Your Witness

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

13th Edition of the Register

As this issue of *Your Witness* goes to press we are putting the finishing touches to the 2000 / 2001 13th edition of the *Register*, and it is going to be the biggest yet.

With the inclusion on the controlled distribution list of solicitors' firms from both the Association of Personal Injury Lawyers and the Forum of Insurance Lawyers, and with the *Register* being made freely available to all district judges for use on their official LCD laptop computers, the new edition will be placing your name at the fingertips of those most likely to be looking to instruct experts in the coming year.

SJE and the claimant/defendant split

The joint appointment of experts is a central plank in the raft of reforms introduced in response to the Woolf Inquiry. The intention in promoting the far wider use of single joint experts (SJEs) is to reduce costs and delays. Taken together with the case management powers now invested in the judiciary, the wider appointment of SJEs may indeed help to achieve both aims – only time will tell.

There is, however, a practical problem in the appointment of SJEs. In the minds of many solicitors, experts still fall into one of two camps: claimant friendly and defendant friendly. Wherever the truth may lie, this perception results in both claimant and defendant solicitors having little faith in the experts put forward for selection by the other side.

In an attempt to discover just what the claimant / defendant split is for experts listed in the *Register*, we asked experts to give a rough historical estimate of the source of their instructions. Well over 2,000 expert witnesses provided data and these are summarised in Figure 1. It is clear from this analysis that just over 50% of experts estimate that their instructions fall at around the 50 / 50 split between claimant and defendant sources. I can see no problem for these experts should they wish to be instructed as SJEs.

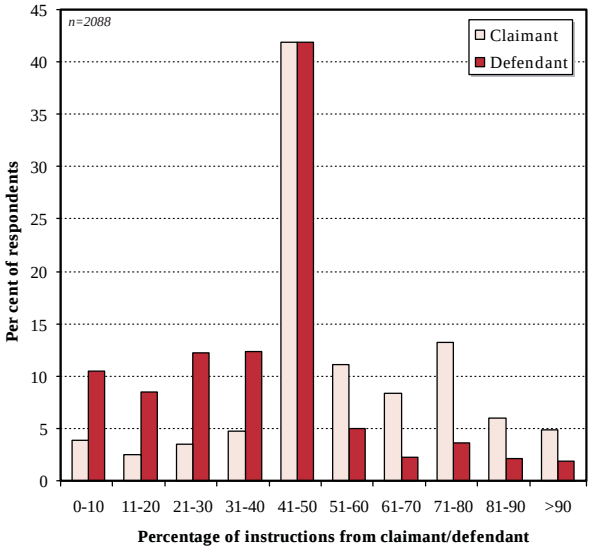

Figure 1 The split between claimant- and defendant-sourced instructions for experts in the new edition of the *Register*

Of the remaining experts, though, there is a clear trend towards claimant-dominated instructions: 21.5% of experts experience a 75 / 25 split in favour of claimant-dominated instructions, whilst only 5.9% show that split in favour of defendant-dominated instructions.

Many solicitors have asked us to include in the *Register* information about the claimant / defendant instruction ratio because they 'do **not** wish to instruct SJEs who are biased towards claimants or defendants'. Their requests reveal the false premise under which they labour.

In effect, solicitors appear to believe that your historical claimant / defendant instruction mix will tell them whether you are claimant- or defendant-friendly. I suspect that in the vast majority of cases it tells no such story. Indeed, if any of the experts with a skewed claimant / defendant split actively encourage such a bias in their instruction rates, by, for example, rejecting instructions from one side or the other, they will find it quite hard to be instructed under the new CPR regime. However, I imagine that most experts exert no such control over the source of their instructions and simply take whatever work comes to their door, operating the cab rank rule much like barristers. Clearly, if you are one of these experts it would be most unfair if a solicitor decided you were claimant- or defendant-friendly based solely on an instruction history that was not of your making!

Therefore the new printed edition of the *Register* will include only a general statement about the claimant / defendant instruction split for the *Register* as a whole rather than specific information against each expert.

J S Publications Software

February saw the release of *Factsheet Viewer*, a new version of *CPR Viewer* and an update to *ESP* (the software version of the *Register*). All three products are available on a single CD-ROM and come with the ability to install trial versions. If you would like to receive a complimentary copy of the CD-ROM to try out the applications, or would like us to send a copy to a colleague, please call us on (01638) 561590.

Chris Pamplin

Inside

Issue 19

Mediation: a new role for experts?

Mediation has a bright future

Mediation is one of a number of methods that can be employed to resolve civil disputes other than going to court. It is, though, the one that is capable of the widest application and has seemingly the brightest future.

The term alternative dispute resolution, or ADR for short, is an all-embracing one that also covers forms of adjudication, such as arbitration and expert determination. These both result in a decision being taken in favour of one or other of the parties to the dispute, a characteristic they share with litigation. Moreover, an arbitral award or expert determination is no less binding on the parties than would be a court judgment.

Mediation, on the other hand, belongs to a category of ADR methods that encourage the parties to settle the dispute for themselves. These 'assisted settlement' methods include early neutral evaluation (ENE), neutral fact-finding and conciliation. But mediation is the one most commonly employed.

The benefits of mediation

Mediation is used for a variety of practical reasons. When businesses have recourse to it they generally find the procedures are simpler than in litigation and take up less management time. It will often be possible to arrange earlier or more convenient dates for the process to take place than if litigation was attempted. These and other factors are said to make mediation a less expensive option than going to court.

Whether this proves to be the case, however, depends on the circumstances. It will almost certainly be true if the issues are straightforward and the dispute is capable of being resolved in the course of one 3-hour session. It will be less obviously so for a full-blown commercial mediation lasting several days and costing both sides thousands of pounds.

Furthermore, mediations do not necessarily result in agreement. Indeed if a party should be unhappy with the outcome, it remains free to litigate the dispute. In that event, of course, the overall expense of resolving the dispute could be a great deal higher for both parties.

There are, however, other advantages in attempting mediation that may outweigh even those of expense. One is that each party bears its own costs and shares that of the mediation: each side is not faced, as in litigation, with the risk of having to meet the opponent's costs. Then again, mediation is much less damaging to future relations between the parties than is litigation.

The courts are promoting mediation

A civil claim for damages usually proceeds by establishing liability and then determining the amount, i.e. it focuses on finding fault. To that extent it is both adversarial and antagonistic. Mediation, on the other hand, is usually initiated by parties wishing to find a mutually satisfactory solution to their dispute. It encourages both sides to review what is really important to them, and what they are prepared to give up. Moreover, mediation can lead to a settlement that offers real benefits to both sides.

Lastly, mediations are conducted in private, away from the glare of publicity. This can be a particularly important consideration when commercially sensitive information is involved.

Why is it, then, that for all these apparent advantages, litigation (or the threat of it) is still the most widely used method of resolving non-family civil disputes in the UK?

The Woolf reforms

In his Interim Report into the civil justice system, Lord Woolf devoted a whole chapter to ADR, even though the focus of the inquiry had been on improving access to justice through the courts. He justified this on a number of grounds, among them the need to increase awareness among lawyers and the public at large of what ADR has to offer and to consider what lessons the courts might learn from its practices and procedures.

Lord Woolf canvassed the idea that all civil courts should provide litigants with information about ADR and encourage its use, and that legal aid should meet the cost of ADR in cases resolved by such means before they went to trial. Most significant of all, though, Lord Woolf recommended that parties should be required to state whether they have discussed the possibility of using ADR methods to settle their dispute, and if not, why not. He also suggested that in deciding the future conduct of a case, the judge should be able to take into account any unreasonable refusal to try ADR.

All in all, the report sent a clear signal to both lawyers and litigants that in future they would have to take ADR much more seriously, because the courts would be actively encouraging them to settle their disputes outside the courtroom. Already the Centre for Dispute Resolution, which provides facilities for large-scale commercial mediations, has reported a doubling in the number of mediations it has organised since the Woolf reforms were implemented in April 1999. It does now begin to seem that the new decade will see a considerable expansion in the use of this and other ADR methods, and that it is the courts that will be spurring this on.

The Funding Code

It is not just to Lord Woolf that we owe the upsurge in interest in ADR. The Government's plans for the reform of the legal aid system have also played a part. Even before the Access to Justice Act reached the Statute Book, the Legal Aid Board had decided that funding could be extended to cover the cost of mediation in civil disputes. Once the Act was passed, it became possible, at least in theory, for funding to be provided for any kind of ADR. This would only happen, though, in cases that satisfied other criteria which were, on the whole, more exacting than hitherto.

In a report on the representations it had received concerning the Funding Code to be implemented this April, the Board made a number of points regarding the support to be given to mediation under the new scheme. For cases where it was deemed suitable by the new funding authority (the Legal Services Commission) and one party was willing, the Board thought that the Commission should have the power to require an assisted person to give mediation a try before embarking on litigation. Furthermore, although the outcome of the mediation would not be binding on either party, it may well be taken into account by the Commission in deciding whether to continue funding the assisted person.

For what can mediation be used?

Neither litigation nor the various methods of ADR provide a complete answer to the problem of resolving disputes. Each has its advantages and disadvantages. Litigation may be inevitable if the parties cannot agree to give ADR a try, or if an injunction or similar court order is being sought. For most kinds of dispute, however, either litigation or ADR may be appropriate.

Participation in mediation is still essentially voluntary and must be agreed to by all those involved before it can be implemented. This is the main reason why it is so rarely employed in personal injury (PI) claims. More than 90% of PI claims for which proceedings are issued settle in the claimant's favour. In such circumstances it is only defendants, or their insurers, who have a vested interest in resolving them by other means.

Mediation: a new role for experts?

It has always been apparent from the entries in the *Register* that a sizeable number of those listed are also qualified arbitrators. What has been less clear until now is how many of them might be actively involved in other forms of ADR.

In view of the new importance being attached to ADR, we included a question about it in the form accompanying draft entries for the 13th edition. It emerged that no less than 37% of experts listed in the new edition practise some form of 'alternative adjudication', whether it be arbitration or expert determination. On the other hand, only 12% practise 'assisted settlement' (i.e. ENE, mediation, conciliation and neutral fact-finding). Yet it is unquestionably assisted settlement, and in particular mediation, that both the courts and the Community Legal Service will be seeking to promote over the next few years.

The hallmark of mediation is its flexibility. It may be employed at any stage in a dispute, whether before proceedings are issued or thereafter up to the day of the trial. Moreover, the parties are generally free to choose their own mediator and to arrange dates, times and a venue that are mutually convenient. Obviously, if litigation has already commenced, the sooner mediation is undertaken the greater the potential saving in costs. And in their separate ways, both the Legal Services Commission and judges will apply pressure to ensure mediation happens.

While the parties' solicitors may be instrumental in arranging mediation, they will probably be the least suited of anyone to provide it. There is, in any case, no closed shop in mediators: both lawyers and non-lawyers can perform that role. If the dispute is in the least bit technical, the parties may well opt for a mediator with special knowledge of the subject matter of the dispute. As a starting point, their legal advisers could refer to the ESP software or the on-line version of the *Register*, which list individuals by their field of expertise and indicate which of them have skills in mediation or in conducting other forms of ADR. Alternatively, the parties may turn to a mediation organisation for advice.

Experts are ideally suited to the role of mediator...

Becoming a mediator

It is beyond the scope of this article to describe what happens in a mediation. In any case there are a number of readily available books on the subject. What must be emphasised, though, is that mediators need special skills. It is essential that they are good communicators and are adept in the conduct of negotiations, in breaking deadlocks and in handling difficult people. Above all, mediators have to be creative thinkers and problem solvers.

Much depends, of course, on the personality and aptitude of the individual. But it should go without saying that many experts practise these skills on an almost daily basis in the course of their professional lives. Moreover, those skills they do not have can always be acquired, and the organisations listed below are just some of those that provide relevant training.

If you are concerned about the effect the Woolf reforms may have on your expert witness practice, or are facing a major drop in income from legal aid work, then branching out into ADR may be the answer. Certainly, if you think you have the necessary skills but have not practised mediation before, that possibility would be well worth investigating.

Further reading

Mediation in Action, by Hazel Genn. Published by the Calouste Gulbenkian Foundation, price £4.99. Available through bookshops (ISBN 0 903319 85 3) or direct from Turnaround Publisher Services (Tel: 020 8829 3000).

... but special skills are required

Training organisations

The Academy of Experts, 2 South Square, Gray's Inn, London WC1R 5HP (Tel: 020 7637 0333).
The Centre for Dispute Resolution, Princes House, 95 Gresham Street, London EC2V 7NA (Tel: 020 7600 0500).
Professional Development and Training, 28 Chipstead Lane, Sevenoaks, Kent TN13 2AJ (Tel: 01732 453227).

Appealing CPR

Judges use new powers to control expert evidence

It is now almost 11 months since the Civil Procedure Rules 1998 came into force. In this report we look at the appeals that have arisen from the day-to-day implementation of the Rules.

There were some instances early on of district judges dismissing claims for purely technical breaches of the Rules. But judges have since been reminded more than once that the overriding objective of the Rules is to enable courts to deal with cases justly and that should govern their interpretation of the Rules.

More worrying for experts is the variable way in which judges have been exercising their discretion over the expert evidence they will allow and controlling how much of the expert's fees are recoverable from the losing party.

It is alleged that some courts have declined to hear any psychiatric evidence, while others have been refusing all evidence from experts specialising in employment and long-term care. There have also been attempts to cap the fees of all the experts in a case to the level of the lowest fee being charged by an expert in the case, and to disallow cancellation fees altogether.

Thus far, though, no cases have come to our notice where experts or their instructing solicitors have mounted a successful challenge to these questionable practices. What these past 11 months have given us is a welter of amendments to the Rules and a number of interesting cases that have tested them at various points.

Amendments

It was always recognised that the Rules would need amending in the light of experience, particularly as the work on some sections of them had not been completed by the time they went 'live'. No-one, however, could have anticipated that changes to the Rules would come through so thick and fast.

To date, 11 batches of amendments have been published and more are in train. Most of the amendments concern minutiae: ironing out inconsistencies, standardising the wording of forms, and so on. Those of greater moment fill gaps in the Rules. These include many provisions relating to the assessment of costs. Happily for experts, only two of the changes promulgated so far impact directly on them. One of these relates to legal privilege and is touched on later in this article, while the other concerns payment of the fees experts may charge for answering written questions about their reports.

Tricky payment issue resolved

Payment of experts under Rule 35.6

Rule 35.6 entitles any party in an action to put written questions to another party's expert, or to one who has been jointly appointed, to clarify the meaning of the expert's report. It also provides for sanctions to be imposed on parties whose experts fail to answer questions put in this way. However, the Rule gives no indication as to which party should pay the expert's fee for the time it takes to answer the questions. This could be a matter of some importance if the questions are at all numerous or intricate.

Single joint experts should not experience any problems in this regard because the instructing parties will be jointly and severally liable for all their fees. But what if the expert has been instructed by just one side and is being questioned by the other?

It might seem that in those circumstances it is the questioning party who should pay the expert. Indeed that is the course recommended in the pre-action protocol for personal injury claims. There are, however, considerations that militate against it. Why, for example, should a party have to pay for clarification of a report that should, perhaps, have been clearer in the first place? Moreover, how will it know the expert's fee rates? And in any case, should these even be a factor in determining whether to seek clarification?

All these issues have now been resolved by the addition of a paragraph to the Practice Direction that reads:

The party or parties instructing the expert must pay any fees charged by that expert for answering questions put under Rule 35.6. This does not affect any decision of the court as to the party who is ultimately to bear the expert's costs.

In plain English this means that whichever party asks the expert a question under Rule 35.6, it is the solicitor who originally instructed the expert to write the report who is responsible for paying the expert's additional fee for answering.

We have developed a Windows software package, called *CPR Viewer*, that helps you to explore the Rules and associated material and keep up to date with the many amendments. For more information call us on 01638 561590.

Cases

Ever since the Rules were published in January last year there has been concern about the 'sanctions culture' they appeared to encourage. Certainly, the discretion accorded to judges in controlling the evidence placed before the court gives plenty of scope for heavy handedness in exercising their new powers of awarding adverse costs, denying winning parties the right to recover costs, and dismissing cases out of hand.

In some instances, no doubt, draconian measures may well be justified. A case in point is that of *Stevens -v- Gullis (third party, Pile)*, which is reported on page 7. In other instances, though, the measures taken may amount to little more than judicial muscle-flexing.

An early example was given by the procedural judge in the case of *Matthews -v- Tarmac Bricks & Tiles Ltd*. At a preliminary hearing to fix the date of the trial the judge was advised that neither of the defendant's expert witnesses would be available on the day the judge wanted. The defendant's barrister had not been briefed as to

why the experts could not attend. When she explained this to the judge he told her that he could either set his preferred date there and then or adjourn the hearing for a short while why she took instructions and then fix the trial for his preferred date!

When the defendant applied to the Court of Appeal for permission to appeal this decision, Lord Woolf regretted the boorish way in which the judge had acted (though not, of course, in so many words!), but nevertheless refused the application. Cases need to be heard expeditiously, and this requires co-operation all round. Doctors practising in the medico-legal field must be prepared to meet court requirements. As for lawyers, if there was no agreement as to dates that were acceptable to the court, they must be ready with explanations why particular ones are not possible for their experts.

This was just the first of several decisions handed down by the Court of Appeal during the following months that upheld the decisions of courts below in the exercise of their new powers.

Another that involved an expert directly was the case of *Baron -v- Lovell*. The judge at first instance had made an order preventing the defendant's expert from giving evidence at trial because his report had not been disclosed properly. In dismissing the appeal against that decision, Lord Justice Brooke held that failure to exchange an expert's report in time was a good ground for disallowing it altogether, especially if the failure was deliberate and thereby denied the other party an opportunity to make an offer to settle.

On the other hand, not all the decisions relating to the new Rules have imparted the same stern message. In *Mealey Horgan plc -v- Horgan*, one of the parties served his witness statements a fortnight late. He applied, as he had to, for an extension of time and for permission for the witnesses concerned to give evidence at trial. In a notably liberal judgment Mr Justice Buckley held that it would be unjust to prevent him calling the witnesses save in the most extreme circumstances. Such circumstances might include a history of deliberate flouting of court orders or of inexcusable delay, but neither applied in this case. It was a sufficient sanction that the party had been required to come cap in hand to the court for permission to adduce the evidence.

CPR challenged over privilege

However, the most instructive case so far on the application of the Rules, and certainly the most dramatic, is one that did not involve experts, although it certainly has implications for them.

The decision in *General Mediterranean Holdings SA -v- Patel and anothers* concerned an application for a wasted costs order. The applicant company was the claimant in a dispute that settled before trial in circumstances which led it to believe that the defendants' solicitors had allowed their clients to run a defence right up to the eve of trial, thereby causing it huge extra costs. The company asserted that this would be confirmed if the solicitors for the other side were to produce records of what had passed between them and their clients.

The defendants' solicitors denied the allegation, but the defendants were not willing to waive their privilege over the records. Although the defendants' solicitors had no wish to be drawn into conflict with their clients, they felt constrained to make an application to the court under CPR 48.7(3), which in relation to wasted costs orders allows a court to direct that privileged documents be disclosed to it and the other party.

The judge in the case, Mr Justice Toulson, reviewed the case law on legal professional privilege. He concluded that the law both 'recognises the right to legal confidentiality which arises as between a person and his legal adviser' and 'regards it as a right of great constitutional importance'. He then ruled that it was quite unacceptable that CPR 48.7(3) could modify or abrogate a client's privilege. It contravened two basic principles: first, that fundamental rights cannot be overridden by ambiguous or general words contained in legislation, and second, that Parliament cannot have intended that subordinate legislation should be used for such a purpose. In short, the Rule was *ultra vires* the CPR's enabling statute, the Civil Procedure Act 1997, and the solicitors in the case before him could not use privileged documents to fend off an attack on their probity. As the judge wryly noted, the guiding principle of the Civil Procedure Rules was proportionality, and a general discretion to order the disclosure of privileged material was scarcely proportionate to any need to do justice to the legal profession.

The veracity of Mr Justice Toulson's reasoning may be gauged from the fact that the Rules were swiftly amended to delete the offending clause.

Court of Appeal reluctant to overrule judge at first instance

Significance of the case for experts?

What makes his judgment of particular interest, though, are its wider implications. Could it be that the rule (CPR 35.10 (4)) which states that experts' instructions are not privileged against disclosure is also *ultra vires*. If a judgment to that effect had to be accepted by the Rules Committee it would, of course, severely undermine a key element of the reform package.

If courts cannot order the disclosure of actual instructions, how can anyone challenge the summary of them that experts are required to include in their reports? And if they cannot do that, what credence may then be placed in experts' reports in cases, such as those on the fast track, where no opportunity exists to cross-examine their author?

It will be interesting to see whether attempts are made in the coming months to bolster this particular provision of the Rules against attack through the courts.

Experts' instructions might regain privilege

News

Woolf reforms force up court fees!

Court fees

One of the main aims of the Woolf reforms is to encourage would-be litigants to settle their disputes without recourse to the law. Another is to make legal action less costly when it is undertaken. Unfortunately, though, it appears that these aims may prove antagonistic.

There has been such a tremendous fall over the past year in the number of issued proceedings – down 23% according to the latest figures – that the Courts Service faces an £18 million drop in its fee income during 2000–2001. To make good this shortfall, the Service will be raising court fees next month, in some cases by as much as 60%, which can only serve to make litigation more expensive, not less.

Staying with this subject, though, there is one change to report for the better, although it does not go very far. Since April last year courts have been levying a charge of £80 when cases reach the allocation stage, i.e. when they are assigned to one or other of the three tracks. This 'allocation fee' attracted protests from a number of quarters, not least the Lord Chancellor's own Civil Justice Council, which criticised the fee for the deterrent effect it was having on litigants pursuing small claims. Heeding the protests, Lord Irvine has now announced that from April the fee will no longer apply to claims for less than £1,000. It will still be charged in full, though, for other cases allocated to the small claims track, i.e. those between £1,000 and £5,000 in value.

Lightning can strike twice

Forensic experts have been getting into a rare old tizzy about the use made of statistics at the trial of solicitor Sally Clark. Readers will recall that Mrs Clark was accused of murdering her two infant children, one 14 months after the other. The defence maintained that both children were victims of cot death. At the trial last November, conflicting forensic evidence was called to explain the babies' injuries. However, a prosecution expert witness, Sir Roy Meadow, stated that the chance of both children suffering a cot death was 1 in 73 million. Not surprisingly, this assertion gravely undermined the case for the defence – the children must have been murdered. With odds in that order, there could be no other explanation. As every juror knows, lightning does not strike twice.

Lies, damn lies and statistics

The reaction was not slow in coming. First off the mark was Professor Peter Fleming, one of the authors of the report from which the damning statistic had been taken. He claimed that it had been quoted out of context and volunteered to appear at Mrs Clark's appeal to explain why the use made of it by the prosecution was misleading. He was also upset that, since the report had yet to be published, the defence had had no means of coming up with its own interpretation of the researchers' findings.

It is an epidemiologist, though, who has really set the fur flying. At Mrs Clark's trial it had been claimed that the chances of a second child suffering the same fate were 'vanishingly small'. Writing in the *British Medical Journal*, Dr Stephen Watkins showed that this was contradicted by research indicating that a sibling of a cot death victim is five times more likely to die that way than in the population at large. In this country it could happen as frequently as once every 18 months. So much for lightning not striking twice.

Dr Watkins called for tighter guidelines on the use of probability theory in criminal cases, and he is not the first to make that demand. Some 3 years ago the then Lord Chief Justice described its use in a DNA case as 'a recipe for confusion, misunderstanding and misjudgment, possibly among counsel, probably among judges and almost certainly among jurors'. We must now wait to see whether the Court of Appeal revisits that issue when it hears Mrs Clark's appeal.

Procedural reform in the family courts

The Lord Chancellor's Department has announced that new Family Proceedings Rules will come into force on 5 June. They will fulfil the same role in family courts as the Civil Procedure Rules (CPR) in civil courts.

Like the latter, the new Family Proceedings Rules are much influenced by the recommendations made by Lord Woolf in the final report of his inquiry into the civil justice system. Thus the new Rules introduce the concept of active case management into family proceedings, and they apply almost in full the provisions of CPR regarding experts. Indeed, the only exception appears to be that, should a family judge seek to limit the fees and expenses that may be paid to a single joint expert (SJE), the judge will not also have the power to order that the parties pay that amount into court. In these circumstances, as in all others, SJEs must make their own arrangements to ensure they get paid at the end of a case.

Legal aid in trauma

Late last year a firm of solicitors mounted proceedings for judicial review of the Legal Aid Board's new contracting regime, which has resulted in a halving of the number of firms able to provide advice and assistance under legal aid. The legal challenge failed, but not before the Divisional Court had expressed concern about 'serious weaknesses' in the new system.

In a judgment handed down on 16 February, the Court stated that clients are likely to suffer real hardship unless the Board acts decisively to address these weaknesses. If the Board, or rather the Legal Services Commission due to take over from it on All Fools Day, fails to heed this judgment, it looks as if it may expect further embarrassing challenges of the kind in future.

Court report

Expert evidence: a cautionary tale

As noted on a previous page, the case of *Stevens -v- Gullis (Pile, third party)* provided the Court of Appeal with an early opportunity to affirm the duties and responsibilities of expert witnesses under the new Civil Procedure Rules. The case also makes plain the potentially dire consequences for the client of failure on the part of an expert to observe the requirements regarding experts' reports that are specified in Part 35 of the Rules and its associated Practice Direction.

The lead judgment of the Court was delivered by the Master of the Rolls, Lord Woolf. It was notably detailed and wide ranging. Unfortunately, though, the report of it published in *The Times* last October was much condensed and omitted to record that the Court had upheld one particularly important decision of the judge at first instance. For much of the detail included in the following account we are indebted to Mr Simon Chandler of CMS Cameron McKenna, solicitors for the architect in the third-party proceedings.

The dispute

In *Stevens -v- Gullis* the claimant was a builder who had been employed by the defendant to refurbish some shop premises. The defendant's architect, a Mr Pile, supervised the work and in February 1995 issued a final certificate for the amount due to the builder. The builder's invoice for this amount went unpaid. When the builder sued for the money in Cardiff County Court, the defendant counterclaimed for a much larger sum under various headings, including defective works and delay in completion.

Enter the expert. In the first half of 1997 a building surveyor, Mr S J Isaac, was instructed on behalf of the defendant. He prepared a schedule supporting the counterclaim. On the basis of this schedule, an amended defence was filed, by which stage there were no fewer than 170 'live' issues. At the same time, the defendant initiated third-party proceedings against his architect, alleging negligent supervision and over-certification.

The experts' meeting

In April 1998 the parties to the main action were given leave to adduce expert evidence. At the same time they were ordered to arrange a meeting of their experts to reduce the number of issues to a more manageable level. As usual, the experts were required to prepare joint memoranda of matters agreed or not agreed.

The meeting eventually took place on 11 November 1998. Soon afterwards the other experts sent Mr Isaac a draft Memorandum of Agreement for him to sign. Despite much chasing, though, he failed to respond. Furthermore, he was late in submitting the reports on which the owner proposed to rely in both actions. Nevertheless, in December 1998 an 8-day trial was listed for the following June.

Preliminary hearings

Dire consequences can follow failure to observe Part 35

By then the solicitors for the architect had come to suspect that Mr Isaac had taken his instructions from the defendant direct, and that this accounted for the fact that his reports were undated, confused and showed little relation to the issues pleaded. Citing these concerns to the court they obtained from it an 'unless' order that required Mr Isaac to supply the details specified in paragraph 1.2 of the newly issued Practice Direction for Experts and Assessors, or else be debarred from giving evidence in the third-party proceedings. A copy of the Practice Direction was attached to the court's order.

Although Mr Isaac made a stab at complying with the order, it was only to the extent of supplying details of his qualifications and experience. He neither made the required statement that he understood his duty to the court and had observed it, nor set out the substance of the instructions he had received. Because of this, the judge ruled that Mr Isaac could not give evidence in the third-party proceedings.

No-one bringing an action for professional negligence can hope to succeed without expert evidence, but under the old Rules the defendant might still have secured a postponement of the trial to enable him to sort matters out and instruct a new expert. Under the new Rules, though, the solicitors for the architect were able to apply for the action against him to be dealt with there and then. In the absence of expert evidence, the judge duly dismissed it.

The judge subsequently made a similar ruling preventing Mr Isaac from giving expert evidence in the main action. He declined, though, to deal with that case summarily, holding that the defendant's counterclaim against the builder might yet succeed without expert evidence. He also left open the possibility that Mr Isaac could give evidence of fact at the trial.

The defendant appealed all three decisions on the basis that the judge had exceeded his powers and improperly exercised his discretion, and that this had resulted in an outcome that was extreme, draconian and unjust.

The appeal

'extreme, draconian and unjust' – 'not at all' says the Court of Appeal

The Court of Appeal heard the appeal within a month of it being filed and had little difficulty in rejecting all the grounds advanced on the defendant's behalf. In the opinion of the Court, the judge at first instance had been entitled to make the orders and was fully justified in doing so. The only criticism the Court made of him was that he had not gone far enough. In its view he should also have debarred Mr Isaac from giving any evidence at all in the continuing proceedings, even evidence of fact.

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Factsheet Update

Two new factsheets have been added to the series recently:

ID	Factsheet title
41	Marketing your services as an expert witness
42	ADR and the expert

The faxback number is (01638) 565809.

Factsheets are also available on our web site, or can be bought as a complete set (including updates) in a binder at £47.00 (£40.00 + VAT). You can also request our **new** *Factsheet Viewer* software. Call us on (01638) 561590 for details.

Know your facts

We pride ourselves in the range of services we provide to experts listed in the *Register*. One instance last month shows just how useful our factsheet series can be when relations with your instructing solicitor take a turn for the worst.

In 1998, an environmental consultant had been instructed in an action funded by legal aid. In addition to preparing a report, he was asked to attend a conference with other experts. The invoices for his fees were submitted in April and November 1998.

On 25 January this year the law firm wrote to inform the consultant that at an assessment of its bill of costs the previous February a district judge had disallowed the fee for his report on the ground that it had not advanced the litigation. Consequently, that fee could not be recovered from the Legal Aid Board. Furthermore, the judge had reduced the expert's fee for attending the conference to the amount allowed to other experts present, in apparent disregard of the fact that the consultant had to travel much further than the other experts.

The solicitors noted that they had challenged the judge's decision but had been unable to persuade him to change it. Accordingly, the only fee they would be paying was that for attending the conference, and it would be in the reduced amount authorised by the judge.

It was at this point that we were contacted. Based on information contained in our factsheet series, we told the consultant that solicitors are personally responsible for the reasonable fees of any expert they instruct *unless* they disclaim that responsibility or restrict their liability to whatever is allowed on assessment of costs. Neither stipulation had been made in this case. We also told him that he could sue for his unpaid fees and, if successful, would be entitled to his costs and to interest under the Late Payment of Commercial Debts (Interest) Act 1998.

The consultant wrote to the solicitors repeating these points and threatening court action if his invoices were not paid within 14 days. Their cheque for the full amount came 3 days later!

Our new Windows-based *Factsheet Viewer* software provides easy access to all 40+ factsheets in the series. It allows fast searching of all factsheets, is regularly updated and, as this case shows, can help you deal professionally with difficult solicitors. Call us on 01638 561590 for more details.

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In delivering the lead judgment, Lord Woolf reviewed the requirements laid on experts by the Civil Procedure Rules. He stressed the importance of parties and experts co-operating with the court to ensure that cases are dealt with justly and efficiently within the allotted time span. Mr Isaac had shown no conception or understanding of his duties as an expert witness. In view of Mr Isaac's behaviour, the judge had had no alternative but to debar him from giving evidence in the third-party proceedings.

In the light of subsequent developments it was obvious, too, that the judge had been right to dismiss that action summarily. It now seemed that the defendant's counterclaim against the builder would need to be entirely recast because of defects in the schedule prepared by Mr Isaac. The defendant had wisely consulted another expert, and the latter's report, while supporting his counterclaim against the builder, indicated that the sum overpaid was barely one-tenth of that asserted by Mr Isaac. In these circumstances, it would be inappropriate to resurrect the defendant's claim against the architect.

That left the defendant's appeal against the order debarring Mr Isaac from giving expert evidence in the action brought by the builder. Although the parties had agreed terms under which they invited the Court of Appeal to set aside that order, His Lordship was satisfied that it should not do so. Courts now have the power to control the evidence placed before them, and when a judge has properly exercised his discretion in that regard, it would be wrong, even with the parties' consent, to overrule him on appeal.

Costly conclusion

Lord Justices Brooke and Robert Walker delivered concurring judgments. With all grounds of the appeal rejected, the Court ordered that the costs of both the builder and the architect be paid by the defendant. As a result, then, of the expert's failure to comply with the requirements of the new Rules, his client had not only lost the opportunity of pursuing a potentially valid claim against the architect, but found himself saddled with some very expensive legal fees.

Comment. The Court of Appeal's judgment in this case is important for the encouragement it gives judges at first instance to exercise their new powers robustly. It gives a clear indication that, provided they do so in accordance with the overriding objective of the Civil Procedure Rules, the Court will be reluctant to interfere with their decisions.

The message for expert witnesses is no less clear. Failure to observe requirements laid down in either Part 35 of the Civil Procedure Rules or its associated Practice Direction can have potentially disastrous consequences for their clients. That, in turn, can serve only to extend the grounds on which experts may be sued in negligence.

To find out how J S Publications can help you stay abreast of the Civil Procedure Rules call us on 01638 561590.

Address
J S Publications
PO Box 505
Newmarket
Suffolk
CB8 7TF
UK

DX 50519 Newmarket

Telephone
+44 (0)1638 561590

Facsimile
+44 (0)1638 560924

e-mail
yw@jspubs.com

Web site
http://www.jspubs.com

Editor
Dr Christopher F Pamplin

Staff writer
John Lord