

Regulation of expert witnesses

A couple of months ago I conducted a lightning survey of readers' views on the regulation of expert witnesses. The survey was prompted by an invitation to speak on the subject of accreditation to a group of chemists. However, I had also been intrigued by a debate that took place at last year's Bond Solon conference, at the close of which a show of hands revealed that two-thirds of the experts present were opposed to the idea of being accredited by any outside body.

I wanted to identify those aspects of accreditation to which experts object. In particular, I hoped to find out more about experts' views on such issues as how competence is to be measured; whether regulation of expert witnesses is necessary; and, if so, whether a recognised system of accreditation could provide the best means of achieving it.

Background

Broadly speaking, expert evidence is welcomed by the courts whenever it is capable of helping them decide cases justly. Instructing solicitors need to know that the experts possess:

- (i) appropriate professional qualifications
- (ii) experience relevant to the issue(s) on which their evidence is required, and
- (iii) an understanding of the requirements of their role as expert witnesses.

In recent decades there have been a number of high-profile miscarriages of justice in criminal cases resulting directly from faulty expert evidence led by the prosecution. They prompted calls for the establishment of an independent body to accredit practitioners who act as expert witnesses – and these were in due course acted upon by the Government. With its initial start-up costs of £265,000 met by the Home Office, the Council for the Registration of Forensic Practitioners (CRFP) was officially launched in October last year.

The Council's stated role is the promotion of high standards among experts testifying in criminal cases. Its eventual aim (to quote its Chief Executive, Alan Kershaw) is to produce 'a definitive register of professionals qualified to use science to produce reliable evidence in court'. At present, its activities do not cover medical doctors who give evidence in criminal cases, though that will come. The Council is also exploring whether to extend its registration system to expert witnesses in civil cases.

In the survey I hoped to find out what experts in the *UK Register of Expert Witnesses* thought of these developments.

The survey

The survey was conducted on-line, and because experts are busy people, it was restricted to just a dozen questions. The questions, though, were carefully phrased to elicit a response on the issues of greatest moment. Over 2,500 experts

were canvassed, and 330 responded. The remainder of this article is devoted to analysing their replies. The results are shown in Table 1.

One must be very conscious, of course, of the dangers of ascribing results obtained by these means to experts in general. It is always easier to secure a response from those who feel most strongly about an issue. Nevertheless, the replies received do convey a strong sense of scepticism about the value of accreditation, especially for expert witnesses practising in the civil courts. This article presents their views.

Judging competence

The first group of questions was designed to establish how experts thought their competence should be judged. It was no surprise to discover that almost 90% of respondents agreed with the proposition that for an area of expertise to be helpful to a court it had to be one governed by recognised standards and rules of conduct. On this, experts were clearly of the same mind as Mr Justice Evans-Lombe in the *Barings* case reported elsewhere in this issue. However, several of those who did not agree with the statement made some perfectly valid points about the difficulty of applying it to fringe disciplines and those at the leading edge of science and technology.

When asked whether competence to give expert evidence should be determined by professional qualifications and relevant experience alone, 60% of those responding agreed. Furthermore, almost exactly the same response was elicited when we asked whether competence to give expert evidence should also require membership of a self-regulating professional body.

Clearly, if you believe that a combination of professional qualifications, relevant experience and regulation by your professional organisation is sufficient to establish your competence to give expert evidence, you will be unlikely to see any point in being accredited by another body.

This is borne out by the answers to the final question in this section, with the great majority of respondents disagreeing with the proposition that competence to give expert evidence should necessitate accreditation by an independent body such as the CRFP.

In this context, though, what is of greater interest are the replies of the 90 experts who had said 'No' to both the previous questions. Only 31 of them thought that accreditation by a separate organisation should also be necessary, as against 56 who did not.

Incidentally, this question got us into hot water with several respondents who pointed out our implicit assumption that the CRFP was independent. They regarded it, rather cynically, as little more than an 'old boys club, set up by ex-staff of the Forensic Science Service in an attempt to keep "outsiders" away from the courts'!

Less than 25% of experts support independent accreditation

Accredited does not mean competent

To recap, then, around 60% of the experts who took part in this survey felt that a combination of qualifications, experience and membership of a self-regulating professional body provided a sufficient guarantee of their competence to act as an expert witness. Those who considered that accreditation by another organisation was also necessary numbered less than 10%.

Criminal litigation

The main impetus for establishing a regulatory system for expert witnesses has come from miscarriages of justice in the criminal courts. So we posed the question: Whatever accreditation the criminal courts may come to expect of expert witnesses for the prosecution, should the same requirement apply to those giving evidence for the defence? Somewhat to our surprise, three-quarters of respondents agreed with this proposition. This will give no comfort to those who believe that the accused should be able to call whichever expert he or she pleases.

A similar proportion of respondents thought that the same requirements should apply to defence witnesses instructed by public defenders as those that apply to experts instructed by solicitors in private practice – although here one might have expected everyone to agree.

Civil litigation

The remaining questions ventured into a major area of controversy. When asked whether the conduct of civil litigation would benefit from the extension to it of the registration system offered by the CRFP for criminal litigation, only a third of respondents agreed. To understand why the majority did not agree, it is necessary to look at the reasons given for taking that view.

By far the most common reason put forward was the regime now imposed by the Civil Procedure Rules (CPR). Before the CPR came into force the lawyers in a case had full control of the expert evidence they presented to the court, and they could, and did, manipulate it to their own ends. The Woolf reforms stopped all that. It is now the court that controls the conduct of litigation, and the court that controls the use of expert evidence.

The other main point raised by experts in their comments on this question was that of scope, with many noting that the range of evidence used in civil cases was much wider than that commonly adduced in criminal cases.

The downside of mandatory accreditation

In the Final Report of his Inquiry into the civil justice system in England and Wales, Lord Woolf wrote that he could not recommend an exclusive system of accreditation for expert witnesses. He gave as his reasons:

‘Such a system could exclude potentially competent experts who chose for good reason not to take it up. It might, in fact, narrow rather than widen the pool of available experts. It could foster an uncompetitive

monopoly and might encourage the development of “professional experts” who were out of touch with current practice in their field of expertise.’

We cited these comments and asked our interlocutors how they, as experts, now rated them. For brevity’s sake, the questions all presupposed that mandatory accreditation in some form or another was on the cards.

The results show that whilst half of the respondents thought that mandatory accreditation in the civil courts would get rid of the cowboys and charlatans, almost three-quarters of respondents would be concerned by the narrowing of the pool of experts accreditation might bring about. Half of the respondents thought that such a move would be anti-competitive, and half thought that ‘professional’ experts are more likely to be out of touch with current practice than colleagues who undertake expert witness work only occasionally.

The 50/50 split in the replies to the last of these questions is especially interesting. The medical experts who are still in practice were quite adamant that retired medics should not be allowed to work as expert witnesses.

And what about you?

Despite the concerns many experts clearly have about the issues touched upon in the survey, it is pleasing to be able to end this summary on an upbeat note. The final question asked if the respondent would stop acting as an expert witness if accreditation were to become mandatory in the civil courts. Only 1 in 10 of the respondents said that they would. On that showing it would seem that while many experts expect that there would be a shrinkage in the pool of available experts, it would be other experts who would be driven away, not them!

Individual comments

We were quite taken aback by the wealth of additional comments this survey elicited, and the strength of the views expressed by many of the respondents. There is room to summarise here just a few of them.

Practicality

A number of respondents queried whether it is even possible to establish a comprehensive scheme of accreditation. As three of them wrote: *‘In fields such as mine (cycling)... there are no professional qualifications and the number of cases is too small to make registration financially worthwhile.’* *‘For those of us who are experts in obscure activities where no professional qualifications or body exist, it seems we would risk being excluded.’*

‘Anyway, how do you regulate a zip-fastener expert?’

Compulsion

It clear from the answers already summarised that for many experts the idea of compulsory registration was anathema. In their comments they were particularly concerned that if it were

72% fear a narrowing of the pool of experts

Allowances must be made for obscure expertise



to come about it was the occasional witnesses who would be the least likely to go through the hoops. As one respondent put it:

‘Occasional experts will always be needed for matters which only rarely trouble the courts, and requiring registration would endanger justice by excluding those who have valid evidence to offer. Accreditation should go to the weight of the evidence, not whether it can be given at all.’

Quis custodiet?

The question ‘Who regulates the regulator?’ was raised many times, of which just one example will suffice:

‘I think that the problem is that the regulation of experts will become the province of those who were in the political process at the commencement.’

Professional bodies

These got support and approbrium in about equal measure. While many expressed the opinion that it was up to their professional bodies to sort out such matters, others took a much more jaundiced view of their capabilities. Of the latter, the following comment is representative:

‘I am sceptical of the real value of many professional institutions, including my own which is little more than a lunch club for old buffers of pensionable age.’

Lawyers and judges

Probably the overwhelming impression from the comments is that experts thought the present system was to be preferred. Litigation lawyers are well used to selecting experts, and indeed have a professional duty to choose ones that are appropriate to the case. And with their new powers, the civil courts can impose sanctions on those who fail in that duty. As two respondents commented:

‘The best judge of an expert is an alert and intelligent lawyer who is prepared to really quiz one on one’s CV and relevant experience.’

‘It’s my belief that the courts will always decide on the competence of an expert both from the report and oral evidence. Accreditation may suggest a “desired” level of knowledge/qualifications, but it does not necessarily follow that one who is accredited is competent.’

	Yes	No	n/a
Criteria for judging competence			
Do you agree that for an area of expertise to be helpful to a court it has to be one governed by recognised standards and rules of conduct?	88.2%	9.7%	2.1%
Do you consider that competence to give expert evidence should be determined by professional qualifications and relevant experience alone?	59.8%	27.2%	13.0%
Do you consider that competence to give expert evidence should require also current membership of a self-regulating professional body?	60.4%	28.7%	10.9%
Do you consider that competence to give expert evidence should necessitate accreditation by an independent body such as the CRFP?	22.7%	58.9%	18.4%
Criminal litigation			
Whatever accreditation the criminal courts may come to expect of expert witnesses for the prosecution, should the same requirement apply to those giving evidence for the defence?	74.6%	9.1%	16.3%
In April, the Government launched a Public Defender Service, to operate alongside the existing service provided by solicitor firms. Do you consider that the same requirements should apply to the experts it instructs on behalf of clients as to those instructed by firms in private practice?	73.2%	5.1%	21.7%
Civil litigation			
Do you think that the conduct of civil litigation would benefit from the extension to it of the registration system currently offered by the CRFP for criminal litigation?	32.9%	51.1%	16.0%
If accreditation were to become mandatory in the civil courts, would you welcome it as a means of getting rid of the cowboys and charlatans?	49.5%	41.1%	9.4%
If accreditation were to become mandatory in the civil courts, would you be concerned by the potential narrowing of the pool of experts?	72.5%	23.0%	4.5%
If accreditation were to become mandatory in the civil courts, would you regard it as anti-competitive?	50.2%	42.0%	7.8%
If accreditation were to become mandatory in the civil courts, would you agree that ‘professional’ experts are less likely to be in touch with current practice than colleagues who only occasionally undertake expert witness work?	50.8%	42.6%	6.6%
If accreditation were to become mandatory in the civil courts, would you stop practising as an expert witness yourself?	10.6%	81.9%	7.5%

Table 1 The questions asked and the percentage responses to each

Who regulates the regulator?

‘The best judge of an expert is an alert, intelligent lawyer...’