

Acting as an SJE – the hard facts

It is now almost 2 years since the Civil Procedure Rules 1998 came into force, and Lord Woolf's brain-child, the single joint expert (SJE), became a reality. Of course, it had always been possible for parties to agree that expert evidence on an issue in their case could be presented by just one expert witness, but outside of the family courts this rarely happened. Under the new Rules, parties are required to consider appointing an SJE, and courts have the power to insist on them doing so.

It is common knowledge that litigation lawyers viewed Lord Woolf's initial recommendations on this score, together with those he made for the disclosure of experts' instructions, with the utmost dismay. In the transition from Report to Statute Book, though, several of the provisions that most alarmed lawyers were watered down. By the time the Rules were implemented, the legal profession was reconciled to the idea of using SJE's whenever possible. The snag, of course, is that what might seem possible to the court may appear wholly unattractive to the parties – or, at any rate, to one of them.

During the first year or so of the new Rules a 'honeymoon period' prevailed. Senior judges congratulated practitioners on their readiness to embrace the concept of the SJE. Lord Woolf himself expressed pleasure at the extent to which solicitors were coming to case management conferences armed with agreed proposals for the appointment of SJE's. Other commentators made sweeping statements to the effect that the use of SJE's was already general. Yet the evidence for all this was purely anecdotal – no-one was seemingly able to provide hard figures to back such assertions. So last month we decided to obtain some data ourselves, by asking experts about their experiences of being instructed in this new role.

The survey

Since time was of the essence if we were to report our findings in this issue of *Your Witness*, we elected to conduct the survey by e-mail. Of the 3,800 expert witnesses on our database, 2,392 could be contacted in this way. There is, however, a difficulty with e-mailed questionnaires: they do not work well if you fill them with questions requiring precise numerical answers or detailed research. Accordingly, all but three of the 15 questions posed invited either a yes/no response or a frequency score on the scale of 1–10.

In the week that followed dispatch of the e-mail, we received 228 replies, of which eight had to be discarded because they were either corrupted in transmission or internally inconsistent.

How widespread is SJE work?

First we asked our respondents to state how many times they had been instructed as an SJE *prior* to proceedings being issued (e.g. in accordance with a pre-action protocol) and how often *after* proceedings had been issued (i.e. as a result of a court order). Moreover, we asked experts to provide this information for each of the years 1999 and 2000.

It was immediately apparent that most of those who replied had yet to experience any great surge of SJE work. Indeed, 52 of them (24%) had not been instructed in that capacity in either of the years. Several experts expressed surprise at this, and one put it down to lawyers still preferring to use their own 'tame' experts. He added: 'Similarly, judges seem reluctant to insist upon SJE's, even in my field of topographic surveying and mapping where one would have thought that the expert opinion of Ordnance Survey would be regarded as independent and authoritative.'

Is there more SJE work?

Whether or not there is still reluctance to use SJE's, it is equally clear from our survey that the incidence of instruction increased sharply from 1999 to 2000. In the first year, 98 respondents were instructed as SJE's in a total of 575 cases (on average 5.9 cases each), whereas in the second year, 162 respondents were instructed in a total of 1,908 cases (on average 11.8 cases each).

While this, perhaps, is only to be expected as more proceedings came to be issued under the new Rules, it is interesting to note that the proportion of instructions given as a result of a court order also increased over the 2 years. In 1999 it was 23% of the total, but in the following year it was 27% of the total. If that trend was to be maintained, it seems likely that more and more SJE's will find themselves having to meet tight deadlines for the completion of their work.

Detailed analysis

For the remainder of this report we summarise the replies received from a more limited group of our e-mail correspondents. This is because, as indicated earlier, the great majority of those who

**Our findings based
on over 2,000
SJE instructions**

**SJE instructions
doubled between
1999 and 2000**

answered our appeal for information had had relatively little experience of working as an SJE, and this made their answers to our further questions less meaningful.

For most of what follows we have chosen to rely on the answers provided by the 60 of our respondents who had been instructed as an SJE at least 10 times during the previous 2 years. In case this should appear too restrictive, it is worth pointing out that the total number of cases in which these 60 individuals had acted as SJE's came to 2,110 – 85% of the total for all those who replied to our e-mail. It seems reasonable, then, to base any further analysis on the answers of these 60 'experienced SJE's', and safer to do so than to take into account answers from experts who, in many instances, had acted as an SJE only once or twice.

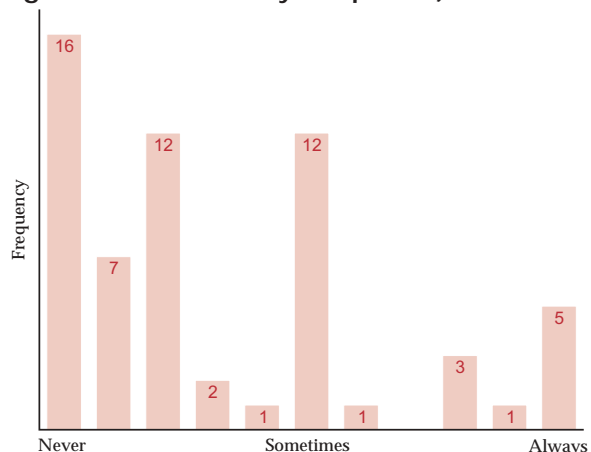
Effect of pre-action protocols

Until October 2000, the only pre-action protocols that had a binding effect were those for personal injury and clinical negligence actions. It is no doubt as a result of this that the 30 experts in our 'experienced' subset who were medically qualified accounted for the lion's share of SJE instructions given prior to commencement of proceedings (84%), as Table 1 shows. As can be seen from Table 2, the majority of SJE instructions received by the non-medical experts in the 'experienced' subset (62%) were given *after* proceedings had been issued.

With two more protocols now in force and several more in the offing, it will be interesting to see to what extent SJE's in other professions come to be instructed sooner.

Expert adviser

We asked our respondents to tell us on how many occasions during the past 2 years they had been instructed as an SJE after previously advising one of the parties on aspects of the case. The received wisdom is that this is unlikely to happen very often. But to our surprise, we found that it had occurred in 144 of the 2,110 cases handled by the experienced SJE's, or 7% of the



overall total. Furthermore, in 80 of these cases, the experts concerned were from professions other than medicine, which means that the rate of incidence for non-medical cases was significantly higher – at 56% compared with 44%.

Separate instructions

The Draft Code of Guidance for Experts recommends that, wherever possible, parties should agree beforehand any instructions that are to be given jointly. We were concerned to discover how often that did *not* happen (Figure 1).

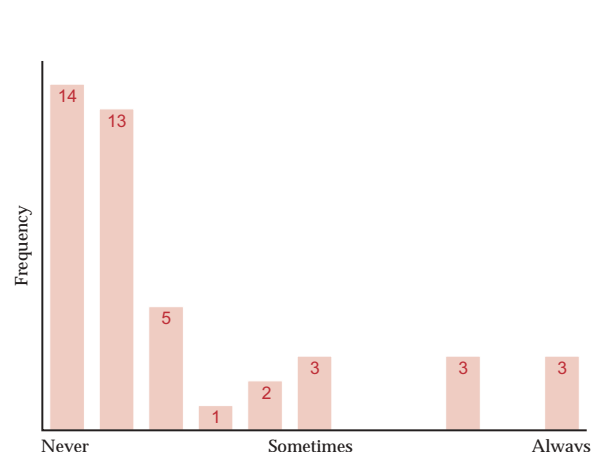
Table 1. Effect of pre-action protocols on the timing of an instruction for medical and non-medical disciplines

	Medical	Non-medical	Total
Pre-action	1,352	251	1,603
Post-action	130	404	507
Total	1,455	655	2,110

Only nine out of our subset of experienced SJE's reported that they frequently received separate instructions, while for 23 of them that scarcely, if ever, happened. Of the 44 to whom it had happened at least once in the past 2 years, 30 said that they had had little or no difficulty reconciling the separate instructions received (Figure 2), but 31 experts reported that it had resulted in them having to obtain supplementary instructions.

The main disadvantage of parties giving their instructions separately is that it tends to delay the start of work. That, at least, was the experience of 32 of the 44 experts who had been instructed in this way, and nine of them complained of being frequently delayed in this manner.

The effect of delay will be most serious in cases where the court has ordered the SJE's appointment, because – as one respondent explained – it uses up the time the court allows for completing the report, with the result that the



Most SJE work is being done by medics

Separate instructions can be a nightmare

SJE then has to work to an unrealistically short time scale. For experts in this situation it would seem that the sooner agreed instructions for SJE becomes the norm, the better.

Disclosure

One of the most frequently reported difficulties encountered by SJE is reluctance on the part of instructing solicitors to release all the information the SJE needs to carry out the assignment. Of our subset of 60 experienced SJE, 15 said that this had happened to them. One expert thought that sometimes 'both parties know that there is more information available, but they seem to have agreed that "If you don't tell him that, we won't tell him this."'

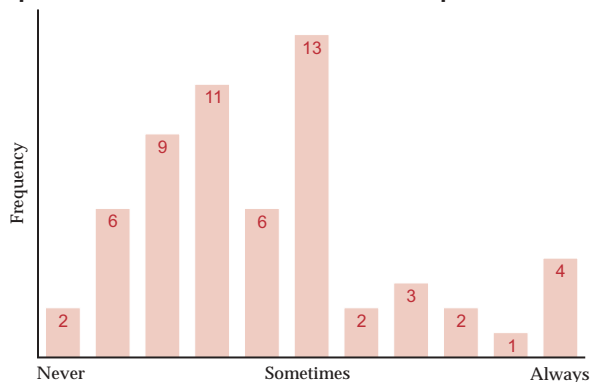
If SJE suspect that a party is holding back information, they might care to adopt the practice of yet another of our correspondents. He wrote: 'When I suspect that relevant information is not being disclosed, I write out a set of questions to be answered by one or other side. If I get no response, then it is obvious what is being withheld and I let the solicitors fight it out. I only prepare a report for the court when I am satisfied that I have all the relevant information to hand or when I have agreed with both sides' solicitors that I am to write it without the further information I have requested. That way things can be moved forward and I don't get directly involved in the subsequent legal wrangling about disclosure!'

In answer to another question on disclosure, 17 of the experienced SJE confessed to being uncertain at times whether they might reveal to one party information imparted to them by another. This suggests that there is a need for SJE to be given clearer guidance on that issue.

Written questions

Under the new Rules, parties are entitled to put written questions to expert witnesses seeking clarification of the reports they have written. For SJE, this can mean fielding questions from *both* their instructing parties. A further complication is that a party may use the opportunity to browbeat the SJE into adopting a position more favourable to its case. One correspondent, an

Figure 3. When acting as an SJE, how often have the parties exercised their right to put questions in clarification of the report?



orthopaedic surgeon, identified insurance companies as being more likely to ask questions designed to alter an SJE's opinion or confuse the situation. He acknowledged, though, that they were often quicker to pay!

Of those of our respondents who had acted as SJE at some time during the past 2 years, 80% had received questions on their reports, although for most it had happened in only a minority of cases. Of our subset of 60 experienced SJE, 39 had not found the questions to be excessive. However, the experience of nine others was quite the opposite (Figure 3).

While for the majority of respondents the most questions they had been asked did not reach double figures, a few were less lucky. One surveyor had had a total of 54 questions put to him about one of his reports, an occupational therapist had notched up 76 questions on one of hers, and a medical doctor had on one occasion been faced with no fewer than 80. In view of this, it is perhaps reassuring that only 1 in 5 of the respondents most experienced in SJE work discerned any trend towards longer lists of questions.

Conferences with counsel

Whereas party-appointed experts regularly take part in conferences with counsel, it is generally thought to be inappropriate for SJE to do so – unless, that is, lawyers representing all their instructing parties are present. It comes as no surprise, then, to find that only 20 of our subset of 60 experienced SJE had ever been involved in such a conference while acting as an SJE, and, if it occurred, it was almost always with the lawyers present.

In this connection it is worth recording that several respondents found the role of SJE to be a lonely one, especially if they are required to attend court. As one of them wrote: 'The isolation leaves one totally out in the cold on the progress of the case. Is a settlement being discussed? Is one about to be released, etc.?'

Requests for directions

While all experts are entitled to seek directions from the court to assist them in carrying out their function, it is difficult to envisage many party-appointed experts finding it necessary, or even desirable, to do so. It might be thought, though, that SJE – and especially, perhaps, those whose appointment had been ordered by the court – would be more likely to need the court's help to resolve difficulties arising from their 'piggy-in-the-middle' role. It says much, perhaps, for the diplomatic skills of our subset of 60 experienced SJE that only four of them had had to use this facility in the past 2 years.

Shadowing

Another of the spectres raised by litigation lawyers was that if courts were to insist on the use of SJE, it would lead to parties appointing

**Disclosure issues
can also cause
problems**

**Shadowing not
much in evidence**



their own experts to 'shadow' the SJE. The end result would be more expense, not less.

Our survey provides no evidence that this is happening to any great extent. Of our subset of 60 experienced SJE's, 36 were not aware that they had ever been shadowed in this way; for only three experts – an engineer, a medical doctor and a surveyor – had it been a common experience.

Similarly, to the question, 'Have you yourself been instructed to "shadow" an SJE?', 40 replied that they had not been, and only four indicated that it had happened to them at all regularly.

As a footnote on this topic, another respondent reported that on one occasion when he had been 'shadowing' an SJE, he was instructed to meet with the expert who was doing the same for the other party, in order to resolve differences between their respective positions. A bizarre experience, indeed!

Payment problems

Rule 35.8 lays down that, unless the court directs otherwise, parties instructing an SJE are jointly and severally responsible for the payment of that expert's fees and expenses. However, neither the Practice Direction that accompanies Part 35 nor the Draft Code of Guidance for Experts has anything further to say on the procedure to be adopted for paying the SJE. Should one of the instructing parties be undertaking that responsibility on behalf of all of them, or is the expert to invoice each party separately for equal shares of the overall sum?

To judge from the replies of our subset of 60 experienced SJE's, the latter is the preferred option of most litigation lawyers. In all, 20 of the experienced SJE's reported that they were invariably asked to invoice the parties separately; a further 15 said that this happened in at least half the cases for which they acted as an SJE.

In these circumstances, it is hardly surprising that SJE's experience just the same difficulties as party-appointed experts in securing payment of their fees and expenses. They may, indeed, find themselves in an even worse situation, because solicitors for losing parties could well be less inclined to pay up if they had not wished to see the expert appointed in the first place.

This is borne out by further replies from the 35 experienced experts who had been asked in the majority of their SJE cases to invoice the parties separately. Of these, 30 experts reported that in at least half of such cases they had subsequently encountered difficulties in extracting payment from one of the parties. Indeed, for 11 experts that was invariably their experience.

One might be tempted to deduce from this that the sooner experts make settlement of their invoices by just one of the instructing parties a condition of accepting appointment as an SJE, the better it will be for them. The experience of our respondents, however, suggests that such an agreement may go only some way towards solving the problem. Of our subset of 60 experienced SJE's, 20 told us that they almost always arranged to be paid in that way, but nine of these experts still reported difficulties in securing payment in half or more of their SJE cases. Having one of the parties settle your bill is still no guarantee that you will be paid promptly!

Conclusion

None of us at J S Publications imagines that a survey such as this can supply ready answers to the problems that face SJE's in performing their challenging role. We hope, however, that the information presented here will be of help to expert witnesses who may be about to undertake an SJE assignment for the first time, and also that it may highlight some issues worthy of further research. That task is one we hope to return to before long.