

# Factsheet 1: Civil Litigation and the Expert Witness

Last updated: April 2011

In all developed systems of law the evidence of expert witnesses can be crucial to the outcome of a dispute. Nowhere is this more so than in the United Kingdom, where expert evidence has been adduced in court cases since at least the 15th century. Nowadays it may be required in both civil and criminal proceedings, as well as in arbitrations, before specialist tribunals, and for public or parliamentary inquiries.

Each of these bodies will have its own rules of procedure, and in civil and criminal proceedings there will be other differences depending on the jurisdiction in which they are taking place. For expert witnesses, though, two distinctions are of particular importance.

## Adversarial versus inquisitorial

Over the last 100 years or so proceedings in the UK courts have generally been conducted on an adversarial basis. Each side presents its own interpretation of the facts and in cross-examination challenges that of the other. It is for the judge or jury to decide between them on the basis of the evidence heard. The judge (but not the jury) may ask questions of the witnesses, and the judge also rules on procedural matters. However, it has been the parties that hitherto have ultimately controlled the pace and conduct of the case. The same is also broadly true of arbitrations.

In coroners' courts, however, and with most kinds of public inquiry, the proceedings are of an inquisitorial nature. Here the coroner/inspector:

- takes an active role in unearthing the facts
- (not counsel) cross-examines the witnesses
- can use his powers to adjourn the case while more evidence is sought.

## Burden of proof

In criminal cases, with very few exceptions, it is for the prosecution to establish its case beyond all reasonable doubt. In civil cases, on the other hand, a less stringent test is applied, and to succeed it is only necessary for the claimant to prove his or her case on the balance of probabilities. This distinction has a marked effect on the role played by expert witnesses in the proceedings.

In criminal cases an expert giving evidence for the prosecution must substantiate it fully, while one appearing for the defence need only cast reasonable doubt on the prosecution case for his or her evidence to secure an acquittal.

In civil cases the experts for the two sides are under the same obligation to the court – to be truthful as to fact, thorough in technical reasoning, honest as to opinion and complete in their coverage of relevant matters. Quite legitimately, too, they will owe it to their respective clients to highlight those aspects of their evidence which are favourable to the client's case. Furthermore, to ensure that neither party is disadvantaged by the resources of the other, procedural rules require that expert reports are exchanged before trial of the action. Finally, the court has the power to order that the experts from both sides should meet with a view to narrowing the technical issues that are in dispute between the parties.

## Need for reform

Over the past 20 years or so there has been mounting frustration with the delays and expense involved in civil litigation. Many commentators felt that because of the delays and costs the adversarial system itself had run into the sand.

All too often the costs incurred were wholly disproportionate to the difficulty of the issue and the amount of money at stake.

In 1994 a senior Lord Justice of Appeal, Lord Woolf, was appointed to conduct an inquiry into this situation, and in the course of two reports he advocated what amounts to a major change of culture in the conduct of civil litigation. Lord Woolf concluded that parties to disputes need to be more open with one another about the strength of the case they have, and that they should be encouraged to co-operate more in bringing about a settlement. To this end he recommended a whole raft of changes, the main effect of which was to take away from litigants (and, more especially, their lawyers) responsibility for the conduct and pace of litigation and to vest it in the court. With the implementation of these changes in April 1999, the judge moved centre stage for most of the action, instead of appearing only in its final scene.

One of the reasons for the reforms was, undoubtedly, aimed at reducing costs, both to the litigant and to the Court Service. It is perhaps no coincidence that this coincided with the virtual demise of the civil legal aid system. By 2006 Lord Justice Brooke reported that the number of civil claims in England and Wales had fallen 20% from pre-Woolf levels (although the number of debt claims had increased). The retiring Lord Justice Brooke said that, in his view, the reforms had been successful but the strategy for funding access to civil justice had not.

## Civil court system

In England and Wales magistrates' courts have jurisdiction in licensing matters and certain areas of family law. All other civil litigation is conducted in county courts and the high court. Actions may be brought in either of these courts, the choice of venue being determined partly by the amount of money at stake.

There is no longer any financial limit to claims that can be brought in the county court (save for some specified types of case), and so litigants will often have a choice as to which jurisdiction proceedings are commenced in. Claims for up to £25,000 may be heard by a district judge, and those involving a greater amount will usually be heard by a circuit judge. The high court will, however, be reserved for those cases that have a high monetary value or that involve difficult or important questions of law.

In any case, because there is no limit to the amount of damages that may be awarded by county courts, much larger claims are often brought there. In 2007 a consultation was begun to look at the possibility of abolishing the distinction between the county court and the high court altogether.

## EXPERT SUPPORT SERVICES FROM THE UK REGISTER OF EXPERT WITNESSES

Until 1999, different rules governed procedure in county courts and the high court, but these have now been replaced by a unified set applicable to all but the most specialist jurisdictions. The Civil Procedure Rules (1999)<sup>1</sup> implement many of the changes advocated by Lord Woolf, and in particular the assumption by judges of a case management role.

Under these rules the procedural judge's first task is to allocate the case to one of three 'tracks'. Claims for less than £5,000 are generally dealt with on the small claims track, though for personal injury and housing disrepair case there is a lower ceiling of £1,000. There was an unsuccessful attempt to raise these limits in July 2007 and a renewed attempt was started in March 2011 with the publication of a new consultation suggesting the £5,000 limit should be raised to £15,000.

Claims for more than these amounts are allocated to either the 'fast track' or the 'multi-track', depending on whether:

- the amount involved exceeds £25,000
- the hearing is likely to take more than a day or
- the case raises issues of unusual complexity.

It is at the allocation stage, too, that the procedural judge will decide whether to permit the parties to adduce expert evidence. The rules provide that 'expert evidence shall be restricted to that which is reasonably required to resolve the proceedings', and there is a presumption that it will be provided, wherever possible, by a single expert jointly appointed by the parties.

Statistics relating to the use of single joint experts (SJs) have levelled off since their dramatic rise between 1999 and 2001 (a jump from 3 to 12 instructions a year) brought on by the Woolf reforms. Results from our 2009 expert witness survey (Factsheet 62) show that in 2009 66% of experts had been instructed as SJs, and on average each expert received 15 such instructions in the year.

The more limited procedure of the fast track is designed not just to speed up litigation but to cut its cost. Fast-track cases progress according to a strict timetable, which should ensure that they are brought to trial within 30 weeks of allocation. There are limitations, too, as to the kinds of document parties may be required to disclose and the amount of oral evidence they may call from witnesses of fact. Furthermore, expert evidence is limited to written reports – unless, that is, the court directs otherwise. There is a presumption, indeed, that the hearing will take up no more than a day of the court's time.

These constraints do not apply to multi-track cases, and for them procedural judges can set timetables that reflect their value or complexity and take greater account of the need of the parties to prepare and argue their cases thoroughly. Indeed, the judge will often meet with the parties' lawyers to settle the timetable and procedures to be adopted. Thereafter, the judge is expected to monitor progress to help ensure that costs are kept within bounds and there is no loss of momentum in bringing the action to trial. Once a multi-track case has reached court, however, the procedure reverts to that with which we have grown familiar over the years. In particular, it affords the only real likelihood of expert witnesses having to undergo cross-examination on their evidence.

There are more than 200 county courts in England and Wales, of which at least one in each court circuit or division is classified as a 'civil trial centre'. The rest are termed 'feeder courts' because they feed work to the centres. Cases that commence in a feeder court and there get allocated to the multi-track will generally be transferred to a civil trial centre. The great majority of fast-track cases, on the other hand, are heard in the second-tier feeder courts.

For each civil trial centre there is a 'designated civil judge' who has overall charge of the administration of justice in that court and in those that feed cases to it. He or she also hears appeals from the decisions of district judges in those courts.

In 1974 only 8% of cases were dealt with by the small claims procedure. Key findings in *Judicial and Court Statistics 2008* include:

- The total number of civil cases started in 2008 was 2,064,000, an increase of 3% compared with 2007.
- There were 20,000 trials (a 9% rise on 2007) and 47,000 small claims hearings (a 13% decrease on 2007).
- Trials took place on average 48 weeks following issue (down from 49 weeks in 2006), while small claim hearings took place 29 weeks following issue (up from 27 weeks in 2007).
- Around 41% of cases allocated to track reached a trial or small claim hearing in 2008; most were settled or withdrawn.
- In all, there were 66,000 trials and small claim hearings, 7% lower than in 2007. This comprised 20,000 fast and multi-track trials and 47,000 small claim hearings.

### The High Court

As we have seen, cases commenced in the High Court will be those that are the most complex, substantial or important that need to be fully argued before a senior judge. The court is organised into three divisions:

- Chancery
- Family
- Queen's Bench.

The Chancery Division tries property cases, including those involving intellectual property, mortgages, trusts, insolvency, probate and company law. The Family Division is, as its name implies, concerned with matrimonial disputes, wardship, adoption and Children Act matters. Finally, the Queen's Bench Division deals with major personal injury cases, breach of contract, negligence, judicial review and commercial disputes of all kinds.

Within this broad framework there are a number of specialist courts with jurisdiction in particular areas, viz. the Admiralty Court, the Commercial Courts, the Patents Court and, most significantly perhaps for expert witnesses, the Technology and Construction Court.

### The Supreme Court

Sitting above the High Court is the Supreme Court. As well as being the final court of appeal, the Supreme Court plays an important role in the development of United Kingdom law. As an appeal court, the Supreme Court cannot consider a case unless a relevant order has been made in a lower court.

The Supreme Court is the final court of appeal for all UK civil cases, and criminal cases from England, Wales and

Northern Ireland. It hears appeals on arguable points of law of general public importance, concentrates on cases of the greatest public and constitutional importance and maintains and develops the role of the highest court in the UK as a leader in the common law world

The Supreme Court hears appeals from the following courts in each jurisdiction:

**England and Wales**

- The Court of Appeal, Civil Division

- The Court of Appeal, Criminal Division
- (in some limited cases) the High Court

**Scotland**

- The Court of Session

**Northern Ireland**

- The Court of Appeal in Northern Ireland
- (in some limited cases) the High Court

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## **Stages in civil litigation**

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Strictly speaking, a civil action only begins when the claim is filed with the court, but litigation may have been contemplated at a much earlier stage. In any event, the claimant's legal advisers will need to do much work before the claim form goes in, and often this will involve instructing experts to advise on the strengths and weaknesses of the client's case.

### **Preliminary report**

Experts instructed at this early stage will generally be asked to provide a preliminary report for the use solely of the client and his or her legal advisers. Opinions expressed in such a report may well determine whether or not the case proceeds. For that reason the expert should base it on as thorough an assessment of the available evidence as he or she is then capable and state his or her views as fully and frankly as possible. If the expert does not, he or she may be open to suit for professional negligence in respect of the advice deemed to have been given<sup>3</sup>

It may be that this is as far as the dispute gets taken. However, if it is decided to proceed with the case, the action will thereafter progress through certain well-defined stages.

### **Pre-action protocols**

Hitherto, all that lawyers had to do before taking a case to court was to send a 'letter before action' notifying the defendant that a claim was about to be made. It was not necessary to disclose (say) the medical report on which the claimant would be relying, to indicate the amount of damages being sought, or to offer to negotiate – although in many instances, of course, that may well have been done. Under the Woolf reforms, all this has changed.

Even with their powers, judges can only hope to exercise control over the conduct of a case once proceedings have been issued. Yet one of the principal aims of the reforms is to encourage a greater degree of co-operation between parties in the hope of enabling them to settle their disputes *without* recourse to litigation. To achieve this objective, as well as to ensure that the cases which do come to court are well prepared, would-be litigants are expected to observe any 'pre-action protocols' that apply to their dispute.

Pre-action protocols<sup>4</sup> require claimants to complete many more steps before they issue proceedings. Their initial 'letter of claim' must now provide a clear summary of the facts on which the claim is based – sufficient, at any rate, to enable the defendants to commence their own investigations and for the defendants' insurers to assess the extent of their risk. The defendants/insurers then have 3 months in which to accept or deny liability. If liability is denied, or if the defendants admit it but allege contributory negligence on the part of the claimant, the parties must then supply each other with copies of all documents in their possession that are relevant to the issues in dispute and exchange any statements they may have obtained from witnesses. On the basis of the reports they obtain, as well as the documents disclosed previously, the

parties are then expected to explore the possibility of a negotiated settlement. Only if this fails should the matter be taken to court.

Given the importance of the concept and its general applicability, one might have thought that those responsible for implementing Lord Woolf's recommendations would have wanted to devise a pre-action protocol to cover all civil cases. That, however, was not the approach the authorities chose to take. They decided, instead, that it would be more appropriate to have different protocols for different categories of litigation. In the first flush of enthusiasm for the idea, no fewer than 23 working parties were established to devise them.

It is largely as a result of this piecemeal approach that only two protocols had been approved by the time the Civil Procedure Rules came into force in April 1999, and that only four more had been brought into use by the end of 2002. By then, a further nine had reached the consultation stage, but of these nine only four have been adopted. This makes a total of ten in force by April 2010. At the current rate of progress it is anyone's guess how soon protocols will have been developed for all forms of civil action.

The Lord Chancellor's Department (LCD; now the Ministry of Justice, MoJ) shelved the idea of creating a general pre-action protocol following the responses to its consultation paper in 2002. According to the LCD, the responses highlighted the difficulties in producing a protocol capable of being applied to all types of dispute. It was acknowledged that there was a need to avoid a proliferation of protocols, but the report stated that it was equally clear that the proposed draft would be too general and would be likely to lead to confusion and unnecessary delay. Instead, the LCD indicated its intention to explore how to build on existing provisions within the Civil Procedure Rules.

There is now, then, a Practice Direction on Pre-action Conduct defining the principles governing, amongst other things, the conduct of the parties in cases *not* subject to a pre-action protocol. Its aims include the encouragement of information exchange between the parties and the use of alternative forms of dispute resolution to settle claims.

### **Expert witnesses**

One of the ways in which parties are now expected to co-operate in the initial stages of litigation is over the appointment of expert witnesses. With fast-track cases, in particular, since no allowance is now made for cross-

examining experts in court, it is all the more desirable that parties should agree to appoint an expert jointly when they can.

It follows that, even where there is no pre-action protocol requiring it, a solicitor will be wary of instructing an expert to write a report for use in court (as distinct, that is, from one for his or her own information) until the solicitors for the other side have been consulted as to whether they would be willing to make it a joint appointment. If no such consultation takes place, and the court subsequently insists on the selection of a single mutually acceptable expert for the task, the first solicitor might well be left with a report that could not be used in court and an unrecoverable fee for its preparation that the client would have to pay, even if the case was won.

### **Starting an action**

Civil actions usually begin with the completion of a standard claim form and its filing with an appropriate court. This is known, in legal jargon, as 'issuing proceedings'. The form has to include a concise statement of the nature of the claim and specify the remedy sought. In a money case it must also indicate the value of the claim, which can be either a specific sum (e.g. the debt owed) or the amount the claimant hopes to recover by way of damages.

The alternative method of starting an action is what is known as the 'Part 8 procedure', after the section of the Rules devoted to it. It corresponds to the former 'originating summons' method and is applicable to the same kinds of case, namely those for which there is no dispute as to facts but the court is being asked to decide a point of law or to rule on the interpretation of a document. Because expert evidence would be superfluous in such cases, the procedure will not be considered further here.

There is now a trend towards dealing with some civil claims 'on line'. By the end of 2008, the government's target for 'Money Claim Online' (<http://www.moneyclaim.gov.uk>) was reported to be 250,000 claims per year, and 100,000 for 'Possession Claim Online' (<http://www.possessionclaim.gov.uk>). The government's overall strategy is that by 2010, 75% of all claims will be started electronically.

### **Service**

Issuing proceedings is not the same thing as 'service'. Although the solicitor filing the claim form will usually have a copy of it served on the defendant straightaway, the Rules merely provide that this must happen within 4 months of issue. Moreover, certain other documents must be delivered to the defendant at the same time, including a form for making an admission or entering a defence and one for acknowledging that service has taken place. In proceedings commenced in the county courts, the documents are usually served on the defendant or respondent by the court office.

### **Particulars of claim**

Although the claim form need only state the nature of the claim, the claimant is also required to provide both the court and the defendant with fuller particulars of it. These need not be filed at the same time as the form but often will be. In any event, they have to be served on the defendant within 14 days of him or her being notified of the claim.

The Civil Procedure Rules are quite specific as to the details that must be included in the particulars of claim: the rather vague wording commonly used in the past is no longer

permitted. The particulars have to make clear what the case really amounts to; if they do not, the case could be struck out by the procedural judge.

### **Response**

There are three courses of action the defendant in a civil action may now take: (i) admit the claim and make an offer to pay; (ii) file a defence within 14 days; or (iii) file an acknowledgement of service by then and a defence within 28 days. If the defendant does none of these things, summary judgment will be entered against the defendant for the full amount of the claim plus costs.

As with the claimant's particulars of claim, so too any defence filed at this stage: it has to be sufficiently detailed to show the court that the case deserves a hearing. Not only is a bare denial no longer sufficient, but if in the procedural judge's view the defence filed has no reasonable chance of succeeding, the judge may find for the claimant straightaway. To avoid that happening, the defendant must state which of the claimant's allegations (if any) are admitted and which are denied; as regards the latter, the defendant must also give his or her reasons for denying them. If the claimant's account of the sequence of events is disputed, the defendant must also put forward his or her own version.

### **Statement of case**

The claim form, particulars of claim, defendant's response and any reply the claimant may have made to that response together make up the parties' statements of case, or what used to be known as their 'pleadings'. One important difference, though, is that the parties must now verify them with the words 'I believe that the facts stated in this claim form (or these particulars of claim or this defence) are true.' Anyone making a false 'statement of truth' would be guilty of contempt of court and liable to a range of summary punishments – which should put an end to the former widespread tactic of pleading virtually anything but at trial proceeding with just one or two of the allegations made or defences offered.

Incidentally, experts must verify their reports in the same way and would be similarly liable to punishment if they did so falsely.

### **Disposal before trial**

We have now reached the stage at which the court's powers of case management kick in. The most drastic of these is disposal of the action before trial. If the procedural judge should decide from the documents so far available that they disclose no reasonable grounds for bringing the case, the judge can strike the case out there and then. If, on the hand, they indicate that there is a case to answer but the defendant either fails to respond in time or files an inadequate defence, the court may – as noted previously – enter a default judgment for the full amount claimed. Lastly, it is open to either party to apply to the court for summary judgment.

### **Offers to settle**

If summary disposal is not an option, there are still other means available for bringing litigation to an early conclusion. By now the parties will have had the opportunity to reassess their cases in the light of information provided by the other side, and one party at least may well be keen to settle before trial. Hitherto, it has always been open to the defendant in a straightforward money claim to make a payment into court of

the amount he or she is prepared to offer in settlement. In other circumstances, a defendant is able (by means of a so-called *Calderbank* letter) to indicate the terms of an injunction he or she is prepared to abide by or an undertaking he or she is prepared to give. In both cases, if the claimant accepts the offer within 21 days, the action is stayed.

If, on the other hand, the offer is refused and at the trial of the action the claimant fails to obtain more than was paid into court (or better terms than were set out in the *Calderbank* letter), the amount of costs the claimant might hope to recover would be limited to those incurred up to the time the offer could have been accepted.

Historically, these provisions have enabled defendants to pressurise claimants into settling early, but not the other way round. However, Part 36 of the Civil Procedure Rules introduces a procedure whereby a claimant may also make an offer to settle, which if accepted would likewise bring the litigation to an end. The sanctions, though, are necessarily different if a Part 36 offer is not accepted and the claimant goes on to achieve a better result at trial. In those circumstances the defendant becomes liable to pay (a) interest on the amount awarded from the time the offer could have been accepted, (b) the claimant's costs on an indemnity basis from the same time, and (c) interest on those costs.

### **Allocation**

Assuming, though, that the case is not concluded at this juncture, the court will now send the parties an allocation questionnaire returnable within 14 days. A procedural judge will then allocate the case to the appropriate track. If it is to be heard under the small claims procedure (as the great majority of cases are), the judge will list it for hearing straightaway. With fast-track cases, on the other hand, all that the parties can expect to be given at this stage is a 3-week 'window' within which the trial will take place. In due course they will receive a listing questionnaire on the basis of which the actual date will be set, but that will not be for another 20 weeks or so.

It is at the allocation stage, too, that the procedural judge will issue directions as to the disclosure of documents (if this has not already happened), the number of expert reports he or she is prepared to allow, and the limit, if any, which will be imposed on the costs that may be recovered from the losing party in respect of expert evidence.

### **Interlocutory stages**

Between allocation and trial, cases on both the fast track and the multi-track pass through a number of interlocutory stages, at each of which the parties may make applications to the court. These can include applications for summary judgment, interim payments, disclosure of documents and so on. It is during this period, too, that most of the directions given by the procedural judge will need to be complied with – including any relating to the exchange of experts' reports, should the parties have been given permission to adduce such evidence separately.

### **Disclosure**

This is the term for what used to be known as 'discovery'. It is intended to complete the process by which each party is required to identify all the relevant documentary evidence of which it is aware. With cases on the fast track the court will

generally set a time limit for this of 4 weeks from the date of allocation to the track.

Under the old rules of court 'discovery' was generally automatic, and over the years its scope had become so wide that litigants frequently used the requirement as a means of wearing down their opponent's resolve to continue with the action. Lord Woolf, indeed, regarded it as one of the principal generators of unnecessary expense in civil litigation. In the Final Report of his Inquiry he recommended its replacement with a much more restricted procedure.

Disclosure is now no longer automatic but has to be ordered by the court. Moreover, when it is ordered it will normally be limited to what is known as 'standard disclosure'. Broadly speaking, this involves each party listing the documents on which it relies *plus* those known to it that adversely affect its case or support that of its opponent. Each party has to make a reasonable search for documents of the latter kind, but it is not expected to go to unnecessary lengths to track down every document that might conceivably have a bearing on the case. As with so many other features of the Woolf reforms, the guiding principle is one of proportionality: has sufficient been done, having regard to the amount involved or the importance of the legal issues?

### **Inspection**

Once the existence of relevant documents has been disclosed, the party to which disclosure has been made will have the right to examine them – subject, that is, to certain safeguards. Experts may then be asked by their instructing solicitors to advise on the impact that any new information revealed at this stage may have on the technical merits of the client's case. The expert may also be able to infer from the disclosed material that there could be other relevant information that remains to be 'discovered'.

### **Expert reports**

By now experts should be in a position to prepare their reports – initially as drafts for the information of their instructing solicitors and for discussion with them, and then in their final form for filing with the court.

If at the allocation stage the procedural judge ruled that the expert evidence the court needed to consider could be provided by a single expert jointly appointed by the parties, then the judge will also have given directions as to the date by which that expert's report must be filed with the court. For cases on the small claims track this deadline is determined by the date of the hearing and it will be the same as that for the disclosure of other documentary evidence, namely 14 days beforehand. For cases on the fast track, though, it will usually be set at 14 weeks from the date of allocation to that track. It is at the allocation stage, too, that the court will give directions for the payment of the single expert's fees and expenses and specify any limitation as to their amount.

Where permission has been given for each of the parties to instruct their own experts, they must not only file their experts' reports with the court by a prescribed date but exchange them as well. In most cases the procedural judge will direct that this takes place simultaneously, and for both small claims and fast-track cases the same deadlines would apply as for filing the report of a jointly appointed single expert. The judge does have discretion, though, to order sequential exchange, and can also rule that reports relating to

quantum (say) may be filed later than those dealing with causation.

It will be apparent from the foregoing that, in fast-track cases at any rate, an expert who has been instructed on behalf of just one of the parties will have less than 10 weeks in which to digest any new information disclosed by the other parties, to prepare a draft report for submission to his or her instructing solicitor and to run off a final version of it for filing with the court and exchange with the other side. Tight timetabling of this kind merely adds to the pressure the Civil Procedure Rules exert on litigants to make joint appointments wherever possible.

Under the Rules, parties to either a fast-track or multi-track action have the right to put written questions to any expert in the case regarding his or her report, but primarily for purposes of clarification. These questions have to be put within 28 days of receipt of the report, and the court may direct how soon they should be answered. The answers provided will thereafter be treated as forming part of that expert's report. Woe betide the expert who neglects to answer such questions, for failure to do so may result in the court refusing to allow his or her instructing party to rely on the report or, in the event of it winning the action, to recover his or her fees from the losing party<sup>5</sup>.

### **Meetings of experts**

These are held for the purposes of identifying areas of agreement and narrowing the issues still in dispute. Opinions differ as to when such meetings should take place, but they are likely to prove most useful in the interval between the preparation of draft and final reports. If experts have to meet before they have even drafted their reports, their discussions may prove insufficiently focused to be worth while. On the other hand, once reports have been exchanged, the views of their authors may have hardened too much for them to shift their positions to any appreciable extent. Meetings between the two report stages offer the prospect of more meaningful discussions and may enable the experts taking part to remove material from their final reports that deals with issues no longer in dispute. At the very least this should save the court time and enable it to focus more easily on those matters still in contention.

Meetings of experts can be convened by the parties themselves, but if they are ordered by the court, then the experts taking part in them will be required to report back to the judge on the matters they have agreed or still cannot agree. Their joint statement to this effect then becomes part of the evidence before the court and may be used in cross-examination of witnesses. For reasons of legal privilege, though, the discussions that preceded its formulation may not be explored at trial. Furthermore, because a meeting of experts can only be ordered on a 'without prejudice' basis, its outcome is not binding on the parties, unless they have previously agreed to be bound by it.<sup>6</sup>

### **Trial**

The procedure followed at small claims hearings is more fully described in Factsheet 21 of this series and so will not be covered here.

For fast-track and multi-track cases, a necessary preliminary to setting the date of the trial is the completion by the parties of a listing questionnaire designed to establish that they have complied with all the directions issued at the allocation stage.

With fast-track cases these questionnaires are dispatched after 20 weeks and are returnable within a fortnight. Then a month or so later the court will fix the date of the trial, giving the parties at least 3 weeks notice of it.

Since the trial of cases on the fast track is supposed to last no more than a day, judges are allowed considerable discretion over the procedure to be followed. They may, for example, dispense with opening addresses from counsel, permit witness statements to stand as evidence in chief, and limit the cross-examination of witnesses. As noted previously, expert evidence will in any case almost invariably be limited to written reports.

In multi-track cases an expert must expect to go into the witness box for examination-in-chief by counsel for his client, cross-examination by counsel for the opposing party and, possibly, re-examination by counsel for his own side. When the judge has given permission for the expert to stand down, he or she becomes available once again to advise the client's lawyers on the significance of technical information revealed by the other party's witnesses and the questions to be put to them in cross-examination.

### **Post-trial stages**

For the expert witness involvement does not necessarily end with trial of the action. The case could, after all, go to appeal. Although this is unlikely to require a further court appearance, the expert may still have to provide his client's lawyers with technical back-up for the appeal hearing.

What is rather more likely is that he or she will still be waiting to be paid – and that could involve providing the instructing solicitor with an itemised breakdown of fees and expenses for assessment by the court.

### **Costs**

At the end of a fast-track trial, if the judge should order one party to pay the other party's costs (which would be the usual outcome), then they will normally be assessed there and then. The costs associated with the trial itself are in any case fixed, as indeed are counsels' fees and those for the attendance of solicitors. However, parties will need to have with them at the trial breakdowns of their other costs, including those of obtaining expert evidence. It follows that prompt invoicing by experts has become more necessary than ever.

With multi-track cases, costs are subject to detailed assessment, and this more closely resembles the former procedure of taxation. Like it, the assessment takes place after the trial is over, though always within 3 months of judgment being delivered.

### **Appeals in civil cases**

Not all of the reforms recommended by Lord Woolf were implemented at once. Part 52 of the Civil Procedure Rules, which concerns appeals, did not come into force until May 2000. It was no less radical, though, than the rest. For one thing, it swept away the hitherto automatic right of litigants to bring appeals in the lower courts. All appeals now require prior leave, and not just those destined for the Court of Appeal or the Supreme Court. Furthermore, permission to appeal is only being granted where the court considers that there is a real prospect of success or other compelling reason why the appeal should be heard. Moreover, in future, only one appeal will normally be allowed.

## **EXPERT SUPPORT SERVICES FROM THE UK REGISTER OF EXPERT WITNESSES**

At the same time, the procedures for determining at what level appeals should be heard were tightened considerably. In fast-track cases appeals against the decision of a district judge are heard by a Circuit judge, while those against the decision of a Circuit judge are dealt with by a High Court judge. The same applies to appeals against procedural decisions in multi-

track cases, except that if the case was heard initially in the High Court, the appeal would go direct to the Court of Appeal. That court also hears appeals against final orders in multi-track cases, regardless of who decided the case originally.

### **Footnotes**

<sup>1</sup>The full text of the Civil Procedure Rules may be consulted on the MoJ website at <http://www.justice.gov.uk>, but downloading them from there is a tedious business. A more convenient source is the Rules Lexicon (RuLex) software produced by J S Publications (a small Windows program providing the text of many of the rules of expert practice and procedure plus the ability to search through them simply and quickly). For more information contact J S Publications on (01638) 561590. Please note, too, that the rules relating specifically to expert evidence are reproduced in Factsheet 35 in this series.

<sup>2</sup>On 29 March 2011 the MoJ published Consultation Paper CP6/2011 entitled Solving disputes in the county courts: creating a simpler, quicker and more proportionate system, a consultation on reforming civil justice in England and Wales. This contains proposals to (i) introduce a simplified claims procedure on a fixed costs basis, similar to that recently introduced for road traffic accident claims under £10,000, for a wider range of personal injury claims and low value clinical negligence claims; (ii) increase the upper limit on such schemes from £10,000 to £25,000 or £50,000; (iii) for small claims track cases that are currently limited to £5,000, increase the upper limit to £15,000; and (iv) introduce mandatory mediation on small claims cases before a hearing can be set. The consultation closes on 30 June 2011 and the MoJ plans to publish its response to the consultation in October 2011.

<sup>3</sup>For a more extensive discussion of expert witness immunity, see Factsheet 28 in this series. For details of insurance against such risks see Factsheet 14, 'Professional Immunity Insurance for Expert Witnesses'.

<sup>4</sup>For a fuller discussion of pre-action protocols, see Factsheet 38.

<sup>5</sup>For further discussion on this topic, see Factsheet 48.

<sup>6</sup>Both the legal basis of experts' meetings and best practice in conducting them are described more fully in Factsheet 23.

### **Disclaimer**

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