Your Witness

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Economics, not justice

Few readers will be ignorant of the Jackson reforms to the civil litigation system in England and Wales. Indeed, we look at some of the consequences on pages 6 and 7 of this issue.

One of the key strands of the Jackson reforms is the need for parties to lodge costs budgets with the court. This raises all sorts of issues for expert witnesses, the foremost being the need to develop a system to lay out best estimates of fees based on some set of assumptions about how any given case will proceed.

But the involvement of an expert witness is just one part of a larger budgeting exercise that lawyers must undertake – and the courts are letting it be known in no uncertain terms that the requirements in the Civil Procedure Rules are to be observed, or serious sanctions will follow. Just such a sanction has recently befallen Andrew Mitchell.

On 21 September 2012, *The Sun* newspaper reported that Mr Mitchell, then the Chief Whip of the Conservative Party, had raged against police officers at the entrance to Downing Street in a foul-mouthed rant, an incident now known as 'plebgate'. Mr Mitchell is suing the owners of *The Sun* for defamation.

As part of that action, a costs budget should have been with the court 7 days before the case management conference. When Mr Mitchell's solicitors finally submitted their budget, the day before the case management conference, it estimated costs at just over £500,000.

The judge made an order that, as the budget was late, Mr Mitchell was to be treated as 'having filed a budget comprising only the applicable court fees'. That might amount to a few thousand pounds!

Mr Mitchell's lawyers appealed for relief from this sanction, mainly because the defendant had suffered no loss as a result of the delay. The judge was having none of it and refused relief. The matter moved up to the Court of Appeal. In dismissing the appeal, the court said:

> *'We acknowledge that it was a robust decision. [The judge] was, however, right to focus on the essential elements of the post-Jackson regime. The defaults by the claimant's solicitors were not minor or trivial and there was no good excuse for them. They resulted in an abortive costs budgeting hearing and an adjournment which had serious consequences for other litigants. Although it seems harsh in the individual case of Mr Mitchell's claim, if we were to overturn the decision to refuse relief, it is inevitable that the attempt to achieve a change in culture would receive a major setback.'*

Now, this raises a serious issue for us all. It is hard to conclude anything other than that *Mitchell* was a show trial. The judges would follow the party line and deliver a judgment that was utterly divorced from any sensible view of what was right and just.

The new test of proportionality is concerned with economic value, not any traditional idea of justice. Modest cases are now allocated resources that are 'proportionate'. The problem with this cost–benefit approach is that 'value' to an insurance company or employer has a different meaning from that of an injured party who sees justice as having an intrinsic value in itself.

The real reason behind the decision in *Mitchell* was for the Court of Appeal to flex its muscles and show practitioners that the new world of economics is more important than any traditional notion of justice. I fear we can look forward to more examples of the Court of Appeal delivering 'dumb' justice as it seeks to drum this point into the heads of litigants and their lawyers.

District judges have already started to implement the new cost–benefit approach by 'cutting down' on evidence. This rationing is potentially very damaging if we are interested in justice.

As Dr Neil Hudgell wrote in the *New Law Journal* recently, 'Challenging employers, big business and government who have committed torts should be a healthy sign of a democracy and ... rationing justice will undermine this further. Is this a price worth taking? I think not.' I agree.

FSR – legal obligations on experts

Towards the end of last year, the Forensic Science Regulator published a revised version of its information document on the legal obligations that fall upon expert witnesses in the criminal justice system. It is a very helpful piece of work that brings together a mass of information that will often be of value to the busy expert witness.

The work is split into sections such as key judicial guidance, the role of the expert witness, duties of disclosure and preservation, admissibility, mandatory elements to an expert's written evidence, the coroner's court system, some guidance on particular types of evidence (e.g. DNA, ear prints, fingerprints, etc.) and secondary sources of guidance or professional obligations.

The guide can be found by Googling for 'Forensic Science Regulator legal obligations – issue 2', and it is highly recommended.

Chris Pamplin

Inside

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Law Commission on admissibility

Law Commission acts to define principles of reliability

The Law Commission aims to make the law as fair, modern, simple and cost-effective as possible. It conducts research and consultations so that it can offer systematic recommendations to Parliament.

Prompted by the House of Commons Science and Technology Committee report of 29 March 2005 'Forensic science on Trial'[1], the Law Commission published in March 2011 its report 'Expert evidence in criminal proceedings in England and Wales'[2]. The Law Commission's report was based largely on a public consultation conducted between April and July 2009 and the House of Commons report.

The House of Commons Science and Technology Committee observed that while expert witnesses tended to be publicly condemned following miscarriages of justice, little or no criticism was directed at the role played by the judges and lawyers in these cases. The Committee's view was that the miscarriages in, for example, *Cannings* and *Clark* ought to be viewed as systemic failures rather than isolated cases of a rogue expert providing flawed testimony.

It often isn't the expert opinion itself that is a root cause of a miscarriage, but the court's willingness to choose between the conflicting opinions of, often, eminent expert witnesses. When this is done in a case featuring little evidence other than expert evidence, there is a much-increased risk of a miscarriage of justice being perpetrated.

The main weakness in the development of English law regarding the admissibility of expert evidence is that it has been based on pragmatism rather than principle. Instead of laying down a set of principles concerning the reliability of expert evidence, English courts have adopted statements of principle provided by foreign courts. The Law Commission rose to the challenge to address this weakness.

Gate-keeper

Judge to act as gate-keeper regarding evidence reliability

The Law Commission's key proposal was that there should be an explicit 'gate-keeping' role for the trial judge, with a clearly defined test for determining whether proffered expert evidence is sufficiently reliable to be admitted. Application of this test would determine whether the evidence is admissible as a matter of law.

The judge first needs to determine that the proposed expert evidence is logically relevant to the disputed matter and will provide the jury with substantial assistance. Next, the judge must be convinced that the witness is both truly expert and able to provide an impartial opinion. And finally, the judge must ask the gate-keeping question: Is the evidence sufficiently reliable to be considered and, ultimately, accepted by a crown court jury?

The Law Commission proposed that the trial judge would not only consider the reliability of the expert's hypothesis, methodology and assumptions, but also examine how the expert has applied them to the case and, if properly applied, whether the expert's conclusion is logically sustainable.

Reliability factors

While much expert evidence is based in science, there is also expert evidence based on experience (e.g. experts in custom and practice for a particular trade), and this was recognised by the Law Commission. It originally proposed two distinct sets of guidelines to be used by judges in undertaking the reliability test. However, following consultation, the Law Commission concluded that the dichotomy was not helpful. Insead, it opted for a single set of generic 'factors'.

The Law Commission recommended that a trial judge who has to determine whether an expert witness's opinion evidence is sufficiently reliable to be taken into consideration should have regard to the following factors:

(a) the **extent and quality of the data on which the expert's opinion is based**, and the **validity of the methods** by which they were obtained

(b) if the expert's opinion relies on an inference from any findings, **whether the opinion properly explains how safe or unsafe the inference is** (whether by reference to statistical significance or in other appropriate terms)

(c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), **whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results**

(d) the **extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise** (for instance, in peer-reviewed publications), and the **views of those others** on that material

(e) the **extent to which the expert's opinion is based on material falling outside the expert's own field of expertise**

(f) the **completeness of the information that was available to the expert**, and **whether the expert took account of all relevant information** in arriving at the opinion (including information as to the context of any facts to which the opinion relates)

(g) **whether there is a range of expert opinion on the matter in question**; and, if there is, **where in the range the expert's opinion lies** and **whether the expert's preference for the opinion proffered has been properly explained**

(h) **whether the expert's methods followed established practice** in the field; and, if they did not, whether the reason for the divergence has been properly explained.

These were not to be regarded as an exhaustive or exclusive list of factors, but they do give a solid starting point from which to judge the reliability of expert evidence.

The Law Commission proposed that any party to an action, or the judge, should be able to raise the question of evidential reliability as a preliminary issue. It also acknowledged that the presumption of innocence is crucial, and that the accused must have the right to adduce such evidence as he or she desires. But, as important as it is, the presumption of innocence does not give the accused the right to adduce unreliable expert evidence to mislead or distract the jury from reliable evidence pointing to his or her guilt.

Note that at no stage of this inquiry into the reliability of the underpinning body of knowledge is it incumbent on the judge, the parties or the experts to show or determine if the opinion given by the expert is actually correct. **The test is only whether the opinion is grounded in a body of knowledge that is itself deemed reliable**.

Government (in)action

So, in summary, the Law Commission's key recommendations were:

- to introduce a **statutory admissibility test**, to be applied in appropriate cases, whereby expert opinion is admissible in criminal proceedings only if it is sufficiently reliable to be admitted ('the reliability test')
- to provide, by statute, judges with a **single list of generic factors to help them apply the reliability test**, and
- to **codify (with slight modifications) the uncontroversial aspects of the present law**, so that all the admissibility requirements for expert evidence would be set out in a single Act of Parliament and carry equal authority.

On 21 November 2013 the Government published its response to the Law Commission's proposals. In it, the Government tells us it shares the Law Commission's concern about the problems caused by the use of inappropriate or unreliable expert evidence, and is persuaded of the benefits of taking action. It also recognises the potential value of the proposed reliability test in reducing the risk of unsafe convictions arising from unreliable expert evidence.

However, the Government notes that there is no robust estimate of the size of the problem to be tackled – in terms of either the number of cases in which unreliable expert evidence is adduced, or the impact this has regarding subsequently quashed convictions.

Application of the new test would involve additional pre-trial hearings, which would increase costs. But there is insufficient information on predictable savings to compensate for those costs. Without certainty as to the offsetting savings that might be achieved, when set against current resource constraints, it is the Government's view that it is **not feasible to implement the proposals in full at this time**. Of course, a lack of data relating to cost saving has not stopped 'the Authorities' putting in place fee capping for experts! It's interesting how these things work, isn't it?

There's no money to implement the proposals!

Rather than creating a statutory reliability test now, the Government will invite the Criminal Procedure Rule Committee to consider amending the Criminal Procedure Rules to ensure that judges are provided, at the initial stage, with more information about the expert evidence it is proposed to adduce. If endorsed by the Criminal Procedure Rule Committee, the Government believes that such changes could increase the likelihood of the trial judge and the opposing party, where appropriate, challenging the expert evidence.

The Government recognises this will, of course, fall short of the recommended reliability test, but considers that the amended Criminal Procedure Rules would go some way towards reducing the risk of unsafe convictions as a result of unchallenged inappropriate or unreliable expert evidence.

So we can conclude that austerity has won the day!

Conclusion

Working with the Law Commission on this report was a fascinating and encouraging experience. The detailed and thorough analysis of the evidence is a model of good practice. Following careful deliberations on the admissibility of expert evidence in criminal proceedings, the Law Commission came to conclusions that have been accepted almost universally.

Here, at the *UK Register of Expert Witnesses*, we agree with the Law Commission's analysis of the problem and support the thrust of its proposals, although we would perhaps have gone a little further. We are therefore pleased that the Government similarly understands and agrees with the bulk of the findings.

We are entirely unsurprised by the Government's decision not to fund any of the proposed changes. Indeed, those who have observed the Ministry of Justice's approach to limiting expert witness fees paid out of the legal aid fund – an unsophisticated and irrational scheme that pays no heed to the effect on access to justice – cannot be taken aback that the Government is unwilling to pay for the recommended reliability test.

But the problems highlighted by the Law Commission remain, and it is the duty of all who are interested in justice to do what they can to ameliorate them. Experts could, perhaps, do worse than to test their own opinions against the reliability factors set out by the Law Commission.

Chris Pamplin

References

[1] See https://www.gov.uk/government/publications/forensic-science-on-trial

[2] Law Commission, *Expert evidence in criminal proceedings in England and Wales*, 21 March 2011, Law Com No 325.

Expert witnesses and cross-border l

Cross-border litigation more likely now

In a shrinking commercial world, experts will increasingly find themselves involved in some form of cross-border litigation. Such litigation is imbued with potential difficulties and, not least among these, is the form and manner in which experts are appointed and expert evidence is taken. Within the EU, however, there have been attempts to 'streamline' the process, but these can throw up their own problems.

When you crash your car in France

In cases in which some obligation arises (other than through contract) that have a connection with more than one European state, such as road traffic accidents involving citizens of more than one EU member state, EU Regulations [Council Regulation (EC) No 44/2001 of 22 December 2000 ('Brussels I')] permit the injured party to bring an action directly against the insurer in the courts in the country in which the claimant is domiciled, provided that a direct action is permitted and the insurer is also domiciled in a member state (*FBTO -v- Odenbreit*[1]). Prior to this, it would have been necessary to bring the claim in the state in which the cause of action had arisen.

To facilitate such litigation, regulations were formulated that were designed to ensure greater uniformity between member states. Regulation (EU) 864/2007 on the law applicable to non-contractual obligations (Rome II) determines the governing law of torts. In summary, the legislative purpose of Rome II is to improve the predictability of the outcome of litigation, in part by achieving certainty as to the applicable law. It was considered that uniform rules applied in all states would help to ensure predictability and justice, in the form of a reasonable balance between the interests of the person claimed to be liable and the person who has sustained the damage.

Whose rules do we play by?

The general rule is that the applicable law will be the law of the country in which the damage occurred (Article 4). The scope of the applicable law is covered by Article 15, which states that it will govern, among other matters, the nature and assessment of damage. However, Article 1(3) provides that Rome II shall not apply to evidence and procedure. These matters are governed by the law of the country in which the case is heard. In recent years, however, the scope of the applicable law of contracts and torts has been gradually extended to embrace, for example, limitation of actions and assessment of damages.

Do different laws apply to evidence and procedure?

In *Wall -v- Mutuelle De Poitiers Assurances*[2] the court was called upon to consider whether questions concerning expert evidence were to be determined by the applicable law or were procedural matters for the purposes of Article 1(3) of Rome II (and consequently excluded from the Regulation and so a matter for the law of the forum).

Wall -v- Mutuelle De Poitiers Assurances

The facts of the case, briefly stated, were these. The claimant was English. In July 2010 he went to France for a holiday on his motorcycle. While there, a collision occurred between himself and a car driven by a Mr Clement. As a result, the claimant sustained very severe and extensive personal injuries.

After emergency treatment in a French hospital, he returned home to England. On 22 December 2011 he issued a claim seeking damages for personal injury and naming Mr Clement's French motor insurers as defendant. There was no dispute that this was a course he was entitled to adopt following Brussels I. Neither was there any dispute that the collision occurred as a result of the negligence of Mr Clement. Consequently, on 21 May 2012 judgment was entered for the claimant for damages to be assessed.

It was common ground that Rome II applied to this case and that, even though the claim had been brought in the English courts, the applicable law would be French, pursuant to Articles 4 and 15.

In accordance with English law and practice, the claimant wished to call a number of experts to adduce evidence relating to the nature and extent of his various injuries and the assessment of his damages. The defendant wanted a single expert to be appointed in accordance with what was said to be French law and practice. The defendant argued that the appointment of the expert and the scope of the expert evidence were matters that were subject to the applicable French law.

Appointing experts

Mr Justice Tugendhat was therefore called upon to decide whether the expert evidence ordered by the court should be determined:

(a) by reference to the law of the forum (English Law) on the basis that this was an issue of 'evidence and procedure' within Article 1.3 of Rome II, or

(b) by reference to the applicable law (French law) on the basis that this was an issue falling within Article 15 of Rome II.

In making his deliberations, the judge was mindful of the differences in the adversarial and inquisitorial systems pertaining in the two countries. He pointed out that Civil Procedure Rules (CPR) Part 35 (Experts and Assessors) was introduced on the basis of the reports by Lord Woolf in *Access to Justice*. Lord Woolf had considered the differences between the ways in which courts in different countries received expert evidence and, in his Final Report at chapter 13, he said this:

> *'The traditional English way of deciding contentious expert issues is for a judge to decide between two contrary views. In continental jurisdictions where neutral, court-appointed experts are the norm, there is an underlying assumption*

that parties' experts will tell the court only what the parties want the court to know. For the judge in an inquisitorial system, the main problem is that it may be difficult for him to know whether or not to accept a single expert's view. There is no suggestion, however, that he is inevitably less likely to reach the right answer than his English counterpart.'

Mr Justice Tugendhat pointed out that, in saying this, Lord Woolf no doubt had in mind that some practices in the common law states are unknown in most civil law states. Furthermore, rules of evidence also differ widely across the various jurisdictions.

Practices specific to common law states include an obligation upon litigants to disclose documents that adversely affect their own case or support another party's case (CPR Part 31 6(b)), the preparation and exchange of witness statements for use at trial (CPR Part 31 14), and the cross-examination of both witnesses of fact and expert witnesses.

Adversial -v- inquisitorial

The adversarial procedures in common law states are designed, he said, to assist the court to arrive at the truth. But they require more work to be done by litigants and their lawyers (often with correspondingly less work for the judge) than is required under most civil law inquisitorial systems. The result is that the direct costs of litigation which have to be borne by the parties are much higher in common law states. This is so, even when the comparison is between a civil law and a common law state in which rates of remuneration charged by lawyers are at comparable levels. On the other hand, in common law states fewer judges are required, and fewer cases are actually tried, instead of being settled. These facts may help to keep down the cost to the common law states of providing for the administration of justice.

Having regard to the differences of procedure, it was not surprising to Mr Justice Tugendhat that outcomes were different, even in those cases where there was no significant difference between the provisions of the substantive laws of the states in question.

The judge identified the provision in the French Code of Civil Procedure for the appointment of experts. It was common ground that the fact that these provisions are in a Code entitled 'Civil Procedure' is not, according to EU law, determinative of whether it counts as part of the applicable law for the purposes of Rome II Articles 1.3 and 4.

French Code of Civil Procedure

The effect of the French Code of Civil Procedure is broadly as follows.

- Personal injury damages are assessed with the assistance of medical experts.
- There may be one or more experts.
- The expert may be appointed by agreement between the parties, or of the court's own motion.
- In practice, a medical expert is always chosen from a list drawn up by the Courts of Appeal or the Court of Cassation in accordance with the provisions of French law.
- A single expert is appointed unless the judge considers it necessary to appoint more than one (Article 264).
- A person who is appointed an expert may obtain the opinion of another expert, but only in a specialism that is different from his own (Article 278).

An expert whose opinion is sought under Article 278 is known as a 'sapiteur'. In practice, this makes it possible for there to be one expert who directs the work and produces a single comprehensive report, which includes the opinions of any sapiteurs. For example, when the victim's accommodation requires adaptation, the medical expert will appoint an architect to give an opinion on the works in question. Another example given is where the victim has suffered serious brain damage and a specialist opinion is required on that.

Rules as to the conduct of the expert and related matters are set out in Articles 232–286. These include the following.

- The expert holds hearings, of which notice must be given to the parties.
- The expert receives documents and information from them, conducts examinations and must disclose to the parties information and documents upon which the opinion is based, and give the parties an opportunity to make representations.
- The judge is not bound by the opinion of the expert (Article 246).

In practice, the judge assesses the losses suffered by the victim, item by item, on the basis of the report.

English court, English rules

Having concluded that the contrasting way in which expert evidence was adduced in the two jurisdictions arose out of procedural differences, the court decided that, although the applicable law in this case was French law, it did not mean that the court had to put itself in the position of a court in France and decide the case as that court would have decided it. To do so would have involved the court in adopting new procedures, and this it was plainly not required to do.

In the judge's view, questions of what expert evidence the court should order, and, in particular, whether there should be one (or more) single joint experts pursuant to CPR 35, were matters of procedure, as referred to in Article 1(3). Such questions should, therefore, be determined by the law of the forum, in this case English law.

Judge ruled that calling of expert evidence was procedural, so case must run by the law of the forum

References

[1] *FBTO -v- Odenbreit (Case C-463/06)* [2007] *EUECJ.*

[2] *Wall -v- Mutuelle De Poitiers Assurances* [2013] *EWHC 53 (QB).*

Delay in service of expert reports

A key aim of the Jackson civil litigation reforms is to encourage courts to take a much firmer line on unjustified delays and breaches of orders, and this includes any failure to serve expert reports in a timely fashion. Such a breach is now likely to result in severe sanctions.

Courts encouraged to take firmer line on delays and breaches of orders

Jackson reforms brook no delay

Cases decided since April 2013 demonstrate the court's intention to be rigorous in its application of the amended rules. Although the courts were given some discretion during the transitional period in relation to proceedings commenced prior to April 2013, such discretion is unlikely to be freely exercised unless there is a compelling reason under the old rules and the overriding objective for so doing.

Prior to April 2013, the court's discretion to grant relief from sanctions was governed by Civil Procedure Rule (CPR) 3.9, which stated:

1) *On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including*
   a) *the interests of the administration of justice;*
   b) *whether the application for relief has been made promptly;*
   c) *whether the failure to comply was intentional;*
   d) *whether there is a good explanation for the failure;*
   e) *the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;*
   f) *whether the failure to comply was caused by the party or his legal representative;*
   g) *whether the trial date or the likely trial date can still be met if relief is granted;*
   h) *the effect which the failure to comply had on each party; and*
   i) *the effect which the granting of relief would have on each party.*
2) *An application for relief must be supported by evidence.*

Transitional period still masking the real effects of new regime

Since April 2013, CPR 3.9(1) reads:

1) *On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –*
   a) *for litigation to be conducted efficiently and at proportionate cost; and*
   b) *to enforce compliance with rules, practice directions and orders.*

There has been some uncertainty as to whether the checklist in the old CPR 3.9 continues to apply or whether it has been superseded in its entirety by CPR 3.9(1).

Relief from sanctions

The recent case of *Thevarajah -v- Riordan*[1] suggests that the checklist remains relevant to an application for relief from sanctions. In this case, the court also acknowledged the desire to counter a culture of deliberate delay, but said that principal regard should be given to doing justice between the parties. Notwithstanding that, litigants should not expect leniency from the court in any applications considered under the new rules.

In *Fons HF -v- Corporal Ltd*[2], the court considered whether to extend the time for filing witness statements. In this case the parties had failed to exchange witness statements in compliance with the original directions order. The judge had made a further order in November 2012 directing that statements should be exchanged by 6 April 2013, which the parties subsequently agreed to extend to 18 April. The defendant, however, was not ready to exchange by that date and applied for a further extension. The judge, in granting an extension to the following day, said that he had '*come very close to refusing the extension*', and was only doing so because the hearing took place so soon after the CPR amendments and the period since the extension in the second order had expired was relatively short. He emphasised, however, that:

> *'... all parties and the wider litigation world should be aware that all courts at all levels are now required to take a very much stricter view of the failure... to comply with directions...'*

... particularly where it is likely to lead to a waste of court resources.

Judicial robustness

It is probably too soon to fully predict the extent to which applications are likely to be refused under the new regime because many applications are still being made in relation to cases begun before the rule changes and so subject to the transitional provisions (but see the report on *Mitchell* on page 1). However, a considerably more robust attitude is already discernible, and any consideration that might be given to delaying the service of expert evidence for tactical reasons should be exercised with extreme caution. Once permission to adduce expert evidence has been obtained, parties must ensure that they comply with the timetable for serving it or, if necessary, make a timely application for an extension of time. A party that delays serving expert evidence for tactical reasons may ultimately be debarred from adducing any.

Such was the view taken by the appeal court in *Dass -v- Dass*[3]. In this case, the high court dismissed an appeal against a case management decision debarring a defendant from relying upon expert medical evidence due to failure to comply with an order to serve any expert evidence made over 2 years previously. The

case was a personal injury claim brought by the claimant against her husband, who was the driver of a car involved in an accident in August 2007. Her husband had lost control of the car and collided with a wall. The claimant, a passenger in the car, was seriously injured.

Mr Justice Haddon-Cave took the view that this was a case in which neither side had covered itself in procedural glory. Both the claimant's solicitors and the defendant's insurer's solicitors had failed to 'get on' with the case. Progress had been unacceptably slow and contrary to the underlying principles of the CPR.

In November 2010 the trial judge had ordered that '*any further [medical reports] not already filed and served to be filed and served by 4pm 27th May 2011.*' But the defendant's insurer's solicitors failed to serve their medical reports in compliance with the order.

In March 2013, nearly 2½ years after making the original order, the trial judge debarred the defendant from relying upon any expert medical evidence on the assessment of quantum in the personal injury proceedings. The defendant appealed against the debarring order.

There was some debate between counsel as to the relevance and application of CPR 3.9. Counsel for the defendant submitted that this was not a relief from sanctions situation because the original order did not include any sanctions; in any event, even if the court did re-open the decision, the new tougher regime would not apply because of the transitional provisions. However, the court took the view that this was an application for relief from sanctions. CPR 35.13 provides:

> *'A party who fails to disclose an expert's report may not use the report at trial or call the expert to give evidence orally unless the Court gives permission.'*

Where a party has failed to comply with an order that expert reports be disclosed by a particular date, this triggers the automatic sanction under CPR 35.13. To prevent the sanction operating, there must be an application for an extension, which had not been made in this case. The court accepted, however, that because the proceedings had been commenced before 1 April 2013, the transitional provisions would apply.

The court found that the reason for non-service of the defendant's medical reports was because the defendant's insurer had not given permission for them to be served. This was a deliberate refusal to comply with a court order.

Tactical disadvantage

There was an element of the 'tactical' in the delay because the defendant's insurer had taken advantage of the delay to carry out surveillance of the claimant and then to inform the medical experts about the findings. The judge observed that the case might well have been over already, but for the delay.

The defendant argued that there had been no real prejudice to the claimant arising from the delay as:

1) no trial date hearing had been fixed
2) there was no question that a fair trial would not be possible
3) the claimant was at all material times not pressing particularly hard for the medical reports, and
4) it was only immediately before the case management conference on 14 March 2013 that the claimant sought an immediate unless order or a debarring order.

Furthermore, this was a significant claim involving over half a million pounds, and the defendant insurers felt somewhat ambushed. In all the circumstances, this was, said the defendant, a case in which the overriding interests of justice required the matter to proceed to trial with all the relevant medical evidence.

Rejecting these arguments, the appeal judge quoted the words of the trial judge, Master McCloud, who had said:

> *'It seems to me that in these days of proactive case management, in circumstances where professionals are representing both sides, and court time has been wasted, or a lengthy delay has been caused where no application has been made for relief or for an extension of time, and in the absence of any good reason to waive this breach it is entirely proper for this Court to take the robust view that the Defendant may not serve and may not rely upon expert evidence on this assessment of quantum.'*

Emphasising the limited circumstances in which case management decisions can be appealed, Mr Justice Haddon-Cave had no hesitation in upholding the debarring order. The defendant had, he said, failed to comply with the order made over 2 years previously, not just because of oversight but for tactical reasons. The fact that the claimant did not press hard, or apply earlier to the court for an unless order, was not the point, and the defendant could not rely or hide behind this. The overriding interest of justice includes orders of the court being respected and obeyed. The judge had no doubt that the same decision would be made before and after 1 April 2013. In a judgment that gave a strong warning to parties, he said:

> *'... let this be a lesson that parties who deliberately refuse to comply with court orders for tactical reasons do so at their peril.'*

Conclusion

Although Mr Justice Haddon-Cave may well be right in his supposition that relief from sanctions would have been refused in this case prior to implementation of the Jackson reforms, we suggest that it would have had a far better chance of succeeding under the more liberal regime. This judgment signals a clear hardening of the court's attitude to such applications.

'... parties who deliberately refuse to comply with court orders for tactical reasons do so at their peril'

References

[1] *Thevarajah -v- Riordan & Others* [2013] *EWHC* 3179 *(Ch).*

[2] *Fons HF -v- Corporal Ltd* [2013] *EWHC* 1278 *(Ch).*

[3] *Dass -v- Dass* [2013] *EWHC* 2520 *(QB).*

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Register logo – FREE to download

All experts vetted and currently listed may use our undated logo to advertise their inclusion. A dated version is also available. So, successful re-vetting in 2014 will enable you to download the 2014 logo.

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We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for help, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2014 dated logo. The results of the re-vetting process are published in summary form in the printed *Register*, and in detail in the software and on-line versions of the *Register*.

Profiles and CVs – FREE

As part of our service to members of the legal profession, we provide free access to more detailed information on our listed expert witnesses. At no charge, you may submit:

- a **profile sheet** – a one-page A4 synopsis of additional information
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If you opt for our Professional service level you can use our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment, etc.

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Our *Expert Witness Year Book* contains the current rules of court, practice directions and other guidance for civil, criminal and family courts. It offers ready access to a wealth of practical and background information, including how to address the judiciary, data protection principles, court structures and much more. It also provides contact details for all UK courts, as well as offices of the Crown Prosecution Service and Legal Aid Agency. And with a year-to-page and month-to-page calendar too, you'll never be without an appointment planner.

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