

Tactical manoeuvres

Emily Formby discusses some of the more difficult issues facing practitioners when instructing experts in personal injury claims; including questioning the need to use one, considering the court's control over the process and deciding when or whether to disclose evidence

"WHERE FACTS ARE FEW, EXPERTS ARE MANY," runs the quote by Donald R. Gannon, and it may be that civil litigators have had this in mind when deciding their approach to using experts within litigation in the past. However, it is an approach that the CPR has tried, with some success, to curtail.

The rules relating to instructing an expert are set out in CPR 35 (now called Experts and Assessors) but it is worth exploring some of the tactical finesse of instructing an expert, and some of the trickier issues faced, particularly in personal injury litigation.

How necessary is it?

The first question may be whether to instruct an expert at all. As claimant it is worth trying to see whether issues are really in dispute before experts are obtained. Indeed, it is not always necessary even to have a medical expert. Contrary to the suggestion of the pre-action protocol, a medical report is not a *requirement*. CPR 16PD.4 makes this clear. Claimants should therefore ask themselves whether the report does more than repeat medical records. If it does not, defendants can consider whether to challenge the cost of the report.

Rules governing expert evidence extend to the pre-issue as well as post-issue stage. Various pre-action protocols deal with expert evidence. Even if the protocol does not apply directly to the litigation in question (such as the Personal Injury Protocol, which is primarily designed for claims in the fast track) the spirit of the protocol should be noted and adhered to as far as possible (see paras.2.2-2.5 of the Pre-Action Protocol for Personal Injury Claims).

At the pre-issue stage, the protocol rubric suggests, at 2.14, that there be a "joint selection of, and access to, experts. The report produced is not a joint report for the purposes of CPR 35. Most frequently this will apply to the medical expert... the protocol promotes the practice of the claimant obtaining a medical report, disclosing it to the defendant who then asks questions and/or agrees it and does not obtain his own report... if proceedings have to be issued a medical report must be



attached to these proceedings."

It should be remembered that the claimant does not have to be the party instructing the expert. In a case where liability is admitted and the defendant knows it will be meeting a sum in damages, the defendant can instruct an expert at an early stage to try and evaluate the claim. This can be an effective way to evaluate and conclude litigation with a minimum of incurred costs.

Experts instructed in this way are not the single joint experts governed by CPR 35.7 and 35.8. They are experts instructed by one party but, possibly, adopted by another. If the evidence is not accepted in due course the remaining party may gain permission to instruct its own expert (a full consideration of true single joint experts is outside the scope of this article).

Court controlled evidence

The thrust of the Woolf reforms and the CPR are to control the proliferation of expert evidence used at trial. Therefore, the first duty of the court (CPR 35.1) states: "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings."

Even if expert evidence is allowed on a

particular topic it is a stepwise process to having an expert at court. The rules, as all practitioners are aware, require the justification of the need for an expert at a CMC followed by a paper report. This report may be obtained by the claimant, with questions asked, before the defendant has an opportunity to rely on his own expert. Even then, the experts will not necessarily give evidence. Further questions will be asked. Thereafter, a joint discussion will be held with the final preparation of a joint report between the experts setting out the areas on which the experts agree, the areas on which they disagree and the reasons for their disagreement.

This process, now almost a standard, was articulated by Lord Woolf in *Daniels v Walker* [2000] 1 WLR 1382; an old case which nonetheless remains a clear statement of good practice and a case worth revisiting.

The involvement of the legal team in the joint discussion varies depending on cases. In some instances, there is no involvement, in others there is a general letter of instruction to each expert. In more complicated cases, the parties spend time (with or without the assistance of their experts) drafting an agenda for the discussion. However, it is

important that the content of the final discussion and the joint report is the work of the experts alone.

The conclusions drawn must be those of the experts, not the lawyers, and, as required, the experts must be reminded that their duty is to help the court on matters within their expertise, a duty which overrides an obligation to the person by whom he is instructed and paid (CPR 35.5). Reported case law is littered with judicial criticism of experts who appear to trim their sails to suit the case of their instructing party. For example, in *Royal & Sun Alliance Trust Co Ltd v Healey & Baker*, October 13 2000, New Law 100109601, an expert acting as independent surveyor commenting on the letting potential of a property was criticised by the judge for failing to cover and give an opinion on the whole of the relevant subject matter. He simply considered the evidence that supported the case of his instructing party.

Having the expert at trial is the final stage, but is often not allowed by the court until the final CMC or pre-trial checklist. While provision for listing according to the expert's availability may be a sensible course this does not mean the expert will give evidence without further consideration. It is also open to the case managing judge to decide that evidence need only be given on specific issues. Thus, the case managing of a claim can in fact have a considerable effect on the evidence that the court will finally hear; and so on the outcome of the case.

Careful consideration of expert evidence at every stage of the proceedings, full preparation for CMCs and the ability to argue for any evidence sought are necessary parts of the legal teams' litigation preparation. Failing to obtain permission for calling or instructing an expert today can impact on the trial some years hence.

A substantial change of opinion at or shortly before trial can render an expert's view subject to judicial circumspection, unless carefully explained or justified by new evidence. In *Bedson v Richards (deceased)* [unreported], the care expert, on the eve of the trial, stated a reduction in hours of care required by the claimant, which led the then Mr Justice Dyson to conclude that: "I was left with the distinctly uneasy feeling that she [care expert] was tacking according to the prevailing wind rather than giving me her best shot at what was properly required for this plaintiff in terms of care, regardless of the financial cost."

Practitioners should also remember that, even with the assistance of expert views, a trial judge may disregard expert evidence as long as he gives reasons for his conclusions – both the decision to disregard and the decision reached.

Disclosure of evidence

It must therefore be true that the decision of when or whether to disclose expert evidence can be of the utmost importance. Disclose too early and you may find your client stuck with a report that cannot be changed or easily amended to deal with tactical exigencies. Disclose too late and the court will complain that there has been a failure to place cards on the table or approach a claim with a view to early resolution of issues and conclusion of the claim without the need for issued litigation and trial.

The answer may therefore be to instruct but not disclose expert evidence at an early stage. This will give the party access to an expert view which can inform one's tactical approach to a claim, assist with asking or answering questions and enable an evaluation of the witness evidence.

The risk run is that this evidence is never disclosed and never put before the court. Therefore, the evidence itself cannot be used as evidence at trial unless it is proved or provided from another means (such as admission from the other party).

A further disadvantage is that the costs of obtaining the evidence – whether report, discussion or conference – will not be recoverable. Nonetheless, the cost of this evidence when weighed against the potential effect on damages may, in certain high-value cases, be a cost worth incurring in the grand scheme.

One problem with this approach, particularly for the defendant, is how to obtain the evidence. In a personal injury claim, examination of the claimant may be required; but this means the claimant must both know of the intended instruction and, indeed, co-operate. Therefore, a better course may be to conduct a paper exercise report only, ensuring the other party is not alerted to the instruction of the shadow expert who, in this way, can be kept outside the litigation process. If the expert view relies on examination of physical evidence this approach may not work.

There is a difference in expert evidence obtained pre- and post-issue. *Carlson v Townsend* [2001] EWCA Civ 511 confirms that a claimant is not required to disclose a medical report obtained at the pre-issue protocol stage, such a report remains the claimant's sole instruction and is privileged. While permission of the court will be required for the claimant to rely on another expert in the proceedings, that permission will not require disclosure of the first report as a pre-condition.

Different considerations prevail at the post-issue stage. In *Beck v MOD* [2003] EWCA Civ 1043, the Court of Appeal allowed the defendant to abandon his first expert's report and

instruct a second expert, but this was conditional on the first expert's report being disclosed. Pursuant to CPR 35.11, any party was therefore entitled to rely on that first report as evidence at the trial.

This decision was refined in the circumstances of *Hajigeorgiou v Vasiliou* [2005] EWCA Civ 236, where the defendant did not need permission to instruct a different expert from the one who had been canvassed at a CMC because the court had not named that expert in the directions. Had the expert been named, the situation would have been different.

Even if the report and the expert's conclusions are privileged, the objective findings in a report may be disclosed. In *Carruthers v MP Fireworks*, 26 January 2007 (unreported), a claimant who had been injured by a defendant's exploding firework was required to disclose the results of tests carried out on the fireworks at a pre-issue stage. The report was privileged and the expert's conclusions were not disclosed (following *Carlson*). However, the tests on the fireworks were, in part, destructive and, with the passage of time, could not be replicated by the defendant. Therefore, in the interests of justice, it was right that the defendant and the defendant's expert should have access to the outcome of the tests – the required information on which to base an opinion.

This principle was extended further in the case of *Pittalis v Ruzsala*, 19 September 2008 (unreported), where the district judge required the claimant to disclose the objective findings on examination of the claimant. The claimant suffered injury in an accident in 2004. She was first examined in May 2005 by a doctor at pre-issue stage. Proceedings were issued in October 2007. The early medical report was not disclosed or relied upon. The expert evidence relied upon was dated 2008 – more than three and a half years after the accident. While the judge accepted that the report was privileged, following the reasoning of *Carruthers*, he ordered the objective examination and results to be disclosed so that the defendant's expert would have a picture of the claimant's condition in May 2005 as well as 2008.

Therefore, even if a report as a whole may not be seen, parties can consider whether parts of the report, particularly the examination results and objectively gathered data, should be disclosed.

Emily Formby is a civil practitioner and specialist in injury and injury related claims at Hardwicke Building. She was instructed by the defendant in the case of *Pittalis v (1) Ruzsala & (2) Hendon Glazing*.

Contact: emily.formby@hardwicke.co.uk