firm itself or be an external database, such as APIL's expert database. In addition to consulting suitable databases, the solicitor will also consider recommendations made by colleagues and other fellow specialist solicitors. The opinions of other experts in the field – the proposed expert's peers - will also be canvassed. Once a suitable expert has been identified, a curriculum vitae (CV) will be considered, specifically in reference to his or her training and expertise in the field. A letter of instruction will then be drafted, which will include all the necessary details of the case in relation to the expert's opinion being sought. Naturally during the course of any instruction the evidence and opinion of the expert will be reviewed, tested and challenged regularly. The expert is always permitted if not frankly encouraged to acknowledge if or when he or she ceases to be an expert appropriate to the issues in the case. This process allows for the appropriate expert to be selected and his credentials to be firmly established prior to, and even during, direct involvement in the case.

4. In terms of additional accreditation, APIL would emphasise that many experts already belong to professional organisations which require them to be accredited in their particular field. For example, paediatric consultants will operate under the auspices of the General Medical Council (GMC) as well as the Royal College of Paediatrics and Child Health. Both of these organisations will ensure that the consultant meets the stringent requirements necessary for practising within paediatric medicine. APIL considers that the current protections offered by the professional bodies, and the use of appropriate screening by experienced PI practitioners, ensures that the standard of expert witnesses being used in publicly funded personal injury cases is exceptionally high. This is reflected in what is a significantly high incidence of agreement of expert evidence in PI cases.

² *'Sudden unexpected death in infancy: A multi-agency protocol for care and investigation'* – The report of a working group convened by the Royal College of Pathologists and the Royal College of Paediatrics and Child Health (September

5. APIL also considers that further accreditation may dissuade many experts from continuing as expert witnesses. According to a recent survey by Bond Solon³ – a legal training consultancy for non-lawyers – experts do not think that accreditation will bring about an increase in work and if accreditation becomes compulsory – as proposed by the LSC – it will actually lead to a reduction in professionals putting themselves forward as experts. APIL would reiterate the fact that many experts provide “*services in their own time, as an adjunct to their profession*”⁴. By insisting they have to go through further processes in order to act as an expert witness, many will either refuse to do expert witness work and concentrate on their full-time positions or concentrate solely on defendant work. Both of these scenarios will result in a reduction of expert witnesses available to help clients who need the support of public funding, many of whom operate within a highly selective and small field of expertise in the first place. APIL believes that it is vital for claimants who have been negligently injured to have the opportunity to present the best possible case. With the potential reduction in the number of expert witnesses willing to act for claimants, APIL is concerned that equality of arms will be adversely affected and there will be a restriction of access to justice.
6. The financial implications of providing accreditation for expert witnesses, APIL suggests, would add a further layer of costs to the legal process; a process which is already criticised for being too expensive. The LSC’s stated intention to “*endorse accredited experts who agree to work as part of the Community Legal Service (CLS) and Criminal Defence Service (CDS)*” will require a certain financial commitment on its behalf. APIL believes that the introduction of compulsory accreditation will not only hinder access to justice but add a further layer of costs to the system. This will naturally be contrary to the LSC’s intention of cutting the £130

2004) page 4 (see www.rcpath.org or www.rcpch.ac.uk for a copy of the report)

³ Bond Solon Training – *Results of an anonymous survey of 133 expert witnesses conducted in November 2002* (published 11 February 2003) - a copy of the report can be found at:

http://www.bondsolon.com/html_red/EW%20Survey%202002%20-%20Results.doc

⁴ Consultation document, page 10, paragraph 5.8

million⁵ it spends on experts each year. It seems paradoxical to APIL for the LSC to endorse a scheme in the hope that it will cut costs, yet a considerable amount of money would have to be spent in establishing and monitoring any compulsory accreditation scheme.

7. APIL would also suggest that the bodies identified by the LSC as the most appropriate for the quality assurance function are unsuitable for the needs of experts in personal injury cases. For example, the Council for the Registration of Forensic Practitioners (CRFP) states that it has 50 areas of expertise to which it is open. In comparison, the UK Register of Experts identifies 22,500 areas of expertise. APIL also questions how the CRFP will appropriately accredit experts in fields which are outside its remit. An APIL member reports that in a recent case he called upon a specialist IT recruiter to act as an expert. It is highly unlikely that such a specialist expert will be called on regularly to act in a legal case, so there is little reason for him to take the time and effort to get accredited if it is not going to bring him further business.
8. APIL suggests there are already numerous methods – including the use of externally held expert databases such as APIL's – to locate and check the ability and reliability of experts; a further organisation and accreditation process will simply add further expense and 'red tape' and may well mean that highly specialised experts are driven out of the claimant field. APIL would point to the current efficient use of experts in personal injury cases to highlight the lack of need for further accreditation.

Fees

9. APIL firmly believes that any attempt to limit, or cap, experts' fees within publicly funded personal injury cases will lead to a significant reduction in an injured claimant's access to justice. APIL members report that the suggested rates for civil experts are approximately 50 to 80 per cent

⁵ Figure for 2003-2004

lower than the current rates. When asked by APIL members to comment on these LSC proposed rates, the majority of experts said they would either stop acting as an expert witness altogether or simply abandon claimant work for more profitable defendant work.

10. APIL considers that the consequence of experts withdrawing from acting as witnesses is that there would be fewer specialist experts in a field where there is already only a small and scarce group of them. Due to the specialised nature of publicly funded personal injury litigation, the experts used also tend to be highly specialised and unique. For example, in relation to child abuse cases, there is often a necessity to hear evidence relating to social care in the 1960s and 1970s. Understandably, social work experts who are able to provide such expert evidence are few and far between. By restricting expert fees, APIL predicts that the small number of such social work experts may well stop acting as expert witnesses. This will limit the ability of injured claimants to present a full and fair case, therefore restricting their access to justice.

11. In addition, APIL is concerned that those experts who are prepared to work for the rates proposed are likely to be less well qualified or experienced, and may take less care and time to prepare reports. This will weaken the claimant's case, and consequently increase the possibility that the case may be lost. While the LSC proposals are intended to save money, by potentially weakening the cases being brought under legal aid there will be increased costs to the Legal Aid Fund in respect of more losing cases.

12. APIL acknowledges the LSC's intention to reduce the financial burden of disbursements for legally aided cases. We would, however, suggest that expert fees are not currently an issue of dispute within publicly funded personal injury litigation. Indeed APIL has continually stated that the financial burden of personal injury cases on the legal aid budget is small and the current system works effectively and efficiently. In terms of clinical negligence, for example, the success of this type of legally aided

litigation can be seen to be illustrated by the fact that there has been no increase in the number of certificates issued in recent years. There has been a steady decrease in the volume of certificates, with 6,064 certificates issued in 2003/04 down 3.9 per cent from 2002/03. In total there has been a 50 per cent decrease in the number of certificates from 1995/96. In terms of case outcomes, the figures have also steadily improved over the last few years. In cases which proceeded to a final hearing there was a 74 per cent success rate, and in 84 per cent of high-cost clinical negligence cases the full amounts of claimants' costs were recovered. APIL feels this indicates the success with which personal injury litigation is run using legal aid, and that in a high percentage of cases the LSC recoups the full cost of disbursements including expert witnesses.

13. APIL would further question whether expert fees are a matter of dispute in legally aided PI cases by virtue of the fact that members report that expert fees are rarely, if ever, challenged by defendants. It has been suggested that the reason for this may be due to the fact that defendants' experts' costs are comparable to those of the claimants. The similarity between defendant and claimant expert costs is illustrative of the fact that the fees being charged by expert witnesses are market driven, rather than being dictated by either party. For example, many experts base their charge rate on a similar scale to that which they would charge someone consulting them in private practice. This fee will be the same regardless of whether the expert is acting on behalf of the claimants or defendants. Indeed APIL members report that preference is often shown to experts who have a good mix of claimant and defendant work as well as still being in active practice. These factors tend to indicate that the expert is both impartial and has current working knowledge within his field.

14. APIL feels that the LSC's proposal that "[e]xperts' fees in Commission-funded cases, like lawyers' fees, must be subject to control⁶" fails to take into account the current measures already in place to control experts'

fees. For example, the Civil Procedure Rules (CPR) imposes on both parties a need to engage in case management conferences (CMCs) with the presiding judge prior to a trial taking place. It is within this CMC that both the claimant and defence legal teams will have to justify the presence and use of their respective experts, as well as tackle issues of proportionality in relation to the fees of these experts. APIL believes that such a system represents an effective and efficient method of controlling and monitoring experts used in cases, and by attempting to exert control prior to the start of case, the LSC is undermining the original intention of the CPR and case management conferences.

15. APIL believes that by capping expert fees for claimants at the levels suggested by the LSC many experts will refuse to act on a claimant's behalf and concentrate on defendant work. This will have a hugely detrimental effect on a claimant's ability to obtain an opinion from an expert with a similar level of expertise and skill to that of the defendant's expert. Ultimately this will lead to denial of access to justice for many. APIL feels that in order for the interests of justice to be served there has to be a level playing field between claimants and defendants. Indeed APIL would suggest that one of the over-riding objectives of the Civil Procedure Rules (CPR) is to ensure parties are on an equal footing and a status quo is maintained between defendants and claimants within the litigation process. By restricting the ability of the claimant solicitor to call upon the best expert available, this objective would not be achievable as defendants would have the 'upper hand'. APIL objects to this inequality of arms, and would question whether it is possible for the claimant to be able to have a fair trial in such circumstances.

16. Furthermore, APIL believes that the continuing constriction of the legal aid budget, in particular with reference to the current suggestion that claimant experts' fees should be capped, brings the LSC into direct conflict with Article 6 of the Human Rights act⁷. Article 6 states that "In

⁶ Consultation document – page 5, Proposal 2.5

⁷ Human Rights Act 1998 (Chapter 42)

determination of his civil rights and obligations, ... , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". From various cases decided by the European Court, the right to a fair trial includes the necessity to comply with the principle of "equality of arms". The European Court of Human Rights has held that for there to be a fair trial an individual must have *"a reasonable opportunity of presenting his case to the Court under conditions which do not place him at a substantial disadvantage"*⁸.

17. APIL considers that running a case without appropriate funding for experts places a claimant at a significant *"disadvantage"* in comparison to a defendant, who is entitled to employ experts without the restriction of a cost cap. APIL believes that it is completely iniquitous that claimants should be in a position where they have to proceed against large and well financed defendants without the experts necessary to prove their case; APIL feels this represents inequality of arms and is therefore contrary to Article 6 of the Human Rights Act.

18. APIL reiterates that within civil cases the burden of proof is on the claimant, which means the solicitor must present the strongest case possible in order to win. Restricting the ability of the claimant solicitor to choose an expert most appropriate for the demands of the case puts the solicitor in direct conflict with this professional obligation to his client. In fact, the need for excellent expert evidence is especially important within legally aided personal injury litigation – i.e. clinical negligence, child abuse and multi-party actions - due to the fact that it is such a highly complex and specialised area of law. For example, within clinical negligence, expert witnesses will often have to advise on the *Bolam* test, which requires them to apply appropriate standards to difficult choices at many levels of expertise which amounts in effect to peer review. This can only be undertaken reliably by experts of the highest standing and repute.

⁸ *Kaufman –v- Belgium 50DR98*