Expert meetings and joint reports: Are they working?

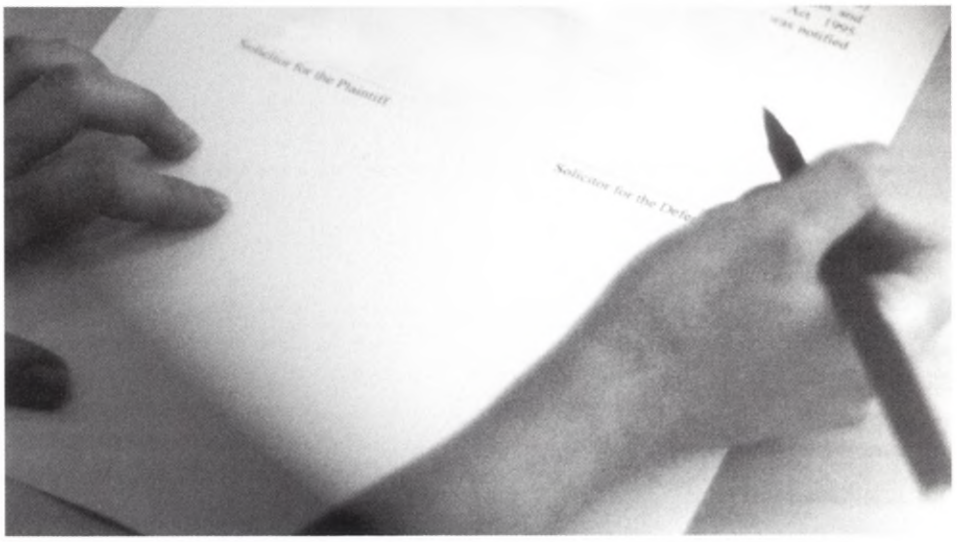
It is now over two years since the Woolf reforms were introduced in the UK. The implementation of the Civil Procedure Rules ('CPR') on 26 April 1999 was prompted by concern that the costs of litigation were disproportionate, particularly in lower value claims, and to ensure a more open approach between the parties to promote earlier settlement of cases. The court was to become more interventionist and what was seen as an excessive and costly use of experts came under the spotlight.

Previously, experts had been treated as partisan, reporting to the instructing party and both sides were allowed to call experts of their choice without any significant restrictions. Under CPR, the emphasis was on the role of independent experts whose duty was to the court and not to the paying party who had instructed them. Parties were also now required to consider joint instructions, which could be ordered by the court if not agreed, and, in higher value cases, experts would meet before trial to limit the issues between them. In every case the 'overriding objective', as defined in Part 1.1 of the CPR, was paramount to ensure that cases would be dealt with 'justly' with both parties being placed on an equal footing.

Solicitors were concerned that their freedom to call experts would be curtailed, and also how the use of joint experts would work in practice. They were not slow in seeking guidance from the court and as early as July 1999 the Court of Appeal (with Woolf LJ sitting) confirmed the expert's overriding duty to the court in *Stevens v Gillis*[1]. So, have these measures succeeded in reducing costs and promoting earlier settlements, or have the concerns of both claimant and defendant solicitors been realised? ▶

Alison Brooks is a Partner at Barratt, Goff & Tomlinson, UK
PHONE 0115 981 5115 **EMAIL** brooks@bgtsolicitors.co.uk
WEB www.bgtsolicitors.co.uk

JOINT INSTRUCTIONS



"Before expert meetings can take place it is preferable to agree to an agenda with the defendant."

When?

Under personal injury pre-action protocols the parties are required to nominate at least one expert to be agreed upon by the other party before instructions are sent. In clinical negligence cases, joint instructions are usually limited to quantum evidence but can be ordered by the court when experts are advising on liability. In a cerebral palsy case I was ordered to instruct a liability expert on causation on a joint basis with both defendants. Not surprisingly, agreement could not be reached and the parties had to return to the court. The order was revised to allow the claimant to instruct their own causation expert with the defendants sharing a causation expert. The original order had already allowed each party to rely on separate breach of duty experts.

In this case, the time spent trying to comply with the order did not save costs and only caused delay. The more recent case of *Oxley v Penwarden*[2] has since confirmed that joint experts on causation are not appropriate. It recognised the importance of the court having an opportunity to hear from several experts where there was likely to be more than one school of thought, and the importance of the parties calling an expert of their choice. However, in other cases joint experts can save time and costs. Even in high value cases, joint quantum experts are now frequently agreed upon between the parties.

The use of joint experts was addressed by Woolf LJ in the Court of Appeal as recently as 5 November 2001. The case of *Peet v Mid-Kent Healthcare Trust*[3] encouraged the use of joint experts for non-medical evidence but went further by ordering that their evidence should not normally be amplified or tested by cross-examination. The cost to the health service was clearly a factor in this case, and the fact that substantial damages were involved did not justify a departure from this general approach. Although a clinical negligence case, the trenchant comments of Woolf LJ suggest strong support for the idea of joint non-medical experts in personal injury claims generally. It is early days yet, but this decision is likely to force practitioners to be overly cautious when agreeing to a joint expert under the protocol.

When is an expert jointly instructed?

This was challenged in the Court of Appeal in *Carlson v Townsend*[4]. It was decided at first instance that when the defendant did not object to a medical expert nominated by the claimant, the expert was jointly instructed. This was overturned on appeal. The expert was not transformed into a single joint expert merely because of non-objection by the other party. Even now, defendant solicitors appear to confuse a jointly instructed expert with an expert to whom the other side has not objected.

The practicalities of joint instructions

This is still proving controversial and a working party is looking at how joint experts are instructed. In *Daniels v Walker*[5] the Court of Appeal suggested that if joint instructions could not be agreed, the expert could be sent separate instructions and if dissatisfied with the joint report, a party could be afforded facilities to instruct another expert to make enquiries prior to questioning the joint expert. If necessary they could also apply to call their own expert (see *Cosgrove* below). This clearly envisaged examining the joint expert at trial which may now be curtailed following the *Peet* decision.

The impact on legal professional privilege

The *Carlson* judgement confirmed that CPR did not override legal professional privilege, rejecting the defendant's application for discovery of an expert report obtained by the claimant. However, in *Smith v Stephens*[6] it was held that CPR did go behind legal privilege in relation to experts, relying on the court's inherent jurisdiction. In the judgement HHJ Nicholls (sitting as a deputy judge of the High Court) stated that, if he was wrong on that basis, he would still have allowed the defendant's application to prevent the claimant's solicitor and counsel meeting alone with the joint quantum experts because:

- Under Part 35.9, where one party has access to information which is not reasonably available to the other party, the court can order disclosure of that 'information'. Accordingly the claimant would have to disclose a tran-

script of any conference that took place.

- The claimant's were entitled to put any questions to the experts under part 35.8(2) and this had not been done prior to arranging a conference with counsel.

Permission to appeal was granted but was not pursued and I understand the claimant eventually overcame the problem by obtaining leave to instruct another expert. Whilst the court was keen to stress that they were not setting a general principle, the Court of Appeal in *Peet* suggested that legal professional privilege was not eroded by preventing a meeting with a joint expert with only one party present unless all the parties had first given their consent. Unfortunately, this raises the horrifying image of a defendant being present at any conference when the joint expert is also there!

What if you are not happy with the joint expert report?

In *Cosgrove v Pattison*[7], the Chancery Division allowed an application to rely on a further expert in these circumstances, but there had to be good reason. A number of factors needed to be established to show that justice between the parties would not be served if only the joint expert gave evidence. The dissatisfaction should not be 'fanciful'. Whilst this decision is welcomed, it does raise issues about equality if one party is better funded. Indeed, experts are already being used by wealthier defendants in some cases to provide undisclosed advice behind the scenes when joint reports are obtained.

Questions to experts

Under CPR Part 35, a party may put questions to an expert after exchange of reports whether or not the expert is instructed jointly. In *Mutch v Allen*[8], the Court of Appeal decided that the expert's reply to questions raised by the other party could be relied upon to assist with the issue of contributory negligence. CPR Part 35 sought to 'ensure that experts no longer serve the exclusive interest of those who retain them but rather contribute to a just disposal of disputes by making their expertise available to all'. Perhaps in the future we will be faced with US style depositions for experts.

EXPERT MEETINGS

Preparation

Before expert meetings can take place it is preferable to agree to an agenda with the defendant. In complex cases this can be extremely time consuming and costly. When the defendant objected to an agenda which I had prepared I had to attend court to successfully argue that questions in the draft agenda should properly be put to the experts. This involved hours of correspondence and counsel's advice, as well as a court hearing. It unfortunately is not an isolated incident. One must therefore question if costs are really being saved in some cases.

The comments of a leading paediatric expert are also worth bearing in mind. He felt that the conclusions of an expert meeting should not come as a surprise to either party if the issues had been properly considered following the exchange of expert reports. If this is correct, then will a meeting save costs? The answer must be that in some cases it does. I have settled two cerebral palsy cases which were assisted by expert meetings taking place. On the second occasion, the same obstetric expert had been used by the defendant and, again, he altered the views which he had expressed in his written report. It illustrates the importance of knowing your expert, ensuring that their opinion has been thoroughly considered before their report is served, and that they are fully prepared. This must include proper analysis of all the reports following exchange of evidence between the parties.

Whatever the merits of expert meetings, courts frequently order them. If this is the case, there is obvious benefit in taking the initiative in setting the agenda, although I am told by ▶

experts that claimant solicitors are still not doing this. Preparing an agenda can prevent new evidence being introduced. It can also (as happened in a recent case) prevent an expert from straying into other areas in order to buttress otherwise weak evidence. I cannot remember a case where our expert has not positively welcomed an agreed agenda even if, as previously mentioned, this means going to court to approve it.

Should solicitors attend the expert meetings?

In the cerebral palsy conferences mentioned above, I decided not to be present as I expected that the defendant's expert would be more open and the claimant's expert was reliable and well briefed. However, in other cases it can be useful. Experts can be poor note takers and keeping a record of the meeting can distract them from the issues. Meetings can be tape-recorded but beware those experts who will use the meeting to discuss their fees!

The most recent view from the Clinical Disputes Forum is that solicitors should be present. However, in the case of *Temple v South Manchester Health Authority* when the experts had apparently misunderstood the legal test, the court considered whether the problem would have been avoided if solicitors had been present. They were not persuaded that it would have helped as the preamble to the expert agenda had set out the legal burden of proof and had solicitors been present the court felt that the process would have 'become very much more formal and confrontational.' This view was reaffirmed in the Court of Appeal in *Hubbard & Ors v Lambeth, Southwark & Lewisham Health Authority*[9]. A well-drawn agenda from experienced solicitors would suffice, although Hale LJ did suggest that an independent neutral chair might be considered.

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The benefits

Expert meetings can provide an excellent pre-trial opportunity to assess the other side's evidence as well as your own expert. When the writer has attended expert meetings it has not appeared to inhibit the experts, but the cost has not always been merited. Very few significant issues are reduced which would minimise costs at trial, and there have been no surprises, except perhaps where an expert has not been properly prepared or given sufficient attention to the issues in the first place.

The disadvantages

Parties should be careful where statements are agreed to and signed following an expert meeting. In *Robin Ellis Ltd v Malwright Ltd*[10] the 'interim' statement was deemed not to be privileged even though discussions at the meeting did retain privilege. The court ordered that the statement should not be withheld from the court, otherwise the meeting of experts would not achieve its intention, namely to narrow the issues. However, the statement could still be challenged where an expert genuinely changed their view after the meeting. This should be distinguished from the case where the expert had later expressly withdrawn his acceptance of an agreement at a joint expert meeting without any apparent justification (see *Pearman v North Essex Health Authority*). In this situation it would be difficult to persuade a court that the views expressed at the meeting were not properly held by that expert and should be ignored. The case of *Hubbard* also reiterated the safeguard within part 35 that discussions were not binding on the parties, nor could they be referred to at trial unless the parties agreed.

Do expert meetings preclude the right to a fair trial?

In the case of *Daniels*, the court was not impressed with the argument that ordering joint experts breached the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). In *Hubbard*, the court again considered Article 6 of the ECHR in four clinical negligence cases. The claimants' argued that their experts would feel inhibited in criticising the treating doctor, who was now a highly respected

professor, and that the issues were so complex that they could only be properly explored at trial by oral evidence. The Court of Appeal rejected these arguments. The experts had already committed themselves on paper to criticise the treating doctors knowing that their views would have to be defended at trial. Article 6 was not undermined by the order for experts to meet, the purpose of which was to narrow the issues to what was genuinely in dispute. There was no reason why the claimant's experts should modify their views merely because of the expert meeting, and they should only make concessions if it was proper to do so.

Conclusion

It is still perhaps too early to see if the benefit of joint experts and meetings has reduced issues and saved costs. Some experts and solicitors feel that meetings of experts increase costs without reducing issues. The writer's own experience has been very mixed. On balance, it has caused as many problems as it has resolved, but meetings probably do focus the minds of both parties and experts earlier. However, there is likely to be an increase in the use of experts behind the scenes. If this happens, claimants will potentially no longer be on an equal footing with defendants who are often better resourced. There is no doubt that experts have been used excessively in the past. In many cases joint expert reports and meetings are beneficial, but it is my view that each party must still be able to test the evidence freely and there is a danger that this will not occur if the joint report is put before the court without that expert being examined.

It is likely that expert meetings will continue to be ordered and it is a fact that a well briefed expert will prevail over one who is not well prepared. In many cases this can serve to induce agreement from a less well prepared party. In personal injury cases, my experience is that experts are more likely to shift position, either as a result of persuasion or a reluctance to attend trial. It is therefore essential that your expert fully understands the issues and the legal tests before any expert meeting takes place. The Academy of Experts has produced a guide for experts which was praised by the Court of Appeal and no doubt further guidance will be needed in the future as new issues are raised. PL

Footnotes:

1 (TLR 6/10/99).
2 (LTL 6/3/01).
3 (19/11/01 TLR).
4 (2001 3 All ER 663).
5 (TLR 17/5/00).
6 (LTL 16/10/01).
7 (TLR 13/2/01).
8 [2001] PIQR P26.
9 (TLR, 8/10/01, [2002] PIQR P14).
10 (1999 WLR 745, LTL 3/2/99).