



A response by the Association of Personal Injury Lawyers

November 2023

Introduction

APIL welcomes the opportunity to comment on the guidance for experts in the High Court. We are, however, disappointed to note that the terminology used in the guidance has been lifted, almost directly, from the Civil Justice Council guidance for experts in England and Wales - for example references to a “track”. The civil process and jurisdiction in Northern Ireland has many differences to that in England and Wales, and it is not appropriate to simply lift guidance from that jurisdiction and apply it here.

There also appears to be a drive away from experts giving evidence in court and instead encouraging submission of written answers to questions instead. This does not sit well with the current civil process in Northern Ireland. The involvement of experts in hearings is valued by the parties and judges. We appreciate that there are some issues with the availability of experts with some cases having to be postponed because an expert is no longer available, however this issue has been addressed well by allowing experts to attend and present evidence remotely. This practice was utilised to great effect during the Covid-19 pandemic, but more recently there has been a move again towards attendance in person. Remote attendance by experts allows a greater number of experts to be available to assist in cases, helps to address the shortage of, in particular clinical negligence experts in the jurisdiction by allowing remote attendance at court from outside the jurisdiction. This helps to prevent cases having to be postponed because of expert non-availability. Experts should be permitted and encouraged to provide evidence remotely – this is far preferable to a move towards having written answers from experts only, and it will also be more cost efficient than an insistence on in-person attendance.

We set out our comments on particular sections of the guidance below.

- 6. Although the court's permission is not generally required to instruct an expert, the court's permission is required before an expert's report can be relied upon or an expert can be called to give oral evidence.***

Requiring the court's permission before an expert's report can be relied upon or an expert can be called to give oral evidence is simply not workable in this jurisdiction. There is no mechanism within the current court process to apply for the court's permission to rely on an expert report. This will simply cause confusion and delays in the court process. We also query why this is needed.

- 7. Advice from an expert before proceedings are started which the parties do not intend to rely upon in litigation is likely to be confidential; this guidance does not apply then. The same applies where, after the commencement of proceedings, experts are instructed only to advise (e.g. to comment upon a single joint expert's report) and not to prepare evidence for the proceedings. The expert's role then is that of an expert advisor.***

We are concerned that this will encourage “back room” discussions with experts, and expert fishing. It will also favour the party with the deepest pockets as they will be able to obtain a number of reports before selecting the one that best supports their position.

16. Before experts are instructed or the court’s permission to appoint named experts is sought, it should be established whether the experts...

Again, we question the mechanism for seeking the court’s permission to appoint a named expert – most often experts are instructed pre-proceedings, not post-issue, so how will court permission be sought for this? There is no mechanism within the civil claims process in Northern Ireland to seek such approval prior to proceedings. The court process in NI is relatively straightforward and this seems to be adding a layer of complexity that is unnecessary and will ultimately delay proceedings. In practice it will be the solicitor who has to seek permission when the solicitor is undoubtedly the best person to identify which expert is required based on their clients instructions and circumstances.

17(iv). Terms of appointment should be agreed at the outset and should normally include the basis of the expert’s charges (e.g. daily or hourly rates and an estimate of the time likely to be required, or a fixed fee for the services). Parties must provide an estimate to the court of the costs of the proposed expert evidence and for each stage of the proceedings;

This would again appear to be a reference to costs budgeting which was introduced in England and Wales to deal with distinct issues about costs in those jurisdictions. Again, NI should not be aligned with a jurisdiction which operates in a very different manner. There is currently a shortage of experts throughout Northern Ireland, and we are concerned that some of the requirements within the guidance, for example the above paragraph, are onerous for the expert, and will mean that even more specialists decide not to continue accepting instructions to be an expert witness. Those who do remain in the field will likely have to increase prices given the huge undertaking required. Again it is not clear how this would be done in practice. Parties already generally share the expert’s terms of appointment and charges when they serve the report, and our members would say that this rarely leads to discussion with the defendants to attempt to settle the case earlier to avoid them incurring expert court attendance fees or court cancellation fees. The existence of those terms does not encourage earlier negotiation.

Further, experts are selected because of their specialism, the cost of an expert should not determine whether or not they should be instructed.

20(vii) Those instructing experts should ensure that they give clear instructions and attach any relevant documents, including the following: where proceedings have been started, the dates of any hearings (including any case/costs management conferences and/or pre-trial reviews), the dates fixed by the court or agreed between the parties for the exchange of experts’ reports and any other relevant deadlines to be adhered to, the name of the court, the claim number, the track to which the claim has been allocated and whether there is a specific budget for the experts’ fees.

This paragraph makes reference to “the track to which the claim has been allocated” and “costs management” conferences. As alluded to in the introductory paragraph these are not applicable in Northern Ireland legal jurisdiction. Costs budgeting is not the practice in Northern Ireland.

26. *Experts should agree the terms on which they are to be paid with those instructing them. Experts should be aware that they will be required to provide estimates for the court and that the court may limit the amount to be paid as part of any order for budgeted costs.*

As above, there is no 'costs budgeting' in Northern Ireland, nor are there regular case management hearings. Reviews take place, but they are very ad hoc and at the discretion of the judge. Ultimately if the judge restricts the fees to be paid to experts, the excess will fall to be paid by the party instructing them. Potentially, therefore the more experienced and costly experts will be instructed by the party with more financial means, and the party which is more financially vulnerable will have to find an expert to do it as cheaply as possible. This will create a risk that those with lesser means will not be able to access justice.

Single joint experts – paragraphs 34 – 37

34. *Wherever possible a joint report should be obtained.*

APIL maintains that the plaintiff should ultimately be free to instruct an expert of their choice. Any rules/protocol/guidance that refer to joint instruction/selection/appointment of experts, should refer to joint selection, rather than instruction. Further, any rules/protocol/guidance may provide for joint selection, but should not insist upon it.

36. *Experts who have previously advised a party (whether in the same case or otherwise) should only be proposed as single joint experts if the other parties are given all relevant information about the previous involvement.*

The wording in this paragraph is vague – it is unclear when an expert should no longer be proposed as a single joint expert. As mentioned above, there are a limited number of experts working in Northern Ireland. Most experts will have previously been instructed by the same solicitors, and most experts tend to lean more towards plaintiff or defendant work. There may also be General Data Protection Regulation issues with sharing information about previous involvements.

37. *The appointment of a single joint expert does not prevent parties from instructing their own experts to advise (but the cost of such expert advisors will not be recoverable from another party).*

Again, ultimately, the plaintiff should be free to instruct an expert of their choice. Where there is appointment of a single joint expert, there should not be a blanket ban on recovery of fees. Instead, this should be on a case-by-case basis. There may be instances where the instruction of another expert will be instrumental to proving the case, and the plaintiff should not be penalised for this.

Joint instruction – paragraphs 38 – 41

Again, joint selection of experts may be one option but should not be the default or only approach. The guidance here assumes that defendants will respond to the plaintiff, but certain defendants do not respond at all, on any aspects of the case. It is not workable to assume that they will respond and collaborate on the instruction of a single joint expert. In some cases, such as those relating to industrial disease or clinical negligence, plaintiff representatives will usually obtain a medical report before sending a letter of claim, in order to ascertain whether there is a case. If the requirement becomes to instruct experts jointly unless there is court approval otherwise, this will cause huge delays and slow down the whole court process.

We would suggest that a better option than joint instruction would be for each party to instruct their own expert, and then for there to be a joint meeting of experts prior to the trial, to narrow the issues in dispute as is currently the position in clinical negligence claims.

As we mentioned above, expert appearance at trial is often important to ascertain the facts of the case. If experts disagree but are not present at the trial to be cross-examined, it could be more difficult for judges to determine the facts.

Sanctions

- 67. *Experts have a duty to provide answers to questions properly put. Where they fail to do so, the court may impose sanctions against the party instructing the expert, and, if there is continued non-compliance, debar a party from relying on the report. Experts should copy their answers to those instructing them.***

In paragraph 67, there is reference to sanctions being imposed on the party who instructed the expert if the expert does not comply. This is unjust – parties cannot control the behaviour of an expert and should not be held accountable for an expert’s bad behaviour. The expert has a duty to the court and is independent by the very nature of that obligation, this implies they are an agent of the instructing solicitor.

Discussion between experts

In paragraphs 72 – 75, there is reference to “tracks”, which as previously highlighted are not a feature of the Northern Ireland civil court system.

- 72. *Where single joint experts have been instructed but parties have, with the permission of the court, instructed their own additional experts, there may, if the court so orders or the parties agree, be discussions between the single joint experts and the additional experts. Such discussions should be confined to those matters within the remit of the additional experts or as ordered by the court.***

We believe, as set out above, that parties should be free to instruct their own experts. However, a provision which allows instruction of additional experts after the instruction of a joint single expert, and discussion between the single joint expert and additional experts, may be abused by wealthy parties who can afford to instruct additional experts. This is not appropriate in cases where there is an unlevel playing field such as personal injury cases, as the well-resourced defendant insurance company will be able to instruct an additional expert to attempt to influence the joint expert in discussions.

Attendance at court

Again, we believe that experts should continue to be able to provide evidence to the court remotely. This worked very well during the Covid-19 pandemic, and provides numerous benefits, as set out above.

Experts and conditional contingency fees

- 87. *Payment of experts’ fees contingent upon the nature of the expert evidence or upon the outcome of the case is strongly discouraged***

The guidance at paragraph 87 is at odds with the principle of contingency fee rules in Northern Ireland. It is also at odds with the expert’s declaration at annex A. Under no circumstances should experts be paid based on the outcome of the case – this must be more than “strongly” discouraged, and the guidance should make clear that this behaviour is not acceptable. Anything less is likely to impair an expert’s duty to the court.

Sanctions

88. Failure to comply with the Rules of the Court, any Practice Direction, or the directions of the court may result in sanctions being imposed by the court and / or the professional body to which the expert belongs. Sanctions can include;

- (i) a wasted costs Order being imposed;**
- (ii) being found in contempt of court;**
- (iii) criminal sanctions if an expert is found to have committed perjury;**
- (iv) claim being made on the experts professional indemnity insurance if they have been negligent.**

As mentioned above, there is a shortage of experts in Northern Ireland at present, with the role of an expert witness being seen as a huge and onerous undertaking. Those that this guidance applies to will be specialists in their field of practice, and the tone of this section of the guidance is offensive. This section is not necessary, as experts will already be aware of the consequences of non-compliance.

Any queries in relation to this response should be directed, in the first instance, to:

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