

# Gauging quality

## Elizabeth Waterman on the hidden factors that influence the appeal of experts

We are one of the largest providers of reports quantifying the costs incurred as a result of permanent disability in personal injury litigation in the UK. The measure most commonly used by solicitors and insurers to gauge our impartiality is to ask the source of our instructions. Ideally, these enquirers would like us to respond that 33% are for claimants, 33% for defendants and 33% are joint appointments. In my opinion, these statistics are meaningless as a measure of independence, quality or accuracy.

### Claimant lawyers

Before going on to suggest alternative measures of gauging quality I will make the point that more care reports are commissioned by claimant lawyers. We have followed the progress of 50 of our claimant instructions, most of which settled, over a three year period. Opposing experts had only been instructed in 40% of these cases by the end of the period of the research. In conclusion, an even split of instructions would indicate a defence bias.

One has to face the fact that defendants wish to settle for as little as possible and claimants for as much as they can get, though both sides, of course, want to do this fairly and professionally. I will discuss how each side is able to find an expert to give them what they want, but I doubt that one expert can fulfil both roles.

Either side could be pleased with the recommendations provided by care experts with inappropriate experience - for example - they may miss the symptoms and therefore consequences and costs of head injuries. On the other hand, in our experience experts with inappropriate experience inflate the knock-on costs of conditions that can be improved by rehabilitation, such as paraplegia and visual deficit.

### Providing information

A more reliable method of influencing recommendations is to provide different background information to opposing experts. Conclusions may

be poles apart if only one side sees certain medical evidence or surveillance videos. However, the outcome could swing in favour of either side when the expert speaks to teachers as well as the family and have their suspicions confirmed that children's problems are being magnified or, conversely, belittled by parents.

Experienced solicitors must be aware that some experts work to a narrower remit than others. Surprisingly, however, experts are not always provided with detailed instructions about what to include in reports. Some experts include transport, specialist equipment, case management and holiday costs. Some address the long-term consequences of the injuries, for example, the extra costs of baby care or the impact of frailty in old age. Clearly, if solicitors wish to keep damages to a minimum, the narrower the remit the better for their argument.

Using an inappropriate report for the job is another way of minimising damages. In our field the most frequent example is, when an early intervention or Rehabilitation Code report is submitted instead of a rehabilitation cost or care report. The former costs only immediate requirements and would not value gratuitous care, cost future care packages and long term needs.

All the other methods of manipulating or controlling what experts recommend are insignificant compared to working to different benchmarks. The result of this lack of control is that experts chose their own points of reference. The yardstick my company uses is 'to assess reasonable costs to return the claimant to his previous lifestyle', but we could equally easily use 'that will ensure the safety of the claimant' as a starting point.

### Unpredictable outcome

The lack of definition of need is the reason why the outcome is very

unpredictable if the solicitor chooses a care expert with an excellent and relevant professional experience but is new to personal injury litigation.

A reasonable analogy is that care experts write their own examination questions and the answers are 'marked' according to the predisposition and requirements of the examiners. In a circuitous way, the courts may be getting the information they need, but surely the system could be made more overt and less open to manipulation. I am sure all care experts would feel more comfortable if they were given a benchmark to work to - though nearly all my discussions with solicitors indicate that they feel uncomfortable doing this.

In conclusion, I accept that an equal defence/claimant split of referrals could be used as a crude measure of usefulness to either side in litigation. I hope I have demonstrated that there are hidden factors that influence the appeal of experts which are nothing to do with partiality and accuracy or indeed justice. I can only speak for quantum experts in personal injury cases but I assume all experts, whatever their expertise, are asked for the same statistics and all would have parallel observations as to why these statistics are misleading. I would welcome a debate on the topic.

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