



Civil Justice Council – Costs Working Group Consultation

Response from the Expert Witness Institute

1 The Expert Witness Institute

The Expert Witness Institute (EWI) is the voice of the Expert Witness community, championing experts from all professional disciplines and the lawyers who use their services.

Our mission is to support the proper administration of justice and the early resolution of disputes through high-quality expert evidence from specialists.

Launched in 1996, the EWI is independent of outside commercial interests. A not-for-profit organisation limited by guarantee, it is run by an eminent Board of Governors that is democratic, transparent, and fully accountable to members.

We represent just under 1000 Expert Witnesses and offer different levels of membership depending on experience for experts and associate membership for solicitors and barristers.

Our register of expert witnesses contains experts with a diverse range of expertise including medical, finance and accounting, business, construction, and forensic science from across the UK, Ireland and across the globe. Experts included on our directory (Find an Expert) have been fully vetted checking their professional credentials and ensuring the reports they have written are compliant with appropriate regulations and are of excellent quality; providing instructing parties with assurance that when they appoint one of our experts, they are appointing an expert with the appropriate skills and experience.

2 General comments

The EWI is pleased to take this opportunity to feed into the Civil Justice Council's consultation on costs. Having read the consultation document, we have focussed our comments on the potential for unintended consequences of the extensions of Fixed Recoverable Costs and Costs Capping and the possible impact on Expert Witnesses. We recommend further research be undertaken before any changes affecting expert witness evidence are considered.

3 Consultation Response

Having reviewed the consultation paper, we are concerned that if Fixed Recoverable Costs and Costs Capping are extended further without consideration of evidence relating to expert witness costs there is a possibility of unintended impacts on expert witnesses, the affordability of expert evidence and, ultimately, access to justice.

The CPR already provides for prospective limits to be applied to the cost of expert evidence. CPR 34.4(4) deals with the position at the point of granting permission for expert evidence to be called, whether at directions stage or by an ad hoc application. Experts' fees are then retrospectively

reviewed when disputed during the detailed assessment process. We believe that the judicial experience of dealing with the cost of expert witnesses would provide valuable evidence to inform any debate regarding the need for any change of approach to the cost of expert evidence in civil claims.

Our concern is that in the absence of consideration of evidence on this, wider changes to the costs regime may lead to a possible reduction in the budget available for expert evidence. If this is the case, this could lead to:

1. Decreased use in expert evidence

With reduced recoverable costs, there is a possibility that instructing parties will be more reluctant about when they commission expert evidence or, in complex cases, reduce the number of experts being used.

This possibility is highlighted by an [article from the Law Gazette on the 18th of August](#). In it, the Association of Consumer Support Organisations said fixed costs for certain services need immediate review. The article says:

“Costs for running personal injury cases have not been revised since July 2013 and there is presently no mechanism to ensure their review. Figures calculated by ACSO show that fixed costs for RTAs settling at more than £10,000 were set at £800 in 2013. To keep pace with inflation, that should now be £1,020.

For an initial medical report in a similar injury case, fixed costs were set at £180 in 2014. Including inflation at RPI, producing the report should incur costs of just under £225 now.

ACSO director Matthew Maxwell Scott said the result is that law firms are being squeezed and forced to abandon personal injury work because their outgoing costs are rising higher than the costs they can recover. He added: ‘There is an elephant in the room when it comes to inflation and the FRC regime. While PI costs have remained static for almost a decade, elsewhere ministers have committed to a review of the discount rate every five years.

‘The freezing of rates for so long means dramatic real-terms cuts for claimants, their representatives and for medical experts and there has been no explanation for this.’”

[Claimants call for review of stagnant fixed costs](#), John Hyde, 18/08/2022

Expert Witnesses are fundamental to the proper administration of justice, providing unbiased expert evidence which will support the courts in the resolution of the case. Expert Witnesses play a key role in supporting legal teams and judges in their decision making and therefore have a crucial role to play.

Without good quality expert evidence, legal teams and judges will find it more difficult to navigate cases where expert evidence would have been helpful and ultimately this will lead to inequality of access to justice.

2. The instruction of experts being based on the cheapest expert rather than the most appropriate or suitably qualified

With reduced budgets, instructing parties are more likely to focus their search for expert witnesses on the cheapest expert. If this happens, there is an increased risk that they will be unable to secure expert witnesses of sufficient quality.

As we have highlighted, Expert Witnesses are fundamental to cases. It is therefore imperative that instructing parties seek Expert Witnesses who have both the professional expertise to be able to advise in the case as well as the training and competencies required to act as an Expert Witness. For the latter they need to have a core understanding of the rules, regulations and practice directions for the delivery of Expert Evidence. They must understand how to apply legal tests and understand their duty to the court and their role in giving impartial, unbiased evidence.

In *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd (No. 2 Costs)* [2021] EWHC 1414 (TCC) (28 May 2021), Mr Justice Fraser remarked:

“There is a worrying trend generally which seems to be developing in terms of failures by experts generally in litigation complying with their duties.”

Not only do cases such as [Pal v Damen \[2022\]](#) (non-compliant report and partisan Expert), [Patricia Andrews & Ors v Kronospan Limited \[2022\]](#) (non-compliance with the rules around Expert Meetings and Joint Statement), [Palmer v Mantas & Anor \[2022\]](#) (unconscious bias), and [Reynolds \(for CSB 123 LIMITED\) v Stanbury \[2021\]](#) (poor performance in giving evidence) highlight the importance of training in the [core competencies](#) for being an Expert Witness, they more importantly identify the need for trained Expert Witnesses to keep up to date with the latest rules and regulations, ensure they remind themselves of their role and obligations, and undertake ongoing professional development which is relevant to their role as an Expert Witness.

Changes which increase the pressure to make cost alone the deciding factor when choosing an expert witness is likely to lead to an increase in this trend which, in turn, will lead to more mistakes being made, an increase in wasted costs, and ultimately a decrease in access to Justice.

3. Experts unwilling to take on cases

Expert Witnesses do not undertake this work to make significant amounts of money, but members frequently highlight the impact of their costs being restricted. The Civil Justice Council is therefore reminded of the impact of restricting costs from other courts.

Criminal courts

Ahead of the consultation on Criminal Legal Aid, we discussed remuneration with our members. They highlighted that:

- 7 years ago codified rates for experts were decreased by 20% - they were already significantly lower than normal fees charged by experts, and this made absolutely no sense at all.
- These rates have not changed for 7 years, and yet salaries and fees, and inflation, have increased incrementally over this period. Many Experts have noted that fees offered

are not sufficient to cover their costs (office costs and equipment, consumables, salaries, insurance, Information Commissioner Registration, CPD). One expert remarked “In essence to do any Criminal work I will just be covering my costs for premises, PA salary and overheads”.

- Expert witnesses, in abiding by the Criminal Procedure Rules, must be “expert” in their field and therefore are more senior and command high fees; moreover, they must be trained in the legal process and court rules – setting an even higher bar.
- The codified rates are so low that they do not cover costs for the most part and therefore experts are very reluctant to undertake Legal Aid work. A number stated that the remuneration and hassle, especially when needing to attend court often at a distance, is not worth it.
- The fee structure for expert witnesses is out of date and seriously below the fees that can be agreed and paid in similar Civil litigation.
- Lawyers are in a position of “subsiding” Legal Aid Agency work to some extent by the significant profits they make elsewhere; not something that applies to Expert Witnesses.
- Solicitors have huge problems finding experts to do LAA work.

These views were once again illustrated by a member who wrote to me last week saying:

“Don’t forget those of us who struggle on low pay rates and in tough contexts providing our expertise in the criminal courts. Nowadays we’re allowed to claim £95 per hr. For doing the analysis and report writing. (When i started doing this kind of work, over 30 years ago, the rate was £110-20). Similarly, we can charge £100 maximum for actual hours spent at court. Less on Legal Aid. Half that rate for hanging around waiting to be called (sometimes for days) and travel time. No daily subsidence payment when attending court. Minimal allowances for overnight stays.”

Family courts

The Family Courts are currently undertaking a programme of work to encourage more Medical Experts to become Expert Witnesses.

In [The President of the Family Division Working Group on Medical Experts in the Family Courts Final Report, October 2020](#), respondents were asked to select the top five reasons preventing them from providing expert witness work. The main barrier identified was financial (see para 39).

“Respondents were asked to rank how “financially attractive” they found expert witness work on a scale from one to five (1=not at all attractive, 5=very attractive) (see Figure 3). In total, 83.05% of respondents did not report that expert witness work is financially attractive, with only 12 respondents who found the work to be very financially attractive.” (Para 41)

The report also quotes some of the qualitative responses including this one:

“...in addition, rates of remuneration were significantly reduced so in the end I didn't think the effort, the stress involved in "putting one's head above the parapet" was worth it... So, I gave it up”

It is therefore imperative that it is recognised that for the proper administration of justice, Expert Witnesses should be rewarded fairly for their work to ensure that claimants and defendants have equality of access to justice.

On this basis we would counsel the Civil Justice Council of the need to be mindful that extending fixed costs or extending cost capping could result in lower rates being offered to Expert Witnesses resulting in similar issues currently experienced in the Criminal and Family Courts.

The risk is that experts, who have a choice about whether to engage in this type of work, will exit the market. This will lead to a lower calibre of Expert Witness being the only ones willing to undertake work. These tend to be those that have not registered with the Institute and do not take their training as an Expert Witness seriously or indeed their duties to the Court. This leaves an inherent risk that the quality, calibre, and reliability of experts in the Civil Justice system will be reduced with greater risk of issues arising.

Our view is that the Civil Justice Council should avoid taking any further action which might restrict the budget for the instruction of expert witnesses for the reasons highlighted above.

It has been noted that plans for the implementation of Fixed Recoverable Costs for certain cases up to £100,000 in value are underway and may be in place by Spring 2023. It is suggested that no further action which might impact Expert Witnesses be taken so that we can work together to look at the implications and outcomes following that implementation or such other research as may be considered appropriate.

4 Further Information

Should you wish any further information or to discuss this further, please contact Simon Berney-Edwards, Chief Executive Officer of the Expert Witness Institute.

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