Your Witness

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CPR drops expert's protocol

I have commented previously on the unhappy situation that arose between the Academy of Experts and the Expert Witness Institute over the two Codes of Guidance for Experts (*Your Witness* 27). Having tried, and failed, to get the Academy and Institute to agree on a single code, the words of the Master of the Rolls, Lord Phillips of Worth Matravers, revealed his disillusion with the entire project.

At that time, I felt that combining the two Codes would be a relatively straightforward task, and so decided to undertake that work for the benefit of the experts in the *Register*. The combined and extended Guidance for Experts document was published in April and has been warmly received by many.

However, given the frustration that the Academy and Institute managed to create, it can come as little surprise that in the latest batch of updates to the Civil Procedure Rules, paragraph 2.6 of the Practice Direction, which reads:

> 'An expert's report should comply with the requirements of any approved expert's protocol.'

has been quietly dropped!

Driving through the media jungle...

Having launched *turn2experts* just over a year ago, now seems a good time to review its progress.

turn2experts is an expert location system designed for the media and PR industries. It is a free service for experts listed in the *UK Register of Expert Witnesses* and offers a valuable route to the desks of journalists and program makers.

Over the year, we have added the key UK media organisations to the list of those who use the service. The big names who have signed up include the BBC, Granada and Carlton – all of whom use the service daily.

Indeed, the BBC, which has included *turn2experts* on it centralised database system known as BBC Research Central, said of the service:

> '... it offers some of the highest quality information of all the sites that we link to.'

... and finding a pothole or two

The one note of caution that has been raised by experts who have been contacted by the media through *turn2experts* is the issue of payment.

This was a topic that the BBC Home Affairs Correspondent, Danny Shaw, touched on in his session at the recent Bond Solon Conference. In his view, experts should not expect to be paid for discussing or commenting on current affairs. But, if the expert was asked to work, for example, as a consultant on a documentary, a fee would normally be negotiated. The rationale behind his view was that experts would simultaneously be gaining exposure and building invaluable relationships with the media which they could use to their own advantage in the future.

Whatever your view on this, the message is clear. If you need to charge a fee for working with the media, get it agreed before spending too much time on the job.

e-wire

The latest addition to our range of services for experts is the *Register e-wire*. This service delivers topical and relevant information to anyone interested in expert witness matters. Sent by e-mail each month, the *e-wire* lets you choose how much detail you receive on a given topic.

By adding e-mail to the ways in which we disseminate information to expert witnesses, we are able to increase the number of experts who benefit from the information flow we provide. And, of course, as a registered expert, we are able to provide you with some exclusive extra detail on selected items.

Draft time ahoy!

This is just to let you know, as if you should need reminding, that January is the month in which we begin preparations for the new edition of the *UK Register of Expert Witnesses*. We will be sending you a draft of your entry for inclusion in the 16th edition in early January for you to check, sign and return. As usual, your co-operation in ensuring that your draft form is checked, authorised and returned to us by the due date will be much appreciated.

If you will be away during the first half of January you may wish to contact us beforehand so we can make arrangements to send your draft ahead of time.

Is the Register worth recommending?

Incidentally, the draft period is a time when we see a marked increase in the number of experts applying to join the *Register*. On investigation, we have discovered that this is often because the applicants have seen the draft paperwork on their colleague's desk.

Naturally, I am always interested in increasing the coverage we provide, and if you feel the *Register* is worthy of recommendation to one of your colleagues, please let us know so that we can send you information and an application form to pass on.

Chris Pamplin

News

Rates for a full day in court (as of 01/09/1999)

Consultant medical practitioner, psychiatrist, pathologist
£288–£415

Fire (assessor) and explosives expert
£232–£332

Forensic scientist (incl. questioned document examiner), surveyor, accountant, engineer, architect, veterinary surgeon, meteorologist
£188–£408

Fingerprint expert
£139–£232

No news is bad news

For some while now we have been pressing the Lord Chancellor's Department (LCD) to say when it will be revising its guidance on the allowances payable to experts who give evidence in court in criminal cases. Until quite recently, this guidance was reissued annually, and generally each revision incorporated modest upward adjustments to the rate bands for the various professions. The current guidance, however, was issued in September 1999, and as a glance at the panel will show, it was by no means generous then. Although we were assured in April this year that increases were being considered, and in June that these were being discussed with the Crown Prosecution Service, we now learn that no changes can be expected before April 2003 at the earliest.

The reason for the delay, we understand, is that in the Government's recent departmental spending review, the LCD did not fare as well as it had hoped. As a result, its own spending plans have had to be revised, and improving the remuneration of witnesses comes way down the Department's list of priorities.

It is worth noting, though, that the court personnel (a.k.a. determining officers) responsible for paying allowances to witnesses may, in exceptional circumstances and entirely at their discretion, pay experts who have provided opinion evidence more than the guidelines suggest. It is up to the individual expert, though, to make the case that he or she deserves to be paid over the odds.

One pertinent reason that might be advanced is that you are the only expert in your field for miles around, with the corollary that the travel allowances payable to any other expert who might have been instructed would have been that much higher. In any case, even if you are not the only expert around, you should always back up your claim with details of your experience and qualifications, just to give the determining officer a 'feel' for your eminence and the inevitability of your selection. It would do no harm, either, to mention the hourly rate you customarily charge for giving oral evidence in civil cases, or to let on that you are aware that the guidance the determining officer may be following is 3 years out of date!

The panel to the left sets out current rate bands for a full day's attendance in court. For further details of allowances that may be payable for preparation time, travel to and from court and, where necessary, overnight accommodation, see Factsheet 11 on our web site.

Lawyers up in arms

Experts are not the only people with good reason to complain about the Government's meanness: mental health lawyers are in the same boat. They have to have been in practice for 6 years, and to have undergone extra training and examinations, before they can receive funding from the Legal Services Commission to represent mentally incapacitated clients. Yet the most they can be paid for doing so is £69 per hour. As one official of the Mental Health Lawyers Association has put it, most of its members would make more money if they retrained as plumbers!

There is, indeed, a growing sense of crisis about legal aid generally. For a while, now, evidence has been mounting up that for most solicitor practices legal aid work is simply not viable at the present rates. The Law Society and the Legal Aid Practitioners Group have been saying as much for some time. And in July, even the Legal Services Commission lent its support to their complaints. Its annual report for the year to April 2002 revealed that approaching half of the 5,000 or so firms it deals with are considering reducing, or stopping altogether, the work they do for the Community Legal Service.

The situation is particularly acute for firms undertaking criminal law work. Fewer and fewer young lawyers are opting to specialise in this area, and many firms with relatively small criminal law departments are closing them down altogether. The effect of such closures will be particularly marked in non-urban areas where, in any case, law firms tend to be few and far between.

Sadly, none of this cuts much ice with the Treasury, whose recent Spending Review allows for an increase in the annual legal aid budget of just £181 million over the next 3 years. The result of such parsimony seems bound to be reduced access to justice for those who can least afford to pay for legal representation out of their own pocket.

CFA chaos

One of the Government's main justifications for removing most claims for damages from the ambit of legal aid was the availability of conditional fee agreements (CFAs) as a means of funding such cases. CFAs are popularly described as 'no win, no fee', although they are much more complicated than that. However, an essential feature of them all is that the solicitor who undertakes to meet the upfront expenditure on a case, and stand the risk of losing the case on liability, is rewarded with a percentage uplift in his or her normal fee, the so-called 'success fee', should the client win.

In many cases, of course, it is the loser's insurer who will have to foot the bill, which is why the whole idea of CFAs is anathema to insurance firms. They particularly resent their use in funding personal injury claims, since over 80% of them succeed. The industry fought a long-drawn out battle to get the courts to limit the amount of the uplift in such cases, and in July last year they achieved partial success in the case of *Callery -v- Gray*. After hearing extensive argument from no less than 15 interest groups, the Court of Appeal

Court of Appeal scuppers CFAs

fixed the amount of the success fee at 20% for those cases that settled before the hearing. Naturally, there were some grumbles about this from solicitors representing claimants, but at least the decision offered both sides greater certainty as to the level of costs that might be recovered.

All that has now been put in disarray by a new decision of the Court of Appeal handed down this September. In *Halloran -v- Delaney*, the Court found for the claimant, but it tagged onto its judgment a couple of paragraphs reappraising the level of success fee in simple claims that are settled before proceedings are issued. This, it said, should be only 5%, depending on the circumstances of the case. Worse still, from the point of view of claimant solicitors, the Court backdated this ruling to 1 August 2001. Not surprisingly, those representing insurers hailed both the new guidance and its backdating as an unexpected victory.

The reality is, of course, that many solicitors will now think twice about signing up to CFAs on even cast-iron personal injury cases, and those that do enter into an agreement are likely to specify two levels of uplift: 5% should the case settle within the protocol period and 100% (the maximum permitted by law) if it does not. That, at least, should encourage insurers to start negotiating sooner, but the real losers will be the potential claimants who cannot now find a solicitor willing to take on their case. The Court of Appeal has, in effect, scuppered a large part of the Government's justification for removing personal injury claims from the scope of legal aid.

More civil courts planned

Another attribute of access to justice is, of course, the physical one of being able to get to court when the need arises. It is axiomatic that no-one should have to forego their right to a legal remedy because they are unable to afford the cost or inconvenience of travel to a court remote from where they live. Yet that has become an increasingly serious problem over the years, as successive Lord Chancellors have presided over a programme of closures designed to concentrate court facilities at regional centres.

It is pleasing to report, then, that the dangers of over-centralisation have at last been recognised. In May, the Court Service announced plans for a 15% expansion in the number of civil courts over, it said, the next 4 years. At the same time, the court system will be reorganised into two tiers, with 93 'Primary Hearing Centres' on one level and 182 'Local Hearing Venues' on the other. The Primary Hearing Centres will be based mainly on existing county and combined courts and will remain the principal venues for civil and family hearings. In rural areas, however, the Service aims to establish a network of 'Local Hearing Venues', housed variously in county courts, in magistrates' courts or in separate premises hired for the purpose. It anticipates that 52 of these local courts would need to sit full-time and the rest part-time.

Spending review puts civil court expansion on hold

Although any expansion of the civil court system should be of benefit to potential litigants, it is not yet clear what effect its reorganisation might have on experts. Nowadays, of course, it is only in multi-track cases that experts are likely to be called to give evidence in court, and the supposition must be that these are the cases most likely to be set down for hearing at primary centres. In that event, the proposed expansion might have the paradoxical effect of requiring experts to travel longer, not shorter, distances in future to give oral evidence.

However, any concern over this is probably premature, because the word is now that the expansion programme has returned to the back-burner, as a result – yes, you've guessed it – of the aforementioned Spending Review. We have been told that the Court Service remains committed to the programme of expansion, but just how soon it will be able to implement it is now uncertain.

Council attacks Treasury policy

There are several references in this issue to the continuing underfunding of the justice system and its baleful effects. However, even we have been startled by the latest development: a press release from the Lord Chancellor's Department attacking Treasury policy.

In fact, the release was issued on behalf of the Civil Justice Council, a body set up by the Lord Chancellor to advise him on the modernisation of the civil justice system. However, the title chosen for the announcement of its views – 'Wrong in Principle and Unfair in Practice' – demonstrates just how strongly they are held by the Council, and possibly the Department as well.

The policy under attack is that of full cost recovery in the civil justice system. The policy dates back to the 1980s when Nigel Lawson was Chancellor of the Exchequer, but it has been embraced and reinforced by the present holder of that office. What is wrong about it is that it ignores the importance of ensuring access to justice as a social and collective benefit for all citizens.

LCD think-tank takes on the Treasury

The Council accepts, of course, that those who use the civil courts in the way of business, e.g. to collect undefended debts, should pay the true costs of doing so. It is right, too, that individuals should pay court fees when they have recourse to the law. But full cost recovery means that they, like the business users, are having to subsidise elements of the court system, such as staff and buildings, that cannot pay their way, and that is – or should be – contrary to public policy.

Would that Mr Gordon Brown saw it that way, but somehow we don't think he will!

Is there property in a witness?

Can the claimant call the defendant's expert witness?

The assertion, 'There is no property in a witness', is usually taken to mean that either party to an action may take a statement from a witness and adduce it in evidence or may call the witness to give evidence in court. To what extent, though, can this apply to an expert witness who has been instructed by just one of the parties? Courts have tackled this issue on a number of occasions recently, and in the process they have redefined the circumstances under which the rule applies to experts. Before we can review these developments, though, it is necessary to summarise the leading case of *Harmony Shipping Co SA -v- Saudi Europe Line Ltd* which came before the Court of Appeal in 1979.

Facts of the case

The plaintiffs were suing for the hire charges on a ship they owned and the defendants had agreed to charter. For their part, the defendants alleged that the charter party was a sham and had only been signed by them to enable the owners to raise a bank loan. To counter this allegation, the owners cited a letter to the captain of the ship instructing him to treat the defendants as its owners and to offer them every assistance. If the letter was authentic, it would have gone a long way to prove the owners' case. The defendants, however, claimed that the letter was a forgery: only carbon copies of it had been produced and they differed one from another.

The owners' solicitors decided to consult a Mr Davis, who was a well-known handwriting expert. He was shown the carbon copies and asked for his opinion. He must have said that they were forgeries, because the solicitors then told him they would not be needing him again. However, a fee was agreed for the opinion Mr Davis had provided, and he gave an undertaking that he would not accept instructions on the matter from anyone else.

A couple of months later, while working on another case, Mr Davis was shown the documents again, this time by the defendant's solicitors. Once more he indicated that they were not genuine. Then something was said to remind him of the circumstances under which he had previously seen the carbon copies, and at that point he declined to be instructed further.

The guilty can't hide evidence behind an expert

When the case came to trial, the defendants subpoenaed Mr Davis to give evidence on their behalf. The plaintiffs objected, claiming that he should not be called because he had already been instructed by them. The judge ruled, however, that the expert was compellable and ought to give the court his opinion on the documents. The plaintiffs appealed.

Judgment

Delivering the lead judgment in the Court of Appeal, Lord Denning said that as far as witnesses of fact were concerned, the law was as plain as can be: there is no property in a witness. Witnesses of fact were compellable and should assist the court with their evidence. The question was whether that rule also applied to expert witnesses.

His Lordship acknowledged that many of the communications that pass between lawyers and experts are protected by legal privilege and can only be revealed in court with the consent of the party concerned. Subject to that qualification, though, it seemed to him that an expert was in the same position as a witness of fact. The court was entitled to have the facts the expert had observed adduced before it and to have the expert's independent opinion on those facts.

Lord Denning gave short shrift to the objection raised on behalf of the owners, that Mr Davis had contracted with them not to accept instructions from anyone else. The undertaking he had given was a statement of his professional practice, not a contract. However, even if it *were* a contract, it would not be enforceable, being contrary to public policy. It was Mr Davis's duty to come to court and give his evidence, and accordingly the appeal must fail.

R -v- King

This decision was followed 3 years later in a criminal appeal that also involved a handwriting expert. The facts of the case are complicated and need not detain us here. The question the Court of Appeal had to decide was whether a particular document sent by the defendant to his solicitors for forwarding to the expert was subject to legal professional privilege.

The prosecution team suspected that the accused might be forging documents to aid his defence. When, therefore, his solicitors requested that some documents in the possession of the Crown be sent to the expert, they wanted to know what other documents had been sent to him for comparison with those they were supplying. Accordingly, they served a subpoena on the expert to produce these other documents in court and give evidence on their authenticity.

In fact, the Crown had struck gold. One of the documents was an invoice which, if it was genuine, would have implicated someone else in the fraud. In the expert's opinion, though, it was a forgery, the signature on it having been traced from another document that could only have come into the accused's hands after he had been committed for trial. That, said the Crown, was the work of a guilty man, and the jury duly convicted him.

On appeal, the Court of Appeal upheld the judge's decision to allow the expert to be called. It reaffirmed that privilege attaches to confidential communications between solicitors and the experts they instruct, but *not* to the documents or chattels on which the expert is asked to base an opinion. If it were otherwise, said Lord Justice Dunn, any forger could hide behind a claim of legal professional privilege by

the simple device of sending all the incriminating documents possessed to his or her solicitors for examination by an expert.

Enter the Human Rights Act

Until 3 years ago, the law on the compellability of expert witnesses remained as stated by Lord Denning in the *Harmony Shipping* case and as confirmed for criminal proceedings in *R -v- King*. Since then, however, there have been a number of criminal cases in which defending counsel have succeeded in preventing the prosecution from calling experts who had been instructed initially for the defence.

In *R -v- Rahman*, the accused's solicitors had instructed a fingerprint expert who gave them his opinion and a report. The expert was not called to give evidence by the defence, but during the trial he sat behind the defendant's barrister and advised him during his cross-examination of the prosecution's witnesses. Observing this, prosecuting counsel applied to the judge for permission to call the expert himself. The defence objected, claiming that both the opinion they had received from him and the advice he was giving in court were privileged. If he were to be called by the prosecution, that privilege would be broken and the defendant exposed to the risk of self-incrimination.

However, defending counsel also argued that if such a tactic were to be allowed, defence solicitors everywhere would be inhibited from instructing experts for fear that they might produce adverse reports. If they did do so, and the prosecution suspected as much, it could then take advantage of the situation to the detriment of the accused, thereby denying a fair trial as envisaged in Articles 5 and 6 of the European Convention on Human Rights (ECHR). The judge agreed and refused leave to call the expert.

Then, in *HM Advocate -v- Wilson*, a child abuse case decided in 2001, a similar result was achieved. The defence had instructed a consultant paediatrician to examine the victim and report. It decided, however, not to call the expert to give evidence on the defendant's behalf. The prosecution became aware of this and applied to call the consultant themselves, to which course the defence strenuously objected. The court held that while in Scottish law the defence had no veto, the defendant was entitled to receive a fair trial in accordance with Article 6 of the ECHR. Leave to call the paediatrician was refused because, in part, there was a risk that confidential matters might be disclosed if he were to be called and the accused's defence prejudiced thereby.

Finally, in March of this year, the Criminal Division of the Court of Appeal decided that in England and Wales, too, an expert's independent opinion might not be admissible in evidence against the wishes of the defendant by whom the expert had been instructed.

In *R -v- Davies*, the defendant was accused of murder and his defence was one of diminished responsibility. His solicitors instructed three psychiatrists to report in that connection. At the trial, however, it was decided to call only two of them, whereupon the prosecution sought to call the other expert itself. The trial judge agreed to this, holding that the psychiatrist's opinion was not privileged because it did not derive from a lawyer to client relationship, as her report had done, but from one of doctor to patient. The defendant was convicted of murder and appealed.

The Court of Appeal took time to consider before overturning the conviction and substituting one of manslaughter by reason of diminished responsibility. Delivering the judgment of the Court, Lord Justice May said that, although there was no property in a witness, the third psychiatrist's opinion *was* privileged. It was privileged because it was based on privileged material, namely conversations between the defendant and the expert in connection with legal proceedings, and it could not be divorced from that material.

Furthermore, the defendant was entitled to be protected from inadvertently incriminating himself. Had he been interviewed by a doctor instructed by the Crown, he would doubtless have been warned by his solicitors that whatever he told the doctor might be used in evidence at his trial. As it was, he had been interviewed by the psychiatrist at the instigation of his own lawyers, and, that being so, he was entitled to assume that anything he said to her would have the same status as a communication with them, i.e. it would be privileged. Accordingly, her evidence should have been excluded at his trial.

Human rights issues have a bearing

Conclusion

It remains the case that no privilege attaches to the 'documents or chattels' on which an expert is asked to base an opinion. However, these recent decisions have demonstrated that, in criminal cases at least, human rights issues have a bearing on whether the same applies to an expert's opinion on other facts he or she may observe. In circumstances where the expert has been instructed by the defence to interview, examine or take blood samples (and comment on these) from the defendant, any opinion expressed by the expert will be privileged against disclosure in court unless the defendant agrees.

It remains to be seen whether the rationale of this change will come to be applied in civil cases. Certainly the right to a fair trial guaranteed under Article 6 of the ECHR applies just as much to civil proceedings as it does to criminal ones. Against this, however, it should be borne in mind that, where the court has directed parties to use a single joint expert (SJE), none of them can claim privilege over the expert's opinion. An SJE's report has to be disclosed to all parties, and so as a witness belongs to them all.

By definition, there is no property in an SJE

The Woolf Reforms 4 years on

LCD relies on hearsay and anecdote...

It is 4 years to the month since Parliament approved the Civil Procedure Rules (CPR) that gave effect to the Woolf reforms. As the Rules came into force barely 5 months later, enough time has now elapsed to consider how far they have succeeded in achieving the aims Lord Woolf ascribed to them. These were, above all, to curb delays in bringing cases to court, to cut the cost of litigation and to make it easier for individuals to enforce their rights.

The importance of the reforms was acknowledged on all sides. In view of this, it is a matter of regret that the Lord Chancellor did not put in place a research programme to monitor their effectiveness. All we have had so far from his Department are two instalments of what it terms a 'continuing evaluation', both of which rely heavily on *ad hoc* surveys conducted by other organisations and anecdotal evidence. Nevertheless, there are some nuggets of hard information to be gleaned from the second report, in particular, which give a fair indication of what has been achieved since the new Rules came into force.

The first of the Lord Chancellor's Department's (LCD) reports, entitled '*Emerging Findings*' and published in April 2001, was avowedly tentative in nature. The second instalment, '*Further Findings*', appeared earlier this autumn and is much more definite in its conclusions. However, it, too, still consists largely of quotations from other sources.

In fact, there has been only one report so far that can claim to be based on original research. It is that of a study commissioned jointly by the Civil Justice Council and the Law Society into the effect pre-action protocols were having on the conduct of litigation. The picture that emerges from this report, '*More Civil Justice?*', makes one regret all the more the lack of thoroughgoing research into the wider effects of the reforms.

LCD's evaluation

In view of the amount of political capital the Lord Chancellor has invested in the project, it is only to be expected that any evaluation of the Woolf reforms published by his Department would be given an up-beat spin. It is no surprise, then, that its second report should attribute to them a further drop in the number of claims issued and a reduction in the time between issue and hearing for those cases going to trial. As we shall see, however, the evidence for this is decidedly equivocal.

... to put on the best spin it can

The report also makes a number of assertions that may well be justified but are even less easy to prove. Thus, in the words of its authors, the evidence 'suggests' that pre-action protocols are working well in promoting greater openness and co-operation between parties, and that the use of single joint experts (SJEs) 'appears' to have worked well in helping to secure the earlier settlement of disputes.

On the downside, though, the report reveals that the average time between issue of proceedings and the hearing of small claims has risen since the new Rules came into force, a change attributed to the raising of the financial ceiling for most kinds of claim destined for this track.

From everyone's point of view, though, the most disappointing conclusion the report reaches is that it is still not possible to say whether the reforms have had any effect on the expense of litigation. We shall come back to this issue later.

Hard facts

One of the best features of the LCD's evaluation is the use it makes of Court Service statistics. These have been collected over many years and provide valuable data on the situation immediately prior to implementation of the CPR and that pertaining since. For present purposes, they are best considered in relation to some of the key features Lord Woolf put forward as characterising the civil justice system and which his recommendations were designed to achieve.

Litigation will be avoided wherever possible

In the county courts, there has been a gentle but steady decline in the number of claims – from around 190,000 a month in the year up to April 1999 to approximately 150,000 in 2001. However, this 20% decrease was due entirely to a fall in claims for debt, personal injury and other forms of negligence, which are precisely the categories of claim the Government excluded from legal aid in its Access to Justice Act 1999. The LCD neglects to mention in its second report that this may have had a more direct effect on the volume of claims than any attributable to the reforms.

Litigation will be less adversarial and more co-operative

The Court Service collects data on the disposal of cases listed for trial. Comparison of these data for fast-track cases with those that would have been allocated to a district judge pre-CPR shows that settlements or withdrawals before the hearing have risen from 50% in the year to June 1999 to 69% in 2001. Over the same period, the proportion of cases that went to full trial fell from 33% to 23%. These changes have been less marked for multi-track cases. But for both tracks the proportion of cases settling at the court door is now 8%, whereas formerly it was double that. This latter improvement implies that there has been a reduction in wasted court time for all involved, including experts.

Wherever possible, expert evidence will be given by one expert only

The LCD's report also makes good use of Court Service data relating to the use of experts. The statistics on cases that proceed to a hearing come from the 'Trial Sampler' county courts are asked

to complete twice a year. The report compares data for cases heard over the period March 1994–September 1997 with those for the year to September 2001. Analysis shows that the percentage of trials involving experts has actually increased from 21% pre-CPR to 33% post-CPR. However, in 15% of cases nowadays it is an SJE that is being used. Before anyone gets too excited about this, it needs to be pointed out that the combined effect of the fall in the number of claims and that of cases proceeding to trial means that, over the same period, the number of expert reports required for county court cases has dropped, possibly by as much as 16%.

According to the Civil Justice Council/ Law Society report, the median cost of first medical reports rose from £190 in 1998 to £280 in 2001

Timescale of litigation will be shorter

As already mentioned, the LCD's report points to a reduction in the average time taken between issue of proceedings and hearing as evidence that the reforms are working. Certainly there has been a reduction. In September 1997, the average interval for county court cases stood at 639 days, whereas 4 years later it was 450 days.

What these statistics do not address, of course, is the time taken over litigation before proceedings are issued, and there is plenty of evidence that where pre-action protocols have been followed it now takes much longer. Before the new Rules came into force, it was not unknown for a writ to be issued without any warning being given or opportunity allowed for negotiation before the court became involved. Post-CPR, the preliminaries prescribed by the personal injury protocol, for example, have been taking at least 15 weeks to complete, and often a lot longer. Indeed, the median time for obtaining first medical reports in such cases is now well over 6 months. Overall, it would seem that the average time from start to finish of a personal injury case has not changed much at all. That, at any rate, was the conclusion reached by the authors of '*More Civil Justice?*'.

Litigation will be less expensive

Alas, the evidence on this is very mixed indeed. As the LCD admits in its second report, it has found it difficult to gather any reliable data on the effects the reforms have had on costs. However, the trends are sufficiently alarming for a former Head of Civil Justice, Lord Justice May, to warn that this is the biggest problem the reforms face.

All the statistics that *are* available would seem to bear this out. The Supreme Court Costs Office keeps a record of bills of costs for High Court cases. Those for the Queen's Bench Division show that whereas the total value of bills submitted in 2001 was no different from that in 1998, the sharp reduction in the number of cases meant that the average value of the bills had increased by no less than 51% in 4 years.

Insurers, too, claim that litigation has become much more expensive, and they blame this on the front-loading of costs resulting from the use of pre-action protocols. Figures produced by one firm indicated that in the 3 years up to 1999, average costs it paid had been increasing by around 3% per year, but from 1999 to 2001 they went up 12% per year.

Number of expert reports down by some 16%

A major factor in the increase in costs is the annual review of solicitors' hourly rates, which in recent years has outstripped inflation. Another factor, it seems, may be the cost of obtaining expert evidence. According to the Civil Justice Council/Law Society report mentioned previously, the median cost of first medical reports rose from £190 in 1998 to £280 in 2001.

It is because of these trends that the Civil Justice Council has established a working group to consider the options and data required for introducing a predictable costs regime for fast-track cases. The working group is focusing on personal injury claims under £15,000 and is due to report next month.

Conclusion

How far, then, can it be said that Lord Woolf's aims have been met in the 3½ years since his recommendations took effect? Almost everyone agrees that there have been worthwhile gains. The new Rules have encouraged parties to define the issues at an earlier stage and to co-operate more in seeking a settlement of their dispute. There is a greater awareness, too, of the need to use genuinely impartial experts, and a large measure of satisfaction with the quality of SJEs where they have been used.

On the other hand, the system of case management, which Lord Woolf hoped would ensure that litigation became more speedy and affordable, has proved excessively bureaucratic, and after 4 years it still lacks the IT resources it needs to function efficiently. Furthermore, many solicitors complain that judges are not applying the Rules consistently or not imposing sanctions when Rules are broken.

What, then, of the three overriding objectives of the reforms that were mentioned at the beginning of this article, namely curbing delays in bringing cases to court, cutting the cost of litigation and making it easier for individuals to enforce their rights? Well, it has to be said that while the first may have been achieved, the second has almost certainly not been, and it is anyone's guess about the third. Now that he is Lord Chief Justice, Lord Woolf may well be wondering whether, in the short term at least, the proposed reform of the criminal justice system will have any better chance of success.

Will criminal reform fair better than civil reform?

A warning out of Ireland

Irish jurisdication is not the same as the UK

As all experts should be aware, the relationship between expert witness and instructing solicitor is a contractual one, whether or not a contract exists in writing. It follows from this that if the fee the expert is to be paid (or, more often, the basis on which it is to be calculated) and the timing of its payment have been agreed, then the solicitor is *personally* responsible for paying that fee within that time span. This is so, even if, by the time the expert's fee falls due, the solicitor has not been paid by the client or whoever else is funding the litigation, and may not eventually be reimbursed for the expert's fee in full.

Even where an expert fails to stipulate a fee or how soon payment of it is required, the solicitor should still pay the expert's bill in full (subject, of course, to it being reasonable for the amount of work done) and within an acceptable time.

In either of these circumstances, the only way in which a solicitor can evade his or her contractual obligations is by expressly disclaiming responsibility for meeting them *before* giving the expert any instructions. It will then be for the expert to decide whether instruction on a different basis is acceptable, e.g. to await payment until after the solicitor has been put in funds by the client or to agree to be paid no more than the Legal Services Commission or court allows on assessment of the costs of the case.

This much applies not only in England and Wales, but in Scotland as well. Not so, though, in the Republic of Ireland, as a reader of ours, Dr B, has found to his considerable cost.

The case

The patient, Mrs A, suffered from a progressive kidney disorder. While pregnant, she was admitted to a hospital in Cork, where she suffered seizures and other difficulties. The question arose whether the baby should have been delivered sooner to lessen the strain on the mother's kidneys. Solicitors acting for Mrs A instructed several specialists, including Dr B, to see if a case existed for suing the hospital for negligence.

Dr B submitted his report, which was not supportive of Mrs A's allegations, in July last year, and he enclosed with it the invoice for his fee. When, after several months, he had heard nothing further, he chased the solicitors for payment. They responded by telling him that they would write to their client on his behalf!

Not getting any satisfaction from the solicitors, Dr B took the matter up with the Law Society of Ireland, who replied to the effect that the situation in the Republic was almost the reverse of that which obtains in the UK. In Ireland, it is the case that *unless* a solicitor gives a personal undertaking to pay an expert's fees, the responsibility for their payment lies with the client. Nevertheless, the Society offered to take the matter up with the firm concerned.

These further enquiries revealed that the firm was no longer pursuing Mrs A's case, though the decision to discontinue had been taken after a number of medical reports had been obtained. It further emerged that the firm had agreed with Mrs A that she could pay off all the fees due, including their own, at the meagre rate of €6.35 a week. The solicitors repeated the assurance they had already given to Dr B, that they would pay him in full as soon as they had collected sufficient funds. Clearly, though, it will be years before sufficient money will have accumulated for that to happen.

Our advice

Although the Irish jurisdiction resembles that of England and Wales in many respects, it is 80 years now since Partition, and numerous differences in law and practice have arisen in the meantime. It is also true that because the population of the Republic is so much smaller than that of Great Britain, solicitors sometimes have difficulty in finding experts locally whom they may instruct. When that happens, they naturally direct their search across the Irish Sea.

Be warned, though, by Dr B's experience. If a solicitor from the Republic should seek to instruct you, insist that he or she accepts *in writing* personal responsibility for paying your fee. Otherwise, you may find that, like our correspondent, you will have to wait a very long time for the cheque.

Web site update and photo call

When it comes to putting experts' details in front of litigation lawyers, our philosophy is to use every means available and, importantly, to play to the strengths of each. The *Register* web site (http://www.jspubs.com) is just one of the methods we employ, and we have seen some very positive growth in its use over the last 12 months.

Since we launched the redesigned site last December, we have seen (on average) every expert in the *Register* 'found' more than 420 times – an increase of 62% on 2001 levels, and a 65% increase in the total number of searches to a record 27,861 p.a. And these figures do not include the searches conducted on the various legal sites that integrate the *Register* search engine into their own content.

The web site continues to develop, and in the coming year we will be adding a system that will allow each expert to see statistics for his or her own entry and to compare them with the average for the *Register* as a whole.

And finally, don't forget that we are now able to show your profile sheet and photograph on your web entry, for free of course. Just send them to us by post or e-mail, and we will do the rest.

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