Your Witness

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Litigation caseload increase

In the first 6 months following the introduction of the Civil Procedure Rules (CPR), the courts saw a 40% drop in litigation. The question in many experts' minds was whether this was a temporary blip or a permanent loss.

Whilst all experts have a potential commercial interest in this issue, I have been struck by the distinct asymmetry in the effects on different disciplines. For example, many medics have noticed little difference in their instruction rates over the past year, but most engineers and employment experts have seen a noticeable downturn in their case load. We are currently conducting a survey amongst engineers to try to identify any causes specific to that discipline.

On a brighter note, several recent reports seem to point to the general decline being temporary.

First, the Court Service has revealed that the number of litigation cases being handled by the courts in March 2000 was virtually identical to that in March 1999.

Next, Andrew Parker, spokesperson for the Forum of Insurance Lawyers (FOIL), has warned insurers to 'brace themselves for a flood of claims'. This advice is based on FOIL's estimate that some 40,000 PI claims have been held back awaiting the outcome of the *Dimond -v- Lovell* test case, settled by the House of Lords last month. (The Law Commission had previously recommended that the level of general damages in PI cases be raised. It was left to the House of Lords to decide by how much.)

At the same time, claimant solictors have been awaiting publication of regulations governing the recovery of success fees before entering into more conditional fee agreements, most of which would have been for PI cases. Indeed the Association of Personal Injury Lawyers (APIL) has conceded that solicitors have been holding back cases, maintaining that it would have been negligent to act before both the test case and the new regulations had been settled.

So only time will tell. But for experts the outlook now looks a little brighter. It would be logical to assume that as litigation levels rise again, so too will the need for expert evidence.

Daniels -v- Walker

Another potential source of increased court activity is the Human Rights Act, which will come into force in early October. This Act has such far-reaching implications that many commentators feel sure the courts will become busier than ever. Such is the concern that the Court of Appeal could not resist the opportunity presented to it by the recent appeal in *Daniels -v- Walker* to try and deflect the impending tide. The case is all the more interesting because it concerns expert evidence.

Until recently it had seemed that if parties agreed to jointly instruct an expert, one of them could not subsequently seek to rely on the report of another party-appointed expert. That, at any rate, was the view taken by the judge at first instance. Not so, said the Court of Appeal on 3 May.

The fact that a party had agreed to a joint report did not prevent that party from being allowed to obtain a report from another expert and, if appropriate, to rely on that expert's evidence at trial. The joint instruction of a single expert should be regarded as a first step in obtaining expert evidence. It was to be hoped that in the majority of cases it would also be the last step. If, however, a party was dissatisfied with a joint expert's report it should be allowed, subject to the discretion of the court, to obtain further information before deciding whether to challenge the joint expert's conclusions.

If only a modest sum was involved, the court might hold that it was disproportionate to obtain a second report. In the circumstances of the present case, though, it was perfectly reasonable for the defendant to have sought to have the claimant examined by his own expert, and the judge should have so ordered.

It was the second ground for appeal – although in the event it played no part in the outcome – that allowed the Court to tackle the human rights issue. Counsel tried to argue that the refusal of an order to have the claimant seen by a second expert denied the defendant a fair trial, contrary to Article 6 of the European Convention on Human Rights and, although not yet in force, the Human Rights Act 1998.

In Lord Woolf's view, that argument would have led the Court down a blind alley. Article 6 could not possibly have any application to the issues in the present case. The CPR laid on courts the duty to deal with cases justly. If it would be unjust, having regard to the overriding objectives of the Rules, to deny a party the opportunity to call other evidence, then that party must be allowed to call it. It would be unfortunate if case management decisions were made more complex by the need to consider human rights issues as well. Lord Woolf hoped that judges would be 'robust in resisting attempts to introduce such arguments'. As you will see on pages 6–8, when I brought this message to an audience of judges, their amusement was obvious!

Chris Pamplin

Inside

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The witness summons

A summons must not be ignored

Have you been served?

The witness summons is a procedural device for securing the attendance of a witness in court, either to give evidence in the case or to produce specified documents (or both). It is used in both civil and criminal cases, and may be employed for a variety of reasons. In criminal cases, for example, the procedure is quite often invoked to compel the attendance of witnesses who are too frightened to give evidence voluntarily. In civil cases, by way of contrast, it may have to be used to ensure the attendance of police officers who might not otherwise get permission from their superiors to give evidence in a civil matter.

In the High Court such a summons used to be known – indeed, for more than five centuries was known – as a *subpoena* (from the Latin: *sub*, under; *poena*, penalty), which neatly indicated the likely consequence of non-compliance. Alas, that evocative term was swept away with so many others in the wake of the Woolf reforms. What we have in its place is the bland term used previously in the county courts. The change does serve to emphasise, though, that for all civil courts in England and Wales the rules governing the procedure are now the same.

Who may be summonsed?

In general, all witnesses who are considered competent to give evidence in civil actions can be compelled to do so. On the other hand, a court may, in the exercise of its discretion, decline to issue a witness summons where it would be oppressive to require a particular individual to give evidence. It could be, for example, that there are a number of witnesses equally competent to provide the evidence required, and the one chosen can show good reason for not doing so. This is an important safeguard for experts – and especially, perhaps, for the better-known amongst them – since they might otherwise be at the receiving end of all manner of speculative summonses to give evidence in cases with which they have had no prior involvement.

Why might an expert be summonsed?

Witness summonses are issued by the court on the application of a party to an action or its solicitor. The two reasons why they might wish to have an expert summonsed are that:

- they know, or believe, the expert to be unwilling to give evidence in court or to produce the required documents, or
- there is a risk that the expert may be prevented from doing so.

Non-compliance risks fines or imprisonment

Unwillingness on the expert's part might be for one of a number of reasons. It could be that the solicitor has been slow in paying for the report commissioned, and the expert is trying to exert pressure to settle the invoice. As we shall see, this tactic can backfire. Or perhaps the expert's loyalties lie elsewhere – as, for example, when a party other than the instructing party wishes to call the expert to give evidence.

The other reason a solicitor might wish to have an expert summonsed is to establish priority in the event of the expert being required elsewhere on the same day. This situation arises quite often when an expert is working on two cases that are due to go to trial at about the same time. In the past, the solicitors concerned would normally have arranged that one of them should apply for a postponement of trial to enable the double-booked expert to give evidence in both cases; courts almost invariably granted such requests. Under the new regime of case management, however, an application of that sort is much less likely to succeed. In current circumstances, issuing a witness summons may be the only means by which a solicitor can ensure that the expert is available to give evidence on behalf of *his* client.

Practicalities

The rules governing the issue of witness summonses are contained in Part 34 of the CPR and may be summarised as follows:

- a witness summons is a document (Form N20) issued by a court on application from one of the parties to an action
- no permission is required of the court to issue the summons – unless, that is, the trial is less than 7 days away, or attendance is being sought on another date than that of the trial or for a hearing other than the trial
- a court may issue a summons for proceedings in a lower court or tribunal that lacks the power to issue one itself
- the summons is binding on the recipient providing it is served at least 7 days before the date on which attendance is first required (although the court may waive that condition), and it remains in force for the duration of the trial or hearing, or until the judge decides that the witness is no longer needed
- the summons will be served by the court unless the party for whom it is issued states that he wishes to serve it himself
- at the time of service the witness must be offered or paid an amount to cover his travelling expenses and compensate him for loss of time (which sum has to be stated on the summons)
- if the court is serving the summons, the party on whose behalf it is being issued must deposit this sum at the court office.

As can be seen, most of this is straightforward. It does, however, beg a number of questions of particular significance for experts, namely:

- How are summonses served?
- What kind of payment is due?
- What are the consequences of non-compliance?

Service

If the court is effecting service it will normally send the summons by first-class post. Whether this is appropriate will depend on the circumstances. If the expert is being summonsed for 'friendly' reasons, e.g. to enable other commitments to be broken, service by post should be quite sufficient – providing, of course, it is done far enough in advance to ensure that the witness has the required 7 days' notice.

If, on the other hand, the expert is believed to be unwilling to give evidence, the solicitor initiating the summons may elect to have the summons delivered by a process server. This would have the aim of impressing upon the witness the importance of complying with the summons and the potentially serious consequences of not doing so. In these circumstances, the process server must also tender the necessary payment, for if it is not offered or paid at the time of service, the witness may apply to the issuing court for the summons to be set aside.

Payment

As the above summary of the Rules indicates, there are two elements in the payment that witnesses are entitled to receive: their **travelling expenses** and **compensation for their loss of time**. The former is defined as a sum 'reasonably sufficient' to cover the cost of getting to and from the court, which is fair enough. It is the other element that is so provoking to expert witnesses.

Rule 34.7(b) defines the latter as '*such sum by way of compensation... for loss of time as may be specified in the relevant practice direction*'. On consulting the Practice Direction to Part 34 one finds that it is '*to be based on the sums payable to witnesses attending the Crown Court*.'

As any expert who has given evidence in a Crown Court will know, attendance allowances there are paid according to rates and scales fixed by the Lord Chancellor's Department (LCD). In the case of 'ordinary' witnesses, maximum amounts are specified depending on the period of their absence from work. For expert witnesses, while there are no prescribed amounts, the LCD issues guidance as to what the appropriate level of their remuneration might be. For different professions, different ranges are specified (*see panel*), and courts may pay whatever they think fit within those ranges. Only in exceptional circumstances would they pay more. It should come as no surprise to anyone that even the maxima on these guidance scales are way below the fees most experts would expect to charge for a day in court if they were free to negotiate them.

Rates for a full day in court (as of 1 September 1999)

1	Consultant medical practitioner, psychiatrist, pathologist	£288–£415
2	Fire assessor and/or explosives expert	£232–£332
3	Forensic scientist (incl. questioned document examiner), surveyor, accountant, engineer, medical practitioner, architect, veterinary surgeon, meteorologist	£188–£408
4	Fingerprint expert	£139–£232

Experts entitled to travel and time payments

Now in civil cases, when a solicitor causes a witness summons to be issued, it is the solicitor, not the court, who remunerates the witness. If the summons is to be served on an expert who is happy to attend court but needs it to escape an obligation to be elsewhere, the Law Society's *Guide to the Professional Conduct of Solicitors* requires that the solicitors pay the expert whatever had been agreed previously between them for the latter's appearance in court.

The solicitor is no longer obliged to do that, though, if the witness has declined to give evidence for any reason. In this event the solicitor need only observe the LCD's guidelines in fixing the amount to be offered. If that amount should be less than the minimum specified in the guidelines, the expert could still apply to the court to have the summons set aside. Otherwise the expert has little option but to accept the sum. Refusing to do so does not excuse the expert from obeying the summons.

Penalties

Strangely enough, there is no reference in Part 34 to the penalties for non-compliance with a witness summons. However, provisions of the former rules of court that have been re-enacted as schedules to the CPR make the defaulter liable to imprisonment for contempt of court if the summons was issued in the High Court, or to a fine if it was issued by a county court. In addition, the expert may be ordered to pay the costs resulting from any failure on the expert's part to attend court: Draconian punishment, indeed, that no one in their right mind should lightly risk incurring.

Conclusion

Oral testimony is one of the traditional bastions of our adversarial system of justice. Although the principle has been eroded of late (particularly with regard to cases on the fast track), it remains important that parties should be able to call witnesses to testify in court, and, if necessary, to compel them to attend for that purpose. For experts, though, a witness summons can be bad news. For the reasons outlined here, experts should do their best to avoid the risk of ever being served with one.

John Lord

A witness summons can be bad news!

Small claims revisited

Legal costs not recoverable by the winner

An amendment to the Civil Procedure Rules that came into force on 2 May has focused attention on the anomalous position of expert evidence in cases allocated to the small claims track.

The Woolf reforms

Readers may recall that last year the Government raised the ceiling amount below which cases are referred automatically to the small claims procedure. Five years ago it stood at £1,000, but in January 1996 it was increased to £3,000 and in April 1999 it went up again to £5,000. This amount now applies to all claims, apart from those for personal injury and housing disrepair where the limit is pegged at £1,000.

The intention behind both increases was, of course, to reduce the number of civil cases that needed to be tried in open court. Already by April last year 80% of cases were being dealt with under the more informal small claims procedure. Raising the ceiling still further not only brought more cases within the scope of that procedure but had the incidental effect of discouraging the use of expert evidence in them.

It is worth noting, though, that the new limit does not have to be applied willy-nilly. While there is a presumption, certainly, that claims for damages of not more than £5,000 (or in personal injury and disrepair cases, of not more than £1,000) will be assigned to the small claims track, other considerations may result in their being allocated to the fast track. For example, cases of harassment or unlawful eviction by a landlord will never be dealt with as small claims whatever their monetary value. It is also most unlikely that any claim alleging dishonesty could be tried that way. Conversely, there is provision for claims exceeding the limits to be treated as 'small' claims if the parties agree to that happening.

When allocating a case to the small claims track the procedural judge sets both a **date** for the hearing and the **amount of time allowed** for it. At this stage, too, the judge gives directions as to the documents (including any experts' reports) that each party is to provide to the other and to the court. These will generally need to be delivered at least 14 days before the hearing. In addition, there are specific requirements to be met for claims arising from road accidents, vehicle repair disputes, building disputes, tenancy agreements and spoilt holidays. Lastly, if the claim is truly small, i.e. for less than £1,000, the claimant will be excused the standard £80 fee that is otherwise payable at the allocation stage.

Usually only £200 per expert recoverable

The 'no costs' rule

Several of the characteristics of the small claims procedure derive from a long-standing provision of the former County Court Rules that allowed cases to be referred to arbitration if both parties agreed. In 1980 this became automatic whenever a defence was filed for claims below a prescribed amount (at that time, £200). Although it is no longer appropriate to describe a small claims hearing as an arbitration, they still share one defining feature, namely that legal costs are not recoverable by the winner. Over time this 'no costs' rule has become somewhat blurred at the edges (*see panel*), but it does at least ensure that litigants whose cases are allocated to the small claims track have less reason to fear being saddled with huge bills run up by the other side should the decision go against them.

For experts, of course, the downside of the rule is that it tends to discourage litigants in small claims cases from seeking to use expert evidence. If the most the litigant can hope to recover from the other side is £200 per expert plus travelling and overnight expenses, the likelihood is that they would have to meet some part of the cost themselves, even if they were to win.

Note, though, that where a case has been allocated to the small claims track despite the sum involved exceeding the relevant limit, costs will be assessed as if the claim were proceeding on the fast track. In other words, the potential exists in those circumstances for parties to make full recovery of their experts' fees and expenses in the event of their winning their case.

Expert evidence in small claims cases

While the 'no costs' rule is certainly a major feature of the small claims track, it is by no means the only one distinguishing it from the other two tracks. Thus, in the interest of keeping small claims hearings as informal and straightforward as possible, a whole raft of CPR provisions are specifically disapplied in their case. These include the rules relating to disclosure (Part 31), evidence (Parts 32 and 33) and – most significantly for our purpose – the majority of those concerning experts.

Indeed, until last month the only Part 35 rules that applied to small claims were:

- Rule 35.1 – the duty to restrict expert evidence to that which is reasonably required

Costs in small claims cases

Although the basic principle is that winners cannot recover their legal costs, the CPR provide that the winning party is entitled to be reimbursed by the losing party for:

- the court fees they have paid
- up to £260 for legal help and advice (but only for certain very limited purposes)
- expert fees up to £200 per expert
- travel and overnight expenses 'reasonably incurred'
- loss of earnings of up to £50 for them and each of their witnesses, plus
- any further sum that the judge may award if he decides that the losing side behaved unreasonably.

- Rule 35.3 – an expert's overriding duty to the court, and
- Rule 35.8 – concerning instructions to a single joint expert.

But to these has now been added:

- Rule 35.7 – the court's power to direct that evidence be given by a single joint expert.

Since the latter is clearly essential to the operation of Rule 35.8, its previous omission can only have been by oversight.

For those familiar with the provisions of CPR Part 35 it might seem that the continued disapplication of Rule 35.4 (the court's power to restrict expert evidence) allows litigants with small claims to adduce it whenever they like. Unfortunately, that possibility is knocked on the head by one of the rules governing the conduct of small claims litigation, namely Rule 27.5. This states, quite unequivocally, 'No expert may give evidence, whether written or oral, at a hearing without the permission of the court'. Moreover, while no rule debars experts from giving their evidence in person, permission to adduce it is normally confined to a written report.

Although the 'no costs' rule ensures that most parties granted permission to submit expert evidence would have to bear some part of its cost regardless of the outcome of the case, the district judge can still refuse them permission to do so. This could be on the grounds that the evidence sought is not proportionate to the value of the claim, will incur needless cost or threatens delay. On the other hand, permission to file an expert's report is being granted almost routinely in cases where the issue in dispute is technical, such as those involving computers or defective goods. Furthermore, no permission at all is required for medical evidence in support of personal injury claims because in such cases a medical report has to be filed with the particulars of claim. Since, however, the injuries complained of in a claim for less than £1,000 are hardly likely to be serious, a letter from the claimant's GP will usually satisfy that requirement. It is only if damages are being sought for future pain and suffering that a more thoroughgoing report will be needed.

Report requirements

In general, then, what are the requirements for reports in small claims cases? Well, for one thing, they are considerably less exacting than for those submitted in fast-track and multi-track cases. Since rule 35.10 (on the contents of experts' reports) is one of those that remains disapplied, so too is the long list of requirements on form and content set out in the Part 35 practice direction. Specifically, there is no need:

- to detail the literature relied upon in preparing the report
- to identify and give the qualifications of those who carried out the tests on which it is based, or
- to summarise the range of opinion on matters dealt with in the report, should there be any.

All this is in keeping with the essentially informal nature of small claims proceedings. Nonetheless, experts instructed in such cases, perhaps by the parties direct, should still bear in mind that their overriding duty is to the court, to help it make a just decision on matters within their expertise. It follows that any report an expert prepares for a small claims case should:

- be addressed to the court
- give just those details of the expert's qualifications and experience to enable the court to assess the report's authority
- provide a brief summary of the history of the matter, the investigations carried out and the facts ascertained
- outline the reasons for any inferences drawn from the facts
- give a clear summary of the expert's conclusions, and
- end with a declaration to the effect that the expert fully understands the duty owed to the court and has complied with that duty in preparing the report.

Cut-down report appropriate

The future for expert evidence in small claims cases

Despite the inhibiting effect of the 'no costs' rule, then, all need not be doom and gloom. Raising the ceiling for automatic transfer of cases to the small claims track has brought within its scope many more cases of a technical nature for which the damages sought are far from negligible. At the same time, the less exacting nature of the requirements governing reports for cases on this track offers at least some prospect that experts may be able to tailor the service they provide to match the lower value of the claims and more limited resources of the litigants bringing them.

There is one other factor that should favour the increased use of expert evidence in small claims cases: there is now much more lawyer involvement than was once the case. With larger sums at stake, litigants are showing greater willingness to seek (and pay for) legal advice before initiating proceedings or filing a defence. In addition, more are opting to have lawyers present their cases for them at the subsequent hearing. Indeed, this is fast becoming the norm for claims arising from road traffic accidents.

In theory, at any rate, greater lawyer involvement in small claims cases ought also to mean more experts being instructed to provide evidence. Whether that happens, though, may well depend on individual experts making it known to the firms that regularly employ them that they are prepared to be instructed in small claims cases and are willing to tailor their fee rates accordingly. It seems inevitable that if experts want this sort of business, then this is what more and more of them will have to do.

Will more lawyer involvement mean more experts?

CPR: The experts' views

Experts want opinion evidence peer-tested

In May I was asked to address a meeting of the Lord Chancellor's Department's Judicial Studies Board to give district judges an overview of how experts were responding to the new Civil Procedure Rules (CPR) regime. In preparation, I consulted a number of experts listed in the *Register* who had indicated that they undertook single joint expert (SJE) work. The following is based on the information they supplied.

Suitability of joint appointment

The CPR dicate that courts should be ordering the joint appointment of experts whenever it will benefit the court and the parties. But how does the court identify whether joint appointment is appropriate? My enquiries suggested two sets of factors: those arising from the **nature of the evidence** required, and those arising from **court procedures**.

Nature of the evidence

Contentiousness

This first factor relates to the extent to which the parties are in dispute on the issue. Jointly appointed experts feel happiest when the issue they have been asked to consider is not highly contentious. For example, in an RTA where liability is accepted, it might well be appropriate to have an SJE provide the prognosis report.

Opinion versus fact-finding

Often the court needs some essentially factual information, but it takes an expert to provide it. For example, measuring noise pollution levels. In the view of many experts, a joint appointment is entirely suited to such a requirement.

Opinion evidence, on the other hand, can be more troublesome. Where the opinion required is unlikely to vary much between experts, a joint appointment may be reasonable. For example, a prognosis report in relation to a broken limb.

But when a **range** of opinions might be expected, can an SJE be expected to identify that range? For example, some surveyors told me that their training disposes them to give a single value to a property. To identify the range in valuation might require input from several surveyors. So where the range of opinion is likely to be broad or difficult to obtain, joint appointment could well be less satisfactory.

Complexity

Woolf applauds strategic use of SJEs

Experts find that the complexity of an instruction increases with the number of parties to the action, the number of discrete issues being considered and because some subjects are just innately complex.

Importantly, another source of complexity can arise from the parties themselves expecting too much from an expert they jointly appoint. For example, whilst one party might regard an engineer as having the most appropriate expertise to consider the problem, another party might want the opinion to be expressed by an expert with different skills – a metallurgist, say. In these circumstances it might prove difficult to find an expert for joint appointment with sufficiently broad expertise.

However it arises, experts feel that complexity should be seen as an indication that an issue is not well suited to joint appointment.

Centrality

The final evidence factor relates to the importance of the expert evidence in the case. Does the case hinge on the expert evidence?

Many experts feel that the traditional party appointment system is preferable when the expert evidence is central to the case. When their opinion is so vital, experts prefer to have it tested against that of one of their peers.

Summary

From these factors, we may conclude that the less contentious, the more factual, the simpler or the more peripheral the evidence required, the more likely it is that joint appointment will benefit the court and the parties.

Joint appointment more suited when…

- issue is non-contentious
- fact-finding evidence is required
- case is simple
- expert evidence is peripheral

Party appointment more suited when…

- issue is contentious
- opinion evidence is required
- case is complex
- expert evidence is central

Court factors

The second group of factors relates to those stemming from court procedures.

Strategic use of joint appointment

Lord Woolf was quoted in the *Law Society Gazette* recently as saying that it doesn't matter if parties choose to instruct experts to shadow an SJE. He outlined a 'win-win-win' situation.

- If a shadow expert agrees with the opinion of the SJE, then the joint appointment has served its purpose.
- If a shadow expert does not agree but the party decides not to contest the SJE's opinion, then again the joint appointment has served its purpose.
- If, however, a party's shadow expert does not agree with the SJE and they decide to contest the evidence, they will probably be contesting just a specific point or two – so yet again the joint appointment has served its purpose!

This strategic use of an SJE to elucidate the crucial issue(s) is an important factor that may well weigh more heavily on judges than some of the others outlined.

Human Rights Act

And lastly there is the effect of the Human Rights Act that comes into force on 2 October this year. Experts have already expressed

concern over whether the court's power to force a joint appointment on parties is consistent with the parties' right to a fair trial. Likewise, some experts wonder whether it can be fair to use the power in rule 35.14 to seek directions without giving notice to any party.

Lord Woolf has made his views known on this subject recently. In his judgment in *Daniels -v- Walker*, he makes it quite clear that human rights legislation should not be used to complicate case management decisions and hoped that judges would be 'robust in resisting such arguments'. The judges I spoke to found this suggestion quite amusing.

Experts' concerns

During the consultation, experts expressed a number of concerns about working under CPR.

Instructions

Many experts were worried about the instructions they receive as SJEs.

- Sometimes the instructions lack clarity.
- Sometimes when instructions arrive separately from each party they conflict in some way.
- Sometimes there is a delay in receiving the second set of instructions.
- Often the instructions fail to contain all the relevant information, e.g. which court is involved.
- Occasionally the instructions either seek to take the expert outside his or her area of expertise, or expect the expert to usurp the court's function by seeking a view on liability or negligence.
- And finally, some instructing parties are less inclined to supply an SJE with all the information of relevance to the case, though ultimately, of course, the expert has to identify in the report the information on which it is based.

Questions in clarification

Many experts find questions in clarification to be a very useful development. The only real concern is that solicitors in party appointments wish to vet the questions being put by the other side. While the practice directions make it clear that copies of the questions should be sent to instructing solicitors, the Rules are not clear on whether the instructing solicitors have the right to vet the questions.

Another problem experts find is that sometimes a party thinks that if clarification is needed, then the report was not clear enough in the first place. Therefore the expert should not be charging for providing clarification!

Fixing hearing dates

The 'robust' manner in which judges are fixing hearing dates, with scarcely a glance at the prior commitments of any other participant, is a source of great concern to experts. In delivering his judgment on the appeal in *Matthews -v- Tarmac Bricks & Tiles Ltd*, Lord Woolf stated that experts must be prepared to arrange their affairs to meet the court's requirements, and some judges have been zealous in applying that dictum. We have heard of experts who have even found that *subpoenas* to appear in one court do not prevent another court, at which they are due to give evidence, fixing the trial for the same day. And as for an expert being on holiday…

Delays, lack of clarity, conflicts, inflexibility...

But it doesn't end here! Experts find requests for long-range predictions of unavailability dates time-consuming to prepare. And the lack of feedback once the dates are given is a nuisance. Wide court windows are also a problem. One expert was asked to be free any time from October 21 to March 1! Many experts simply double book and hope for the best.

Judicial case management

Another complaint experts have is that often they do not hear of the court's directions until long after they were issued. This can turn a 6-week reporting period into a 'next Friday' panic! Experts would like to see courts direct that all persons affected by management directions be informed of them at the earliest opportunity.

The next problem experts have with judicial case management is its timing, and the impact that has on the use of experts. Many experts feel that they could play a much more useful role if only they were brought in at a much earlier stage. Where a pre-action protocol exists, as in personal injury cases, solicitors are given the confidence to obtain expert evidence early on. Often this isn't so for cases where there is no protocol, for then parties tend to wait until the court has explicitly approved the use of expert evidence before issuing instructions.

The overuse of expert evidence about which Lord Woolf complained in his Report was a consequence of the parties' solicitors having control of the litigation. With the courts now in control of expert evidence, it may be that the CPR have a greater anti-expert thrust than is necessary. From their experience with personal injury cases, experts would like to see some more general pre-action protocols created to redress the balance.

In the exercise of their management role, judges adopt conflincting attitudes towards experts. On the one hand they want to hear evidence from those who are 'working at the coal face'. On the other hand, when setting timetables to prepare evidence, take part in discussions or appear in court, some judges show no consideration for experts' professional commitments, and certainly nothing so trivial as holidays, public service or appearing in another court!

SJEs feel isolated, exposed and sniped at by all sides

The Rules

The Rules themselves are a source of concern to many experts because they still leave many questions unanswered. For example, part 35.6(4) contains a sanction for use when an expert does not respond to questions put in clarification by

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Factsheet Update

The following factsheet has been replaced recently with a new report:

ID	Factsheet title
26	Society of Expert Witnesses Spring Conference Report 2000

Please note that faxback access to the factsheets has now been removed.

You can access factsheets through our web site, or by using our *Factsheet Viewer* software, which for £40.00 per annum provides quarterly updates and fast, flexible searching across all the factsheets.

another party but it applies only to party-appointed experts. So what happens if an SJE neglects to answer a question?

Another example arises from the selection of experts in the PI pre-action protocol. The protocol requires party A to advise party B if they intend to adduce some expert evidence and offer a list of proposed experts. Party B can object to some or all of these experts. If any experts remain, then party A can instruct one of them and, in general, party B cannot object to that expert's report at a later date. However, this expert is not jointly instructed and party B has no control over what the expert is asked to consider. This does not seem to be a very level playing field, and indeed some experts report that the old style of expert use persists in this arena.

SJE as judge

Another worry is that SJEs could end up usurping the role of the judge. What can be done to avoid this risk of 'trial by expert'?

For example, if the instructions received from one of the parties envisages the SJE carrying out more work than the SJE considers proportionate to the value of the case or feasible within the timetable, what should be done? Is the expert free to make that judgment, or should the court's direction be sought?

And as indicated previously, when cases hinge on the expert evidence, expert witnesses prefer to have their evidence tested against that of their peers.

Witness or investigator?

Being keen to offer as much help as possible, some experts feel that their overriding duty to assist the court should allow them to step outside of their instructions when they believe their expert knowledge has highlighted an important factor the parties appear to have missed. The situation might arise where liability has been agreed but the expert who is brought in to consider quantum discovers clear evidence that the agreement on liability is unsound. While always being careful not to indulge in advocacy, some experts would like the court to find such an investigative approach acceptable.

Conclusion

The role of the SJE in our adversarial court system is anomalous and almost bound to be antagonistic. One expression of this antagonism is the number of SJEs who complain of feeling isolated, exposed and sniped at from all sides. Courts should be concerned to help SJEs deal with these strains, or they may find fewer experts of the right calibre who are willing to undertake a joint instruction.

The purpose of the consultation was to inform the discussion of expert-related issues amongst the judiciary. We will have to wait and see whether this sort of dialogue helps to resolve any of the issues faced by experts working under the new Rules.

Chris Pamplin

News

All change at the top

Anyone who may have thought that reshuffles only happen to cards and Cabinets has been proved wrong, for we are about to witness one in the higher reaches of the judiciary. The holders of all the top posts are on the move, prompted by the retirement through ill health of the senior Law Lord, Lord Browne-Wilkinson. His place would normally have been taken automatically by the next most senior Law Lord. Instead, the Lord Chancellor has drafted in the Lord Chief Justice, Lord Bingham, who has never sat as a Law Lord. He is reputed to have 'a safe pair of hands', which the Government may well regard as much needed in the light of the House of Lords' handling of the Pinochet affair.

As Lord Chief Justice we now have Lord Woolf. While this removes him from day-to-day involvement with the civil justice system he has done so much to transform, it provides him with a new challenge: that of seeing through the upcoming reform of criminal procedure. And in his place as Master of the Rolls we shall shortly have Lord Phillips.

The last participant in this game of musical benches is the Vice Chancellor, Sir Richard Scott. He, too, is destined for the House of Lords. While in his present post Sir Richard was given the additional title of Head of Civil Justice, and with it the responsibility for implementing the reforms initiated by Lord Woolf. That title and responsibility will now be passed to the new Master of the Rolls, Lord Phillips.

Debasing experts?

Apparently, the Prime Minister is hoping to get round a proposal to restrict the number of Government special advisers (or 'spin doctors') by re-titling some of them 'experts'. According to a report prepared by Lord Neill, Chairman of the Committee on Standards in Public Life, there are now 27 special advisers attached to the Prime Minister's office, as against nine before the last election and 73 elsewhere in Whitehall. The Opposition parties fear that changing the terminology might enable the Government to appoint yet more spin doctors in the guise of 'experts'. Our concern is that in so doing it will irretrievably debase the meaning of that word!

The common touch!

Speaking recently about the legal services that would be available in the aftermath of his reforms, the Lord Chancellor was reported by *The Times* as saying: 'Were I to be an ordinary person, I should be very satisfied.'

Come off it, Derry! Who are you kidding?

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