A bit of a turn-off

The role of expert witness is less attractive as a result of recent litigation developments, says Mark Solon

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Recent years have seen public policy in the area of litigation evolve in ways that make the work of an expert witness more stressful, more risky, more burdensome, less well remunerated and generally less attractive. The government's drive, with the help of the senior judiciary, to reduce the cost of litigation, has brought down fees particularly in publicly-funded work to such an extent that many specialist and experienced experts can no longer afford to undertake the work, leaving serious question marks over the quality of the work done by some who remain in the market.

Costs budgeting has meant that experts are required to provide accurate estimates of costs at an early stage and submit their reports to stricter and tighter deadlines. This has to be strictly policed by the instructing solicitors, who will themselves be penalised by the courts if costs are inaccurate and deadlines not met. This can cause friction between experts and instructing lawyers.

Approach to costs

The senior costs judge Andrew Gordon-Saker, one of the key speakers at the twenty second annual Bond Solon Expert Witness Conference, taking place on 4 November 2016, offers a short explanation of how the thorny issue of costs is approached by the court. The courts, he explains consider the amounts of experts' fees in three situations.

- First, at the end of a civil case, when the court is deciding the amount of reasonable costs which the losing party should pay the winning party.
- Second, when a client is challenging his own solicitors' fees (including the fees of any experts instructed by the solicitors).
- Third, when there is a dispute between the expert and the instructing solicitors as to the reasonableness of the fees.

"In this last situation, the expert has a direct interest in the outcome. But they also have an indirect interest in the first two situations. The expert may well have been paid by the time of the court's assessment, but a finding that the fees were unreasonable could lead to reputational damage or a request for repayment."

So, he says that making the fee structure transparent and providing adequate breakdowns of the work done will help the instructing solicitor to recover the experts' fees in full. Gordon-Saker notes that: "For the last couple of years there has been considerable pressure to reduce the cost of civil litigation."

Budgeting the costs at the outset of proceedings, he says, enables the court to control the costs prospectively, but requires experts to estimate their fees accurately to the end of the case.

Fixed recoverable costs

The government is keen to introduce fixed recoverable costs in cases of more modest value (possibly to all cases valued up to £250,000). If this happens, Gordon-Saker explains: "The winning party would receive an amount of costs fixed according to a tariff which would take into account value, complexity and the type of case'. Adding: "The figures in the tariff will almost certainly be considerably less than the sums allowed now on assessment."

Dr Waney Squier

Another worrying development for many arises from the case of Dr Waney Squier, one of the country's foremost paediatric neuropathologists, who was struck off the medical register by the General Medical Council (GMC), due to the expert evidence she gave in relation to so-called shaken baby syndrome.

Human rights lawyer and director of Reprieve, Clive Stafford Smith, called it "a very dark day for science, as it is for justice" and in a letter to *The Guardian*, a group of doctors and eminent barrister Michael Mansfield QC accused the GMC of behaving like a "21st-century inquisition". While GMC chief executive, Niall Dickson, defended the action, stressing that "four senior judges had expressed strong criticisms" of the way Dr Squier had presented her evidence and noted that the tribunal found proved more than 130 allegations about her conduct.

Tom Kark QC, acting for the GMC in the case concerning Dr Squier, who is speaking at the Bond Solon Expert Witness Conference, noted: "The allegations brought by the GMC did not focus upon Dr Squier's beliefs or personal opinions. This case arose out of six cases in which she had provided evidence in the Family Court, the Crown Court and the Court of Appeal. It focused specifically on the duties of experts to comply with the Civil and Criminal Procedure Rules and the guidance set down for the provision of expert evidence which it was alleged Dr Squier had breached in three ways: i) by giving evidence outside her expertise; ii) by giving evidence not based properly on the facts of each case; iii) by misquoting or misciting research papers which did not in fact support her opinion."

The case reflects the split in the scientific community about the evidence over shaken baby syndrome, but it is already affecting the willingness of experts to put themselves forward to challenge what are regarded as the mainstream or majority opinions. NLJ

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