Your Witness

Newsletter of the UK Register of Expert Witnesses, published by J S Publications

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Web Register integration

One of the arcane arts of the Information Age is getting the most out of Internet search engines. And the big problem for any web site is how to get the search engines to list the site for all the terms a 'surfer' might try.

Relying on search engines to get lawyers to our web site has never been our sole strategy. I have always held the view that it is better to put the *Web Register* where lawyers habitually visit, rather than try to entice them to visit our site.

Starting with Butterworths' PI On-Line in 1997, the number of legal web sites that now host the *Web Register* has grown to include LawZone, LawTalk and InfoLaw. Lawyers visiting these sites are able to find experts using a version of the *Web Register* that is tightly integrated into the host site. To see how it works, why not visit *www.lawzone.co.uk* and take a look?

By pursuing this open policy with other web site providers we have been able to offer even wider access to vetted experts via the Internet. If you know of any other web sites that would benefit from such an alliance, please let us know.

NB Only if you have asked to have your details placed on the *Web Register* will they be accessible through these public web sites.

New e-newsletter for experts

Through our work with LawZone, we have become aware of how valuable many people find electronic newsletters. In a joint venture with LawZone, we are going to initiate an e-newsletter for expert witnesses. The first issue is in preparation and will be sent to everyone who has an e-mail address listed in the *Register* in mid-October.

Don't panic! We do respect your e-mail privacy and will only send this first issue to everyone. If you wish to receive future issues you must subscribe to the newsletter (which is free of charge) by following the simple instructions that will appear in the first issue. If you do not wish to receive even this first issue, please let us know by 18 October on (01638) 561590 and we will remove your e-mail address from the list.

Whatever happened to the Draft Code?

We have recently had a number of questions on the helpline about the status of the Draft Code of Guidance for Experts and those Instructing Experts. You may recall that this document caused great consternation last year when the Expert Witness Institute (EWI) appeared to be trying to sideline the Academy of Experts and the Society of Expert Witnesses at the consultation stage.

Many experts were critical of the prescriptive nature of the Code, and the way it mixed expert issues with those relating to instructing solicitors. Despite receiving many submissions, the EWI made remarkably few changes to the Code prior to submission. For your interest, we have posted on our web site an Acrobat document showing the changes between the pre- and post-consultation versions of the Code (see *www.jspubs.com/downloads/DCGE/changes.pdf*).

The Code was lodged with the Vice Chancellor in June 1999 and since then the silence has been deafening! Recent enquiries at the Lord Chancellor's Department (LCD) revealed a very relaxed attitude towards the Code. The draft was 'still very much under discussion' and the LCD was 'looking at further documents'. The most telling comment, however, was that the LCD was 'very busy and other work takes priority'. You may draw your own conclusions!

New staff at J S Publications

Over the summer our team has undergone a period of change and expansion. Alison Moore has joined the administration office, and if you have any questions about your entry or any of our services, you can contact her on (01638) 561590.

Sophie Adams has joined us to help diversify our product range. She brings a wealth of knowledge about the publishing sector and will be exploring opportunities for new products.

How are you used by the media?

One area in which we are currently interested is the use of experts by the media. If you have experience of dealings with the media, whether good or bad, and are willing to discuss them with us, please telephone Sophie Adams on (01638) 561590.

Conference season

Three expert witness conferences are scheduled for this autumn.

- **Expert Witness Institute**, Thursday 12 October, Royal College of Physicians, London, 'The Expert Witness – Present Issues and Future Challenges'. Cost £200 (inc. VAT) members, £350 (inc. VAT) non-members. Call 020 7583 5454.
- **Society of Expert Witnesses**, Friday 27October , York Racecourse, York, 'The Expert Business'. Cost £76 + VAT members, £120 + VAT non-members. Call 0845 702 3014.
- **Bond Solon**, Friday 10 November, Church House Conference Centre, London. 'Experts Now'. Cost £135 + VAT. Call 020 7253 7053.

Chris Pamplin

Human rights and experts

Government less sanguine than Woolf over HRA litigation

In our last issue we reported an attempt by Lord Woolf to discourage lawyers from raising human rights issues when contesting case management decisions in the civil courts. Delivering judgment in a Court of Appeal case, he expressed the hope that judges would be 'robust in resisting attempts to introduce such arguments'.

Since then, of course, the media have been full of dire predictions that the courts, both civil and criminal, will be swamped with human rights cases as soon as the Human Rights Act 1998 comes into force this month. Certainly, the Government seems less sanguine than Lord Woolf that the judiciary will be able to head off much of this extra litigation, for it announced in July that it was budgeting an extra £60 million to help the courts cope. From where, then, will this anticipated upturn in activity come, and how is it likely to affect expert witnesses?

No ordinary law

One thing that is quite clear is that the Human Rights Act is no ordinary law. Indeed, it is regarded by many lawyers as the most significant constitutional measure since the 1689 Bill of Rights. By incorporating the European Convention on Human Rights into UK law, the Act both confers positive rights on everyone in the country and imposes duties upon all public authorities to respect those rights. In effect, the Act creates a new public law tort whenever a public body acts incompatibly, or fails to act compatibly, with the Convention.

The novelty of conferring positive rights on individual citizens cannot be over-stressed. English law is founded on the principle that individuals may do as they like unless it is unlawful – whether because Parliament has made it a criminal offence, because it amounts to a civil wrong or because it has been prohibited by administrative action. In each case, those who complain of what has been done, or of what may be done, must first prove that it is unlawful. With the Convention incorporated into English law, the position is altogether changed. The starting point is no longer the freedom to do as one wishes but the rights one enjoys under the Convention. Furthermore, those rights will prevail unless whoever is interfering with them can justify the interference.

Scope of HRA wider than you may think

The scope of the Act

Although the Act speaks of 'public authorities', that is by no means as limiting as it may sound. In addition to obvious candidates, such as government departments / agencies and local councils, the term covers utilities, regulatory bodies, schools, NHS hospitals, public advice services and – most significantly – the courts. They, indeed, are specifically required by the Act to interpret legislation, both primary and subordinate, in ways compatible with Convention rights. Since the Civil Procedure Rules are subordinate legislation, it follows that they, too, are caught by this requirement.

The Act also imposes duties on individuals if, as it puts it, 'certain of their functions... are functions of a public nature'. This would certainly include judges, but also experts when sitting with a judge as assessors. Expert witnesses, on the other hand, are not subject to the Act – although, as we shall see, they may be affected by its operation and will increasingly find themselves preparing reports for cases that allege infringement of Convention rights.

What rights?

We do not have the room to reproduce the text of the Convention but, as the following summary indicates, the rights it bestows are nothing if not comprehensive:

- the right to life
- the right not to be subjected to torture or to inhuman and degrading treatment or punishment
- the right to liberty and freedom from arbitrary arrest or detention
- the right to a fair trial by an independent and impartial court and of access to justice
- the right to freedom of speech, thought and assembly
- the right to be protected against unreasonable searches and seizures
- the right to respect for the sanctity of the home, to privacy and family life
- the right to property
- the right to choose the government through free and secret elections
- the right to equal treatment without discrimination.

If this list seems familiar to British eyes, that is only to be expected, since it was a Home Office official who originally drafted the Convention. Yet despite this, and the fact that the first to sign up to it was the UK, it is only now, 50 years later, that the Convention is being assimilated into our domestic law.

It is important to note here that the rights to justice conferred by the Convention are not absolute rights. With the exception of Article 7, which prohibits retrospective criminal penalties, they can all be restricted to ensure respect for other rights under the Convention or to strike a balance between the rights of the individual and the interests of the community as a whole.

Note, too, that in this connection the European Court of Human Rights has ruled that the Convention is a 'living instrument', and that accordingly what may have been an allowable restriction in the past may not continue to be so. This readiness to change rules in the light of new circumstances is a familiar enough concept in our common law (see, for example, the instance reported on page 6 of this issue) but a novel one for the interpretation of statute law.

The impact on litigation

Most members of the public associate the Human Rights Act with the criminal justice system, and in particular with correcting miscarriages of justice. This is hardly surprising in view of the steady stream of decisions of that kind which have emanated from the European Court in recent years. However, the requirement the Act lays on our courts is to interpret *all* legislation in ways compatible with the Convention, and that means that no area of the law, whether public or private, is potentially immune from its reach.

To take just one example of this, the Act seems bound to widen the scope for claims arising from medical accidents. Hitherto, patients, or their next of kin, have only been able to sue in negligence or for breach of statutory duty. Now, however, they will also be able to sue hospitals for failing to take positive steps to protect the patient's right to life. Since every operation under anaesthetic involves some risk of death, this could have an enormous impact on clinical negligence litigation.

Then again, in the context of child welfare cases, courts often have to decide whether or not a particular course of action is in a child's 'best interests'. In this they nearly as often defer to psychiatric or other expert opinion – or at least have done so hitherto. From now on, though, courts will also have to satisfy themselves that in reaching such decisions they are according sufficient protection to the child's fundamental rights. The course of action advocated by 'a responsible body of professional opinion' may well not measure up to that requirement. This in turn suggests that both the courts and the experts advising them may have to rethink the approach they take in such cases.

The right to a fair trial

It is, however, Article 6 of the Convention that has the most obvious bearing on expert witness work. This is the one that guarantees the right to a fair trial, though its influence extends way beyond that. Over the years, cases alleging infringements of Article 6 have accounted for more than half of all those referred to the European Court. As a result, a considerable body of case law has built up. From this, a number of key principles have been derived, namely:

- individuals must have access to a court and such access must be effective
- each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions which do not place him at a substantial disadvantage to his opponent (the concept known as 'equality of arms')
- both parties must have access to all the evidence
- reasons for any judgment must by given.

Of these principles, the most fundamental is access to the courts. It is ironic that the Labour administration which has brought the Human Rights Act into being should also have done more than any other to curtail this access. For those individuals eligible to receive legal aid on financial grounds, the present Government's reform, or rather dismantling, of the system has sharply reduced both the availability of legal advice in civil matters and the areas of law on which that advice, and any subsequent help, can be provided. It seems likely, though, that the Government would be able to beat off any human rights challenge to these changes on the grounds that they are designed to redirect public funding in support of litigation of greater social priority – in short, a legitimate case for restricting the rights of individuals in the interests of the community at large.

Where the Government may prove more vulnerable to challenge is in failing to ensure that parties to civil litigation enjoy 'equality of arms'. As we have seen, the courts are now required to interpret the Civil Procedure Rules in ways compatible with the Convention. Indeed, the statement of the Rules' overriding objective acknowledges that dealing with a case justly includes ensuring that parties are on an equal footing. But whereas parties are supposed, under the Convention, to be afforded 'a reasonable opportunity' to present their evidence, the Rules allow procedural judges wide scope to interfere with this right where expert evidence is concerned. Not only is the calling of that evidence placed under the complete control of the court, but the court can also insist on it being presented by a single expert, even though one or both parties object to that happening.

Then again, consider the tight timetables laid down for fast-track cases and the encouragement this gives judges to refuse postponement of hearings even when experts who are due to give evidence at them are not available on the dates in question. Several instances of this have been reported, and the Court of Appeal has shown marked reluctance to interfere. Were it to happen again, though, it would now be possible to appeal the judge's decision on the ground that it breached Article 6 of the Convention. Furthermore, despite Lord Woolf's hope that judges would be 'robust' in resisting such challenges, appeals on that ground might well succeed.

The fact is that there is inherent tension between the requirements of the Civil Procedure Rules, beneficial as so many of them are, and the duties laid on the courts by the Human Rights Act. In the long run, no doubt, an accommodation between them will be achieved. In the meantime, we can look forward to some interesting cases as lawyers begin exploiting that tension in the interests of their clients.

HRA may increase medical negligence claims

Lawyers set to exploit tension between HRA and CPR

Court reports

Cresswell principles restated

Role of the expert witness redefined

The Technology and Construction Court was the forum recently for a contract case that prompted the judge who heard it, Judge John Toulmin CMG QC, to redefine the role of the expert witness in the light of the Woolf reforms. It is to be hoped that the judgment in *Anglo Group plc -v- Winther Brown & Co Ltd and BML (Office Computers) Ltd* will soon be published in one of the official report series. In the meantime, we are most grateful to Irwin Mitchell, the solicitors for BML, for making available to us a copy of the draft judgment as handed down on 1 March.

In the original action a finance house, Anglo, sued a DIY wholesaler, Winther Brown ('WB'), for arrears and damages following repudiation by WB of a leasing agreement for a computer system purchased from BML. The total amount of Anglo's claim was £67,006. For its part, WB alleged that the computer system was defective, and that this had depressed its profits, wasted staff salaries and caused it the extra expense of purchasing a substitute system. For this it counterclaimed a total of more than £1 million.

The history of the case need not detain us, any more than should the defects complained of by WB, except to note that at one stage there were 55 of them, of which 26 were identified in court as being major. What will be of interest to readers of this newsletter, though, are the criticisms made of some of the expert evidence.

Expert's duties. Before detailing his criticisms, Judge Toulmin identified eight duties that an expert witness owes to the court (*see panel*). As readers familiar with the 'Cresswell' principles will recognise (see Factsheet 4), three points are common to both sets, and a further three correspond closely. What is novel about Judge Toulmin's summary are his points 2 and 3. In this post-Woolf era, it seems more than likely that his reformulation of the Cresswell principles will come to be regarded as definitive.

The experts in the case. With regard to the case before him, Judge Toulmin commented that the two experts who gave evidence for BML had adhered fully to the standards he had just outlined. This was not so for the two who gave evidence for WB, however: they had adopted a more confrontational approach. WB's specialist on quantum had admitted in court that his initial report was not that of an independent expert and had never been intended as such. It had been prepared as a negotiating tool. Although this witness maintained that the second report he had written had been that of an independent expert, the judge considered that it, too, was flawed, because it relied on the unrealistic and inflated assumptions of his first report.

It was, however, the evidence of WB's computer expert that drew the judge's most scathing criticisms. The judge quoted at length from an article the witness had written in 1995, in which the latter maintained that an expert witness appointed according to the rules then current was under no duty to the court as an expert, and later, that his duty as an expert was to help his client win his case on the facts, nothing more. In Judge Toulmin's view the

Experts must not say what **they** *would have done*

The Toulmin principles

1. An expert witness should at all stages in the procedure, on the basis of the evidence as he understands it, provide independent assistance to the court and the parties by way of objective unbiased opinion in relation to matters within his expertise. This applies as much to the initial meetings of experts as to evidence at trial. An expert should never assume the role of an advocate.
2. The expert's evidence should normally be confined to technical matters on which the court will be assisted by receiving an explanation, or to evidence of common professional practice. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.
3. He should co-operate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending without prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely areas of disagreement to be set out in the joint statement of experts ordered by the court.
4. The expert evidence presented to the court should be, and be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of the litigation.
5. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
6. An expert witness should make it clear when a particular question or issue falls outside his expertise.
7. Where an expert is of the opinion that his conclusions are based on inadequate factual information he should say so explicitly.
8. An expert should be ready to reconsider his opinion and, if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity.

expert's approach in the present case was consistent with the one advanced in that article.

The outcome. For these and other reasons stated in his judgment, Judge Toulmin concluded that neither of WB's experts had conducted themselves as independent expert witnesses or in a manner acceptable to the court, and he was therefore unable to rely on their evidence. This, of course, was bound to have a disastrous effect on WB's case, for it led the judge to accept the evidence of BML's experts on every point at issue which he had not otherwise categorised as trivial or self-inflicted. As a result, Anglo succeeded in its claim against WB, and WB not only lost its counterclaim but had to shoulder the legal costs of the other parties as well as its own. This was a striking instance, if ever there was one, of the consequences that can follow failure on the part of experts to observe their duties to the court.

Admissibility of evidence questioned

Just recently, it would seem, Judge Toulmin has been faced with more than his fair share of problems with experts, for in a judgment delivered at the beginning of May he again had cause to criticise the evidence two of them had provided in another Technology and Construction Court hearing.

The case of *Pride Valley Foods Limited -v- Hall & Partners (Project Management)* arose from a fire in a food factory. Each party fielded two experts, one to deal with the fire itself and the other to deal with issues of project management. Judge Toulmin went out of his way to praise the fire experts, saying that he had been impressed by the extent to which they had been able to agree important matters. He was much less complimentary about the other pair of experts and questioned whether their evidence was even admissible.

The authorities. Judge Toulmin took as his starting point a well-known dictum of Mr Justice Oliver to the effect that evidence which amounts to no more than an expression of opinion as to what the expert would have done does not assist the court, and that any expression as to what he thinks should have been done usurps the function of the judge (*see panel*). The instant case posed the very problem envisaged by Mr Justice Oliver in that there was no recognisable profession of project managers. In so far, then, as it might be appropriate to accept expert evidence on project managers' duties, much would depend on what, precisely, the project managers had been asked to do.

The architect's report. The claimant's expert was an architect, and his report approached issues from the point of view of an architect who first designed a project and then, as project manager, supervised others in carrying out the work. The defendant's expert, on the other hand, was a chartered surveyor who was used to managing projects in conformity with design drawings but having no design function himself. As the claimant had appointed the defendant to act in the latter role, it followed that much of the architect's report was irrelevant to the case.

Further criticisms. However, Judge Toulmin's criticisms of the architect's report by no means ended there. He also castigated it for:

- dealing with questions, apparently posed by the expert's instructing solicitor, which were for the court to decide
- containing many expressions of opinion as to what the expert would have done in similar circumstances which were of questionable assistance to the court, and
- purporting to make many findings of fact that only the judge could make.

The report, he concluded, 'offends against the established basis on which experts should give evidence'.

Judge Toulmin was clearly much exercised, too, by the length of the architect's report, which ran to over 100 pages, with 100 more pages of appendices. In that connection he cited with approval the comments of Mr Justice Dyson in a construction case decided in 1998: 'Prolix expert reports directed to issues with which they should not be concerned merely add to the expense of litigation. Everything possible should be done to discourage this. In appropriate cases, this includes making special orders for costs.'

The surveyor's report. As regards the much shorter report submitted by the defendant's expert, Judge Toulmin considered that that, too, went beyond what was appropriate. He acknowledged, though, that this was probably due to an understandable desire to counter points made by the claimant's expert in his report. All in all, the judge concluded, the reports

Unacceptable evidence

In the course of his judgment in the 1979 case of *Midland Bank Trust Co -v- Hetts, Stubbs and Kemp* (1979), MrJustice Oliver said:

'The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks and would have done had he been placed, hypothetically and without benefit of hindsight, in the position of the defendants is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the [defendants'] duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to

Court warns of cost sanctions for sub-standard expert reports

Experts must not accept instructions that would cause them to usurp the court's function

Do experts still enjoy immunity?

Advocates lose immunity from suit

Advocate immunity ended

In a landmark decision, the House of Lords has ruled that it is no longer in the public interest that advocates should have immunity from suit for negligence in their conduct of cases in court. A team of no fewer than seven law lords heard the combined action, which had been brought by the Solicitors' Indemnity Fund in an effort to overturn a trio of decisions that the Court of Appeal had handed down in December 1998.

In *Arthur J S Hall & Co -v- Simons* and *Barratt -v- Woolf Seddon* the Court had allowed the appeals of two clients against decisions of lower courts striking out claims against their former solicitors, whilst in *Harris -v- Scholfield Roberts & Hill* the Court had dismissed the appeal of a firm of solicitors which had had a claim against it allowed in the High Court. In all three actions the clients had alleged negligence in the in-court conduct of still earlier cases of theirs.

The House of Lords last considered the rationale of immunity from suit in the 1969 case of *Rondel -v- Worsley*, although it revisited the subject 9 years later in *Saif Ali -v- Sydney Mitchell & Co*. In the latter case the House decided that an advocate's immunity also extended to pre-trial work, although only when it was so intimately connected with the conduct of litigation as to have the effect of determining the way in which a case was conducted at trial. In signalling that the decision in *Rondel* was no longer binding on itself or lower courts, the House also swept away any need for the qualification in *Saif Ali*: from now on lawyers, whether solicitors or barristers, must accept full responsibility for all the work they do, whether in or out of court, like any other professional.

The ruling

Delivering the lead judgment of the House, Lord Hoffmann said that considerations of public policy were not immutable. There had been great changes over the past 30 years in the law of negligence, the administration of justice and public perceptions, and it was time to look at the issues again. The starting point had to be that a wrong ought not to go without remedy, and any exception that denied a remedy required sound justification.

Immunity of experts now unclear

His Lordship then reviewed the arguments supportive of immunity and had little difficulty in disposing of most of them. For example, if there was ever a risk that advocates might be inhibited from fulfilling their duty to the court by the possibility of being sued by clients, that risk was much smaller now. Indeed, specific provision had been made in the new Civil Procedure Rules to reduce the incidence of vexatious litigation. It might be thought, too, that if the threat of such litigation having an adverse effect on the behaviour of advocates was real, that would have happened following the introduction of the wasted costs regime, and there was no suggestion that it did.

The only argument he regarded as having real substance was that it was contrary to the public interest to retry a case that had already been decided in another court. However, actions for negligence against lawyers were not the only cases that gave rise to that possibility, nor was it invariably true that re-litigation of an issue was unfair or brought the administration of justice into disrepute. Furthermore, where re-litigation was an abuse of process, the courts had the power to strike it out.

In the course of his judgment, Lord Hoffmann took care to stress that advocates, like judges and witnesses, still enjoy absolute immunity in respect of everything they say in court. No-one taking part in court proceedings can be sued for libel, malicious falsehood or even conspiring to give false evidence. However, unlike others involved in the trial process, advocates owe a duty of care to their clients, and it was for that reason that they should be liable to be sued by them for negligence.

The analogous position of experts

In holding that there was no analogy in this respect between the position of advocates and that of judges or witnesses, we are inclined to think that Lord Hoffmann overlooked the special situation of *expert* witnesses. Indeed it is generally accepted that expert witnesses, too, owe a duty to their clients, albeit secondary to the one they owe the court. To this extent their position is analogous with that of advocates.

Moreover, the existing case law on immunity of experts is founded largely on the self-same *Rondel* and *Saif Ali* cases that the House of Lords has now consigned to legal history. It was so of the judgments in *Palmer -v- Durnford Ford* (1992), *Landall -v- Dennis Faulkner & Alsop* (1994) and, most recently, *Stanton -v- Callaghan* (see *Your Witness* 11 and 13 for details). True, the Court of Appeal did find in the last-named case that, in the context of court-ordered meetings of experts, there were other grounds of public policy as to why experts 'should be free to make proper concessions without fear that any departure from advice previously given... would be seen as evidence of negligence'. Nevertheless, the House of Lords' decision in *Hall -v- Simons* has knocked clean away all previous justifications for immunity of experts based on that of advocates.

It remains to be seen to what extent this landmark decision will be exploited in future litigation alleging negligence on the part of experts. Expert witnesses are, of course, already liable for any advice they may give to a client or the client's lawyers. But can experts now be held liable in negligence for their conduct in court or for making a hash of the evidence they give from the witness box? That possibility, it seems, can no longer be dismissed out of hand.

News

Protocol update

The latest set of amendments to the Civil Procedure Rules 1998 (the 18th, no less) includes a number of changes to the pre-action protocol for personal injury cases, and some of these concern experts.

The guidance notes accompanying the protocol have always made plain that while it was primarily intended to cover fast-track cases, the spirit, if not the letter, of the protocol should still be followed for multi-track-type claims. The updated text is more specific about what this entails, to the extent that the parties in multi-track cases are now 'expected' to comply with the protocol in respect of, among other things, agreeing experts.

The amendments also iron out a difficulty that has arisen over the nomination of experts for joint appointment. The protocol originally laid down that the second party (almost always the defendant) had 14 days in which to object to any of the names that had been put forward, after which the nominating party could instruct one of those remaining on its list. But often claimants were nominating expert witnesses in their letters of claim, to which defendants have 21 days to respond. This resulted in the topsy-turvy situation of defendants having to decide on experts before they were required to say whether or not they would be contesting the claim. The amendments provide that in such circumstances the two periods will from now on run consecutively.

Finally, experts in industrial diseases may care to note that a further amendment provides that the protocol no longer applies to claims of that kind, whether on the fast track or the multi-track.

More figures

The volume of *Judicial Statistics* that is published each July relates to the previous calendar, rather than financial, year. So that for 1999 spans the coming into force of the Civil Procedure Rules. The data fully confirm the resulting fall in the number of new claims that had been so widely predicted.

Some 245,000 fewer claims were issued in the county courts, a drop of 11% on the previous year, while in the Queen's Bench Division of the High Court there was an even more dramatic fall in new cases of 37%. We will have to wait until next summer, though, to discover whether this reduction in activity is merely temporary or likely to prove permanent.

There are statistics, too, on all sorts of recondite topics. We learn, for example, that, on average, a county court trial lasts 3 hours 37 minutes, while a small claims hearing takes just 1 hour 14 minutes. Incidentally, the new volume also reveals that small claims now account for 87% of all county court cases that proceed to hearing, thanks in part to the raising of the ceiling for such claims from £3,000 to £5,000.

High finance

Although most attention was focused on the Government's plans for funding education and the NHS, the Lord Chancellor's Department (LCD) also benefited from the public spending review announced in July. Its budget for next year was increased by nearly 11%, from £2,378 to £2,635 million, with a similar increase being planned for 2002–03.

Most of the extra money is for the criminal justice departments, with the Crown Prosecution Service alone getting £52 million more in 2001–02. But legal aid also received a boost: an extra £130 million has been set aside for spending on this over the next two financial years, although as reported elsewhere in this issue a big chunk of the increase is earmarked for human rights cases. According to the LCD, the additional money should allow approximately 5% more people to receive legal aid by 2004.

Exactly where these extra beneficiaries will come from is not at all clear, especially as the LCD has since unveiled plans to *restrict* their number by a further tightening of eligibility limits for civil legal aid. Hitherto these have been based primarily on income, and assets such as the client's home only come into the equation if they are worth more than £100,000. Now the LCD is proposing that anyone with more than £3,000 equity in their home should make a contribution to the costs of their case. Effectively, this would mean that no homeowner would ever again be eligible for full civil legal aid regardless of their other circumstances. All in all, it would seem to be a case of the Chancellor giveth and the Lord Chancellor taketh away.

Legal aid budget widened – but eligibility tightened further!

Tribunals under review

It is more than 40 years since the administrative justice system was last overhauled, and in the meantime the number of tribunals has increased from 30 to 90, with another 14 due to come into being shortly. They range from Agricultural Land to Wireless Telegraphy, with many other obscure functions between. Their procedures are diverse, and differently constituted tribunals frequently reach different decisions on similar facts. By common consent, then, the independent review of the system, announced by the Lord Chancellor earlier this year, was long overdue.

The review is being conducted by a retired High Court judge, Sir Andrew Leggatt, and he will be investigating the structure of tribunals, their independence, accessibility and, most significant of all, compatibility with the Human Rights Act 1998. One particular bugbear is the lack of legal aid for those appearing before the much-used tribunals covering employment, social security and pensions. Another is the delay in getting cases heard, which can extend to over a year. Sir Andrew Leggatt's report should make interesting reading when it is published next year.

LCD statistics confirm 11% fall in civil claims

Letters to the Editor

The lead article in our last issue (The witness summons, *Your Witness* 20) provoked a lively response, but unfortunately we have room here to print only one of the letters received.

Mr A E H Roberts, an architect and Director of Byrom Clark Roberts Ltd, writes:

Avoiding the witness summons: a Utopian dream

I wonder what kind of solicitors commission John Lord such that he is in any position to 'do his best to avoid the risk of ever being served with a witness summons' – or is John Lord perhaps one of those rarer solicitors who accept that an expert who is treated with courtesy will do his best to honour any commitment?

My own experience is that probably half my appointments as expert now, particularly in the personal injury field, result in issue of a witness summons in those cases where the matter goes as far as a hearing date. I am usually asked early on what my availability is often over a period of 12 months or more (itself not an inconsiderable task), and will not uncommonly be asked for updates on a regular basis on several occasions, often for new or extended overall periods.

Once a hearing date has been set, a summons is becoming almost the expected thing. To give solicitors their due, I think this is primarily (with my instructing solicitors anyway) a safeguard against a clash of hearings – to which John Lord refers. I have yet to be summonsed as a 'hostile witness', and would certainly hope to avoid that one insofar as it is in my power to do so.

That seems to be the crunch: It just isn't in our gift as experts to avoid being served with a summons or otherwise, and from my experience the service of a summons in no way reflects how the solicitor concerned values your service. I have solicitors who will write me a glowing commendation at the end of a case, but will nonetheless have used a summons to protect my availability on their client's behalf – not really that unreasonable after all.

Where the article did help considerably is in the question of payment. Quite a number of summonses I have received have had only nominal payment attached to them, which is certainly considerably less that the table rates that you showed in the article – more in line I suspect with a witness of fact situation. John Lord's comments are therefore very helpful insofar as I can in future respond with a **polite** request for a proper payment / offer of payment with the summons.

John Lord replies:

I am grateful to Mr Roberts for his comments and for the fresh insight he provides into a procedure that appears to be affecting ever larger numbers of expert witnesses. His letter also affords me the opportunity to correct an impression my article may have given that, as far as expert witnesses are concerned, summonses are mostly used to compel the attendance in court of those who are reluctant to give evidence there.

As Mr Roberts rightly indicates, the usual reason why solicitors arrange for expert witnesses to be summonsed is to establish a prior claim over their services in the event that another case on which they are working has its hearing set for the same date. In many instances, indeed, the arrival of a summons is welcome, because it provides expert witnesses with a valid reason for breaking commitments to other clients, should that become necessary.

Whether it should be considered reasonable for solicitors to do this is an open question. Nowadays, the fact that an expert has been summonsed to appear elsewhere does not prevent the judge in charge of a clashing case insisting that its hearing goes ahead as planned. The end result for the expert would then be one court appearance, not two, and quite possibly one disgruntled client.

I would agree with Mr Roberts that there is nothing that an expert can do to avoid a witness summons if his or her instructing firm has adopted the routine of applying for one whenever it has an expert who is due to testify in court. Until I read his letter, though, I had not suspected that the practice might have become quite as widespread as his experience suggests.

If having expert witnesses summonsed were to become general practice, that is all the more reason, of course, why experts should be aware of their rights in such circumstances. One of them, certainly, is that if the summons is being served on an expert who is willing to attend court, then the solicitor who has had it issued ought to pay the expert at whatever rate for court appearances may have been agreed between them previously. That, at least, is what the Law Society's *Guide to the Professional Conduct of Solicitors* enjoins in its chapter on litigation and advocacy (see commentary to principle 21.11).

In the absence, though, of prior agreement as to payment, summonsed expert witnesses might well find that they are unable to insist on any compensation for 'loss of time' greater than that dictated by the Civil Procedure Rules. As I pointed out in my article, this is based on sums payable to witnesses giving evidence in Crown Court cases, and as far as *expert* witnesses are concerned, that could be a good deal less than they are accustomed to charging.

This brings me to the revelation Mr Roberts makes that quite a number of the summonses he has received had payments attached which were way below the Lord Chancellor's Department's stated minima. In any circumstances that is astonishing, and one wonders how many other solicitors may be trying to take advantage of expert witnesses in the same way.

Factsheet Update

Factsheets 8–12, which deal with various aspects of legal aid, have been comprehensively revised to account for changes made by the Access to Justice Act 2000 and recent case law.

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

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