Your Witness

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LiPs, OICs and MedCo

The 'compensation culture' around whiplash injuries is an ongoing thorn in the Government's side. On page 4 we report on the efforts being made to tackle the issue in the form of 'Official Injury Claim (OIC)'. It is envisaged that most simple whiplash claims arising from road traffic accidents will be pursued by unrepresented claimants using the new OIC portal. Rule changes will mandate that every claim must be supported by a fixed cost medical report obtained through MedCo. It will bring into direct contact many more litigants in person (LiPs) with general medical practitioners and accident and emergency consultants.

Any expert who chooses to start or continue working in this market must (i) agree to mandatory training, (ii) submit themselves to an interview with the MedCo audit unit, and (iii) allow their business to be subjected to periodic audit checks. But that's not all!

Before 31 May 2021, experts offering their services through MedCo as Direct Medical Experts (as distinct from working via a medico-legal agency) had to pay £180pa for the privilege. From 31 May fees increased significantly. Now experts have to pay £500pa *plus* £20 per case for each case above 300 in a year. For such quick and simple cases, a not uncommon 500 cases a year will now cost the expert £4,500pa rather than £180. Is it me, or is the Government building a system designed to drive away experts?

Going public

An expert using our *Register* Helpline recently raised the question of media interest in a coroner's court case. Our member wanted to be clear about what is and isn't in the public domain, and what is covered by confidentiality.

This is an area potentially fraught with danger. In theory, proceedings in the coroner's court are a matter of public record. Fair and accurate reporting of proceedings is usually permissible and even encouraged. At the same time, though, the families of the deceased deserve sensitivity and respect for their privacy.

All inquest hearings must be recorded by the court. A recording is a 'document' for the purposes of the regulations. In considering a request for a copy of a recording (or other document), coroners will bear in mind the clear distinction in law between disclosure to 'interested persons' and disclosure to others, including the media. The coroner may only refuse a request by an interested person on certain specified grounds. But a journalist is not an interested person. The coroner may provide any document '*to any person who in the opinion of the coroner is a proper person to have possession of it*'.

The coroner should take into account the person requesting the document, the reason for the request, the public interest, the sensitivities of particular passages of evidence, the need for editing or redaction, and other relevant factors.

Coroners are not obliged to produce transcripts of hearings, so any request by the media usually takes the form of a petition for a recording or a document referred to or produced at the inquest.

A coroner's discretion to grant the request will be governed by the open justice principle. Where the Press requests access to material referred to in an inquest, in recognition of the role of the Press as 'public watchdog' in a democratic society, there is a presumption in favour of providing access.

The coroner can refuse access in a number of circumstances. These include national security, public interest immunity, legal privilege, the avoidance of prejudice to current or future criminal proceedings, and the protection of personal information.

So, while the inquest hearing is public, the disclosure of documents and reports to journalists is not necessarily going to follow. Accordingly, experts should be cautious against making any direct response to journalistic inquiries. If journalists want access to such evidence, they would be better seeking it from the coroner.

Survey 2021

What is it that expert witnesses most want to know about their colleagues? Well, how much they charge comes close to the top of the list! In my mind, there is no more useful way to satisfy this demand for information than to conduct regular surveys among our readers and to publish the results in *Your Witness*. Our 2021 survey will look at your work as an expert witness, your terms, conditions and charging rates, and the trends in your volume of work. It's the 14th survey we have run, and the resulting analysis of trends over more than two decades offers valuable insights.

Of course, given the COVID pandemic, the last year has been anything but normal. However, we feel it worth continuing the series, and have added an extra section about the impact of the pandemic on experts' forensic work to capture a snapshot of these extraordinary times.

I would be grateful if you can find time to complete the short questionnaire, anonymously if you prefer, by simply pointing your browser at *www.jspubs.com/survey2021*. I will report on the results in a future issue.

Chris Pamplin

Defining 'reasonably required'

Reasonableness lies in balancing assisting the court with cost proportionality

The Civil Procedure Rules (CPR) require that **expert evidence should be restricted to that which is reasonably required to resolve the proceedings** (CPR 35.1). But the test of reasonableness is a subjective one, and so there has always been a degree of uncertainty about precisely how this test is to be applied.

Warren J, in *British Airways -v- Spencer*[1], proposed a three-stage test to determine whether expert evidence is necessary.

1) If the evidence is necessary, it should be admitted.
2) If it is not necessary, then the question is whether it would still **assist the court**.
3) If it would assist, then the question is whether it is **reasonably required** to resolve the proceedings.

This last part should take into account factors such as the value of the claim, the likely impact of the judgment, where the costs will fall, and the possible impact on the conduct of the trial.

Warren J's test was approved in *Kennedy -v- Cordia*[2] when the Supreme Court stressed that the question of **whether the evidence would assist the court was a key consideration governing admissibility**. It was further recognised that experts may give both opinion evidence and expert evidence of fact. The court concluded that **if skilled evidence of fact would be helpful to the court in the efficient determination of the case, the court should admit it**.

It was against the background of these cases that an appeal against the decision in *Swansea City Association Football Club Ltd -v- Owen*[3] came before the Queen's Bench. In brief, the respondent had been employed as a goalkeeper. In 2015 he'd suffered an injury to his wrist which had been treated by one of the Club's medical specialists. The respondent claimed that there had been a negligent failure to treat the injury properly and that this had effectively ended his playing career. He was now working as a coach. His claim was in part for loss of earnings.

At a case management conference, the Master granted permission to each party to adduce expert reports from a number of medical professionals, accountants and specialists in football playing ability. The experts' fees were significant but reasonable, ranging from around £1,500 to £5,000. The Club sought, in addition to this, to adduce evidence from a player's agent, on the ground that the agent, with his greater knowledge of the game and expected salaries, would be much better placed to assess the respondent's lost earnings than an accountant. The agent's expert fees (perhaps redolent of professional football in general) were expensive... in excess of £23,000. The Master refused the Club permission to call the agent as an expert and expressly commented that, in his view, the fee was too high. Following the case management conference, the respondent disclosed his expert accountant's report. This report calculated his lost earnings based on hypothetical salary levels which had been provided to the accountant by a football 'scout' and a former professional goalkeeper. However, this had resulted in a very wide range of hypothetical sums dependent on a number of factors, including the league in which the player was engaged.

The Club tried again to adduce the evidence of the agent, arguing that the agent was able to provide much better opinion evidence on where the respondent would likely have ranked within the salary ranges, which the accountant simply did not have the expertise to give. The Club proposed that the question of the agent's fee be dealt with by a cap on the recoverable costs. The Master refused the application and the Club appealed.

Applying CPR 35.1 and the accepted tests, the appeal court said the question to be decided was whether expert evidence from a sports agent was reasonably required to resolve the case. The court acknowledged that if the answer to this question was yes, then the appeal should succeed. The appeal court recognised that, in determining this, they were far better placed than the Master had been because they'd had the advantage of seeing the accountant's report, and the factual evidence about salaries and the broad ranges identified. The trial judge would have to make a finding as to where the respondent would most likely have fallen in the wide range identified in the accountant's report. The appeal court was satisfied that the accountant's evidence could not assist with that. Although the evidence of the expert on football playing ability could provide some basic material on the respondent's talent and ability, he was not qualified to give an opinion on how that ability would translate to salary. This was a question of fact that could be better answered with the expertise of an agent.

Although the question was one involving a finding of fact, the facts were not in the public domain and were not easily accessible because clubs tended not to publish information about salaries. However, an agent with appropriate professional experience could provide insight on salary expectations and the factors that would be relevant in salary negotiations. The appeal court considered this to satisfy the CPR and the tests for reasonable necessity. It would then be for the trial judge to decide which factors were relevant in the respondent's case.

The appeal was allowed and both parties were given permission to rely on a sports agent as an expert. Dealing with the questions posed in relation to the reasonableness and proportionality of the expert's fee, the appeal court said that directions would be made limiting the amount recoverable for the agent's fees for providing an expert report. His fees, said the court, should be proportionate to the case and comparable with the fees of other experts involved in the proceedings.

References

[1] *British Airways plc -v- Spencer* [2015] *EWHC* 2477 (*Ch*).

[2] *Kennedy -v- Cordia (Services) LLP* [2016] *UKSC* 6.

[3] *Swansea City Association Football Club Ltd -v- Owen* [2021] 4 *WLUK* 223.

Admitting late expert evidence

Admitting expert evidence very late in the day is a fraught business. In *Shetty -v- Pennine Acute Hospitals*[1], the court ruled on appeal against a refusal to allow permission to rely on the evidence of an additional expert witness, even though the evidence was served 10 months after expiry of the court's time limit.

If there is no fault in the delay

The Court of Appeal was mindful that the witness statement was 10 months late. Indeed, in the light of the amended Civil Procedure Rule 3.9, there was pressure to disallow such late evidence. However, it was necessary to determine whether the party seeking to adduce the late evidence was at fault. In this case, the evidence concerned a factual issue which had arisen at the secondary stage of the gathering of expert evidence, and it fell squarely within the exceptions identified by the court in *Mitchell*[2]. In such circumstances, even assuming there had been a default, there was a good reason for the delay and relief should be granted.

The Court of Appeal concluded that **where the late evidence arose out of 'later developments', and the admission of the evidence was practical, relevant and proportionate** (and presumably that the adducing party had not been guilty of some fault that led to, or exacerbated, the delay), **there was no undermining of the strict approach to timetables**. Thus the new evidence should be allowed.

If new matters aren't being raised

The principles to be applied by the judge in allowing or refusing such evidence came before the court once again recently in *Lucinda Sanford Ltd -v- Russell*[3]. The case involved a building dispute. The claimant had been contracted as a builder in the defendant's home refurbishment. He had also acted as project manager and designer. Work commenced in 2015 but ceased in 2018 before the work had been completed. The claimant brought a claim for the money he said was due to him under the contract, and the defendant counterclaimed for alleged delay, failure to complete the work on time and resulting remedial costs.

There were five separate experts in the case, all of whom were required to report on separate disciplines. A Scott schedule had been prepared and updated, and a trial date had been set (turn to page 6 of this issue if you are new to Scott schedules). Directions had been given imposing a timetable for joint statements and expert reports to be served. It should be noted that, by the time the experts were instructed, the remedial and completion works had already been undertaken, so that it was not possible for the alleged defective works to be seen in situ.

One of the defendant's experts was a building surveyor who had been involved in the refurbishment from 2017. He had produced a witness statement with a number of photographs of the works, including the roof. However, after the deadline for reports had expired, the surveyor came forward with an additional 4,000 photographs, as well as a supplemental statement dealing mostly with alleged defects in the roof and cornicing which made reference to some of the photographs. The claimant objected to both disclosure of the photographs and the supplemental statement.

There was no question that the photographs and supplemental statement were useful and relevant, particularly because it was no longer possible to inspect the original work. To this extent, the evidence probably fell within the parameters identified in *Shetty*. However, the defendant and the expert were unable to supply any reasonable explanation as to why the defendant had not obtained all 4,000 photographs from the expert at the date of his first report. Consequently, there was doubt about whether the defendant could fairly be said to be without fault.

The view taken by the court was a pragmatic one. Although the proceedings were well advanced, and the claimant had argued that his legal team was already well ahead on preparing reports and joint statements for a tight trial timetable, there was no suggestion that the defendant was seeking to adduce evidence on 'new matters'. The court noted that the issues regarding the roof had been identified in the Scott schedule and agreed by the claimant. Accordingly, the court was able to say that the supplemental report did not contain any new allegations, merely new evidence in relation to an existing report. The expert had simply described the alleged defects in more detail by reference to the photographs.

The lack of explanation for the delay in producing the photographs was a troubling one, but the court was persuaded that the overall justice of the case should lead them to permit the surveyor expert's supplemental witness statement and the photographs to which it referred. The court believed that, although late, the exercise of the claimant's expert witnesses looking at the roofing photographs contained in the supplemental disclosure should be relatively straightforward and not cause the trial to be delayed.

However, so far as the remainder of the 4,000 photographs was concerned, although useful, they had arrived too late. There were too many to study and there was insufficient time for this to be done without prejudice to the claimant.

A welcomed less draconian approach

Although the courts continue to take a fairly dim view of delay in presenting expert evidence, things have come quite a long way since the draconian stance frequently taken in the aftermath of the civil justice reforms. Those that saw this as somewhat despotic and repressive will no doubt recognise a small victory for the cause of natural justice.

Courts being less draconian where party not at fault for the delay

References

[1] *Shetty -v- Pennine Acute Hospitals NHS Trust* [2014] 2 *WLUK* 970.

[2] *Mitchell -v- News Group Newspapers Ltd* [2013] *EWCA Civ* 1537.

[3] *Lucinda Sanford Ltd -v- Russell* [2021] 4 *WLUK* 273.

Litigants in person, MedCo and expert

New lawyer-less whiplash claims system launched

After numerous delays, not all of them brought about by the current pandemic, the Ministry of Justice's (MoJ) much-heralded Road Traffic Accident (RTA) on-line portal for litigants in person (LiPs) opened on 31 May 2021 (at least that's the promise from the MoJ as this issue goes to press).

The Official Injury Claims (OIC) portal – you can find it at *www.officialinjuryclaim.org.uk* – is the result of the enactment of the Civil Liability Act 2018. This Act has as one of its principal objectives the establishment of an entirely new system for dealing with whiplash injuries suffered in RTAs. The legislation is intended to address the continued high number and cost of whiplash-related personal injury claims which have served to increase greatly the cost of motor insurance. At the same time as the new portal comes into operation, there will be a prohibition against any offer or agreement to settle a whiplash claim without a medical report.

The Pre-Action Protocol (PAP) and Practice Direction (PD) for whiplash and small claims reforms were released in spring 2021, following finalisation of the whiplash damages tariff. It is important to note that the new RTA Small Claims PAP covers all road traffic injury claims that fall under the new small claims track limit of £5,000 (for the injury) and are subject to an overall maximum claim value of £10,000. It will be mandatory for qualifying claims to follow the new PAP procedures, which will be brought to operational life via the portal.

For all accidents occurring on or after 31 May 2021, all such injury claims valued at under £5,000 will be assigned as small claims and will progress through the new OIC service. The increase in the injury element of the small claims track (from £1,000 to £5,000) will extend the range of cases for which costs will not normally be recoverable. Consequently, the system will be used by a **greatly increased number of unrepresented claimants**. The MoJ's own projection is that the number of cases involving LiPs will potentially increase from 5% of claims to as high as 30% of claims.

Interested experts have plenty of hoops to jump through

It is intended that claimants will be able to navigate the system to search for either a medical reporting organisation (MRO) or direct medical expert (DME). To facilitate this, the portal will be linked to MedCo to enable medical reports to be obtained based on automatically generated instructions, including the parties' versions of the incident. The PAP provides that the compensator will generally pay for the fixed cost report obtained via the MedCo process.

MROs and DMEs will be required to opt in to MedCo if they wish to offer services to unrepresented claimants. These experts will, as the MoJ has revealed, be expected to compete for instructions from LiPs.

In May 2020 concerns were expressed about a LiP's ability to navigate the system to successfully select an appropriate expert. Certainly, a LiP should not be expected to adopt the same criteria used by lawyers, where the choice was thought to be far too wide. However, it was also warned that the concept of different tiers of experts would be meaningless to most LiPs and too complicated for them to fully grasp. It was feared by some that uncertainty about which MRO or DME to instruct might simply drive LiPs to seek the advice of claims management companies (CMCs), or other 'non-solicitor' representatives.

Following a consultation process, the MoJ has resolved that the search process for obtaining medical reports where the claimant has legal representation will be unchanged. However, LiPs will be offered a choice of four MROs (two from each of the top two tiers) or five DMEs. Apparently, government lawyers had warned that to do otherwise might offend against competition laws. This, said the MoJ, reflected the perceived need for competition both within and between each tier. The way in which this operates is to be kept under review.

The *Whiplash Injury Regulations 2021*, currently awaiting parliamentary approval, provide rules governing the settlement of whiplash injuries at Paragraph 4. In England and Wales, 'appropriate evidence of an injury' means:

(i) evidence of a whiplash injury or injuries provided in a fixed-cost medical report from an accredited medical expert who has been instructed via a search of the online database of medical reporting organisations and experts held by MedCo Registration Solutions ('MedCo'); or

(ii) evidence of a whiplash injury or injuries provided in a medical report from a doctor who is listed on the General Medical Council's Specialist Register where that medical report has been obtained in respect of another injury suffered on the same occasion as the whiplash injury or injuries and is identified in the report as being more serious than the whiplash injury or injuries.

An 'accredited medical expert' means a medical expert who, on the date they are instructed, is accredited by MedCo to provide fixed-cost medical reports in respect of whiplash claims.

It is abundantly apparent that the provision of expert medical services will be kept very much 'in house' and is likely to be monitored closely. Even in the run-up to the scheme going fully live, there have already been disputes between MedCo and MROs. At least one claim[1] has concerned MedCo's entitlement to amend or suspend the status of an MRO following alleged non-compliance with the qualifying criteria. Although there was a suggestion at one time that a treating GP should be permitted to provide a report, the draft regulations define the 'fixed-cost medical report' as being an initial report in a whiplash claim from an accredited medical expert who, unless there are exceptional circumstances:

i) has not provided treatment to the claimant
ii) is not associated with any person who has provided treatment, and
iii) does not propose or recommend treatment that they or an associate then provides.

It should be noted that the regulations, if approved, will apply only to causes of action which accrue on or after 31 May 2021, and not to alleged injuries sustained prior to that date.

Rules governing the qualifying criteria for DMEs were published last year. All DMEs are required to show compliance, and will need to complete an audit interview with the MedCo audit team relating to compliance with the new rules. DMEs also need to demonstrate that they have appropriate systems and procedures in place, as well as adequate resources and consumer protection policies. If undertaking unrepresented claimant work, DMEs will also be required to undergo a DBS check. The basic DBS check is mandatory, but the enhanced DBS rating should be considered to be best practice.

During consultation, some objections were raised that the system of audits and interviews placed additional impacts on DMEs that were not expected of MROs. However, the view was taken that such safeguards would provide the necessary reassurance in relation to the service provided to LiPs. Furthermore, it was thought that demonstrating compliance with the new rules would not be too onerous. The MoJ has, however, indicated its intention to work closely with MedCo to ensure that DMEs opting into this scheme receive adequate notice, support and documentation to prepare for both the additional Accreditation Module and the audit interview.

Many experts have expressed their concerns in relation to the expectations LiPs may have of this new system. Indeed, will a LiP fully understand the nature of the expert's role, the expert's duty to the court and other significant factors?

The MoJ has given assurances that all users of the portal will be fully informed of the role of a medical report in supporting the court, and that while a LiP does have the right to ask for amendments to be made to correct any factual inaccuracies, the LiP cannot ask an expert to change their professional opinion.

Nevertheless, there is a reasonable expectation among some experts that a lack of understanding on the part of the LiP is more likely to lead to misapprehension as to the expert's role, as well as unreasonable expectations and baseless or spurious claims against the expert. It will be necessary, therefore, to have very clear terms of engagement with a LiP, and they ought to include some specific provision for how complaints are to be resolved. It is regrettable, then, that the contracting arrangements between LiPs and experts under MedCo are far from clear!

Other concerns include:

- the requirement that **experts should be able to be contacted outside regular working hours**, and the impact this might have on an expert's work–life balance
- the **number of referrals** an expert may be required to deal with
- the **requirements for complaint-handling procedures** that include the need to provide appropriate training for support staff working for the DME.

The conduct of LiPs, particularly regarding communication with the expert, is something that the MoJ and MedCo will have difficulty controlling. However, the MoJ has said that such conduct will be expected to be reasonable. How reassuring!

Those experts who have indicated to us that they will not be opting into the OIC scheme identify various issues of concern. High amongst these are:

- the **resources required to set up a back-office function are too expensive**
- the **high costs and the amount of extra time it will take to meet the required rules**, and
- the **inadequacy of the fixed recoverable costs available**.

During the last 12 months or so almost everyone has become more proficient and comfortable dealing with matters online. In any event, the OIC portal will offer guidance on completing on-screen forms and provide other support for claimants. It will also furnish a solution for the 'digitally excluded'. Such new innovations are never, it seems, without teething problems. It remains to be seen how well OIC will work in practice.

Of course, under the old system, the majority of such cases would have involved a claimant lawyer (typically working on a no-win no-fee basis) deciding if a claim had merit. Under the new system, there will be fewer lawyers involved, more LiPs essentially deciding on the merit of their own claim, and likely more input from CMCs. The neutral bystander might be forgiven the view that this could well result in an increase in fraudulent claims, not a decrease!

Ironically, RTA claims have, in any event, been falling steadily year on year. During the period January to March 2020 there were ~157,000 claims, but in the same period in 2021 the number had fallen to ~107,000 – a significant fall of 31%. As a result, motor insurance premiums fell by 14% in the 12 months to April 2021, the biggest annual fall since 2014. The pandemic and the resultant fall in the number of vehicles on our roads have undoubtedly contributed to this drop, but they are not the sole reasons. A general decline had been identified pre-COVID, and there is no reason to suppose that the trend would not have continued.

It should be mentioned that, while all of this has been ongoing, the Government has, rather quietly, introduced an increase in the small claims limit for non-RTA claims. It will rise to £1,500 (as opposed to the £2,000 first mooted), but the increase will not come into effect until April 2022.

Effective processes must be in place to deal with litigants in person

References

[1] *On Medical Ltd -v- MedCo Registration Solutions Ltd* [2017] *EWHC* 3111 (*Ch*).

Scott schedules – a brief guide

Scott schedules are found increasingly outside the TCC

Expert witnesses working in jurisdictions such as the Technology and Construction Court (TCC) will be familiar with the Scott schedule. Their use has increased over time, and they are now a fairly common occurrence across the spectrum of the civil courts and tribunals. They are also used frequently in arbitrations. But we know from our Helpline that there are plenty of experts for whom the Scott schedule is a novelty. For those, we hope this short guide will prove useful.

Simply stated, **a Scott schedule is a method of setting out the individual elements of a claim in the form of a table or spreadsheet**. The tabular format **allows for the comments of all the parties and their experts to appear side by side** in relation to each element of a claim or counterclaim. It allows the parties and the court to quickly assess the issues between the parties and their experts, and to discern the level of dispute in relation to each issue.

There are few hard and fast rules governing the use of Scott schedules. However, guidance is given by individual court jurisdictions, and this guidance is broadly similar but not identical. For the purposes of this article, we will concentrate mainly on the guidance issued by the TCC (where the Scott schedule is perhaps most widely used), but the advice will have broader relevance.

Scott schedules are dealt with in section 5.6 of the TCC Guide[1] which requires that parties should always consider whether presenting a claim in a Scott schedule would be helpful. This is particularly so in cases involving multiple heads of claim and/or numerous evidential documents. In such cases, instead of looking at multiple documents to establish the issues in dispute, the parties and the judge, arbitrator or adjudicator can refer to one summary document.

It is important, though, that the helpfulness of presenting a claim in this format is genuine. **A Scott schedule should not be ordered or agreed by the parties if it will waste costs and effort** (see s. 5.6.2). For example, a Scott schedule should not be permitted if it will duplicate earlier schedules, pleadings or expert reports. As is so often the case, the court is likely to apply the test of whether a Scott schedule is both appropriate and proportionate to the dispute. In *West Country Renovations Ltd -v- McDowell*[2], Akenhead J refused to allow one of the parties to use a Scott schedule on precisely those grounds, saying that its use was '*not appropriate for costs and convenience reasons as well as it not being obviously needed.*'

They offer a simple tabulation of a claim's elements

It will be obvious, then, that if a Scott schedule is to be used, **the possibility should be raised at an early stage in proceedings and prior to significant other steps that would otherwise result in unnecessary duplication of effort**.

In court proceedings, if the parties have not already agreed to use a Scott schedule, they should raise this possibility with the judge at the first case management conference (CMC). Similarly, in arbitration, the parties should raise the use of a Scott schedule with the arbitrator at their case management meeting.

The position is slightly different in the case of an adjudication, where the referring party may serve a Scott schedule with its referral notice and invite the adjudicator to order that the responding party replies to the schedule.

Form and preparation of the schedule

The form and nature of the Scott schedule will not necessarily be the same in each case. They will vary according to the nature of the claim, and there are a number of different formats and templates that can be used. However, Scott schedules all share some common characteristics and requirements.

Whatever the format and column headings of the spreadsheet, they must be specified when ordered by the court or agreed by the parties. It is important that the schedule is easy to navigate and clearly set out. Given the likely number of columns, the table will usually be in landscape format.

Each item of a claim must be contained in its own row, and the rows must be numbered consecutively. There should be sufficient columns for all parties to respond, and each party should have its own column (e.g. where there are multiple defendants). In addition, and where appropriate, column space must be included to allow comment by the parties' experts. The judge, too, will need to be able to add his/her own comments, for which space should be allowed.

It will be apparent, then, that all of this can result in a fairly crowded table! Consequently, although the entries on the table should be as detailed as possible, the parties and their experts should try to be succinct and avoid any excessive or unnecessary repetition.

As with all pleadings, **entries made on a Scott schedule must be supported by a statement of truth from each party**.

As soon as parties have agreed, or have been ordered, to prepare a Scott schedule, they must cooperate in its preparation. In the majority of cases, the schedule will be prepared by the claimant. The most common format is probably that of a spreadsheet (e.g. Excel). It has the advantage of being easily transmitted between the parties and is relatively simple to amend and extend. Once prepared by one party, the schedule then travels between the parties. Each party will state its position on the various issues identified, and may update and add to these as further pleadings, witness statements and expert reports are exchanged.

Scott schedules and witness evidence

As mentioned, **a Scott schedule is merely, and primarily, a means of setting out the elements of a claim in tabular format. It does not replace formal pleadings, witness statements or expert**

reports. However, because the evidence of witnesses and expert witnesses will frequently be contained or referred to in the schedule, it does provide a useful tool for both preparing and assessing witness evidence.

For example, in complex cases where there may be a number of expert witnesses in different disciplines, a Scott schedule can act as a checklist of the different issues to be covered, and pinpoint where those issues appear in the pleadings. A schedule will also assist in identifying an individual party's position on an issue, which documents relate to it, which expert witnesses are dealing with the issue and where in the expert reports the evidence on each issue is to be found.

A Scott schedule can also be useful in **identifying the crucial elements in dispute**, as well as **differentiating between those areas that are agreed and those that remain contested**. This approach enables the parties to focus on the issues where there are clear differences, often **enabling settlement** on those issues that are agreed.

Good and bad use

The Scott schedule definitely lends itself well to a particular type of case. A good example is to be found in the case of *McGlinn -v- Waltham Contractors Ltd*[3].

The case involved a dispute over the building of a house in Jersey. Deficiencies in the design and construction of the house were alleged. After the contractors left the site, the house sat empty for 3 years while the alleged deficiencies were investigated by a team of numerous experts and contractors. The house, which had never been lived in, was demolished and not rebuilt. Claims seeking damages for negligence and breach of contract were made against a number of parties, including architects, building contractors, engineers and quantity surveyors. The primary claim was for more than £3 million. The basis for the court's analysis was a Scott schedule. Given the number of parties, the number of defects alleged and the nature of the claims, the judge's task in analysing these was assisted considerably using the Scott schedule. The judge was able to identify quickly the nature of each alleged defect, the relevant facts (if any) concerning how this defect came about, the scope and extent of the defect, and the best evidence and expert evidence in relation to it. In his judgment, Coulson J paid tribute to the parties who had prepared the schedule, saying:

> *'A large amount of material, and a host of detailed technical points, was dealt with in what I regard as an exemplary fashion. A tight timetable was produced, agreed, and then adhered to. I am extremely grateful to all those involved for their assistance.'*

However, just because there are a large number of issues or items of dispute does not automatically make the use of a Scott schedule appropriate. Indeed, that very fact might militate against it.

For example, in *Imperial Chemical Industries Ltd -v- Merit Merrell Technology Ltd*[4], Fraser J took the view that he should not make an order requiring a Scott schedule to be prepared because it was obvious to him that almost every item referred to in the case was the subject of vehement disagreement. There was no point, he said, in ordering a Scott schedule if the process was unlikely to narrow the issues. It would do little to save court time and costs. He drew attention to the experience endured by Jackson J who had been required to value *'every piece of steel work in Wembley Stadium (42,000 metres of pipework) and every item of damages from a Scott schedule'*. Unsurprisingly, Fraser J had no wish to be subjected to the same ordeal!

Of course, for any Scott schedule to be useful, it must clearly and relevantly address the issues in the case. Failure to do so can lead to precisely the sort of delay and expense that the schedule is intended to avoid. This is particularly so when the task of producing a schedule falls upon litigants in person or is carried out without the assistance of appropriate experts.

In *Lansdowne House*[5], which was another building dispute case, the claimant was ordered at the CMC to set out in a Scott schedule the alleged defects in the property and the sums claimed to be attributable to each defect. Although the claimant served what the judge described as *'a very impressive spreadsheet'*, it did not identify the sums claimed for the repair of each of the defects. Global sums were included, but there had been no attempt to break these down and attribute them to individual defects. As a result, there was considerable overlap in the sums claimed.

The court ordered the claimant to produce a revised Scott schedule with the assistance of an expert quantity surveyor. The claimant failed to do so, and the court was obliged to make a further order. At the third attempt, the court and the defendants were satisfied with the claimant's Scott schedule. However, the claimant was ordered to pay a substantial portion of the costs incurred by the defendants in dealing with the various inadequate Scott schedules, as well as the costs of the additional court hearings that their failure to act had necessitated.

Although the cases cited primarily involve the TCC, the use of Scott schedules is now widespread. Whatever the jurisdiction, however, the accepted tenets for their effective and proper use remain much the same. **In the right circumstances, Scott schedules can perform a very useful function and result in much saving of time and costs.** It is vitally important, however, that **clear guidance is given at the outset** governing the format the Scott schedule should take and ensuring that all parties and their experts understand exactly what is required.

Used properly, Scott schedules can save both time and money

References

[1] See *https://www.gov.uk/government/publications/technology-and-construction-court-guide*

[2] *West Country Renovations Ltd -v- McDowell* [2012] *EWHC* 307 (*TCC*).

[3] *McGlinn -v- Waltham Contractors Ltd* [2007] *EWHC* 149 (*TCC*).

[4] *Imperial Chemical Industries Ltd -v- Merit Merrell Technology Ltd* [2018] *EWHC* 1577 (*TCC*).

[5] *Lansdowne House (St George's Hill) Ltd -v- Liberty Syndicate Management Ltd (on behalf of Liberty Syndicate 4472)* [2011] *EWHC* 332 (*TCC*).

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