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Solicitors and experts: working together under the new civil procedures

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APIL members will be only too well aware of the far reaching changes to civil procedures to be implemented in April 1999 which will inevitably affect the way solicitors and experts work. The intentions behind Lord Woolf's recommendations are undoubtedly laudable, but how will the Woolf principles outlined below;

- To help ensure that justice is meted out fairly
- To encourage the courts to deal with cases more swiftly and according to their complexity
- Expenses to be kept down

be served by the new regime on experts? The practical implications to solicitors, experts, plaintiffs, and ultimately to justice, may prove less welcome. This article examines some of the likely effects.

The role of the single expert has been one of the most controversial aspects of the Woolf recommendations and although tentatively tried by some solicitors, still represents a major area of concern. In reality many experts act as an advisor within their professional field to the instructing team. However, a jointly appointed expert would have difficulty doing this. Lawyers may then seek the view of another expert to comment on the opinion of the joint expert even if only to confirm this view! Clearly there could be time and cost implications here.

A further worry is that for a single non medical quantum expert to prepare a full and detailed report, they would require all relevant information, including medical reports, to be pre-agreed, otherwise the report would need to present a number of different models. It can take a long time for medical issues - not to mention other areas of dispute - to be settled. Single experts may therefore be called to produce two or three draft reports based on information available at the time, which again would have cost implications.

Courts to decide if an expert can be appointed

Very often, solicitors may need a consultant's help to quantify the claim. But, what if the courts rule against an expert being appointed? Would this procedure adversely affect justice? If a solicitor appealed against such a ruling it could delay resolution and increase expenses.

It has also been suggested that opportunist defendants could take advantage of such a system by arguing that an expert was not required, thereby preventing the plaintiff fully preparing their case.

Capping experts' fees

It has been said that capping the cost of an expert's report may be of more assistance to the defendant than the plaintiff as a report from a seasoned and proven professional may cost more than one from someone who has recently joined the profession.



Also, solicitors should beware that an unknown expert could, in an era of increased meetings between experts and joint statements, undermine the case or perhaps weaken the plaintiff's position. Indeed, it may be cynical, but the defendants may reap greater benefit from this ruling by arguing down the fee which the plaintiff is allowed as this could reduce the time spent on a report and affect its quality.

Expert's primary duty being to the Court

With very few exceptions, experts genuinely offer their impartial opinion. Whilst many experts do offer 'advice' in negotiation stages, a typical expert in the witness box gives a fair and unbiased opinion within their field of expertise.

Although the new procedures empower experts to "ask the court for direction", it is not yet clear how this system will operate and who will be required to answer the expert's questions. Whilst such guidance from the court may sometimes be helpful, the proposed system looks more likely to impede the intended streamlining of the judiciary, especially if the expert seeking information were unable to continue their report until the court responded to their request.

Courts to direct the use of experts

From now on, the courts will manage the manner in which experts give evidence. In an effort to reduce the costs attributed to lengthy court appearances, evidence will be largely limited to written advice.

Because of this reduction in court appearances, the new system allows for the defendant or plaintiff's solicitor to ask for (written) clarification on points in the expert's report. The written questions must be submitted within 28 days of the completion of the expert's report and can be for clarification only. But, this clarification may well require further research by the expert to support or reject a question and will inevitably impact on costs and the time required to resolve a case.

Court may demand a meeting of experts

In order that opposite experts can identify the issues where they are in agreement and where they disagree, it is likely that meetings between experts will become more common. Such meetings are best seen as a means of honing down areas of disagreement and can therefore focus the attention of the opposing parties and hasten settlement.

From a practical point of view, it makes sense if an agenda is set in advance and that a joint statement is prepared afterwards.

However, asking experts to see what they can agree is

fraught with danger: to some extent it involves "the solicitor handing over" an aspect of the case. But it would be inappropriate for a solicitor to instruct his or her expert not to agree certain points, or even to refer points of potential agreement back to the instructing legal team. After all, experts are meant to be impartial.

Pre-emptive offers to settle

While experts are experienced in responding to the plaintiff's request to produce a report quickly following a payment into court, the new opportunity to offer a settlement figure means time is of the essence for the following reasons

- i. By obtaining the expert's report quickly, the plaintiff's solicitor can put pressure on the defendants.
- ii. "Points of clarification" must be answered within 21 days following the settlement offer.
- iii. In order that the defendant and his solicitor may fully consider the settlement offer, they may need their own expert's report. Less than 21 days would be available for this.

However, there appear to be two problems with this part of the new civil procedures. First, the idea of offering a settlement figure does not fit easily with the inquisitorial 'jointly appointed expert'; and secondly, although this approach meets Lord Woolf's requirements to deal with cases more swiftly, it looks likely to encourage a more aggressive form of litigation which may demand greater case management skills from the plaintiff's solicitor.

From the expert's point of view, while it will be important that he meets his instructing solicitor's time scale, it will be equally necessary to ensure that the court receives the quality of research it requires in the appropriate format.

The future?

Undoubtedly the way in which solicitors and experts work together will change under the new civil procedures. Although it is intended that litigation will be speeded up and become available at lower cost without compromising justice, it looks doubtful that these intentions will be fulfilled. What will be of interest is whether the new rules will draw the British system closer to the inquisitorial approach to personal injury present in Europe or the aggressive litigation of the United States. Only time will tell. ■

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