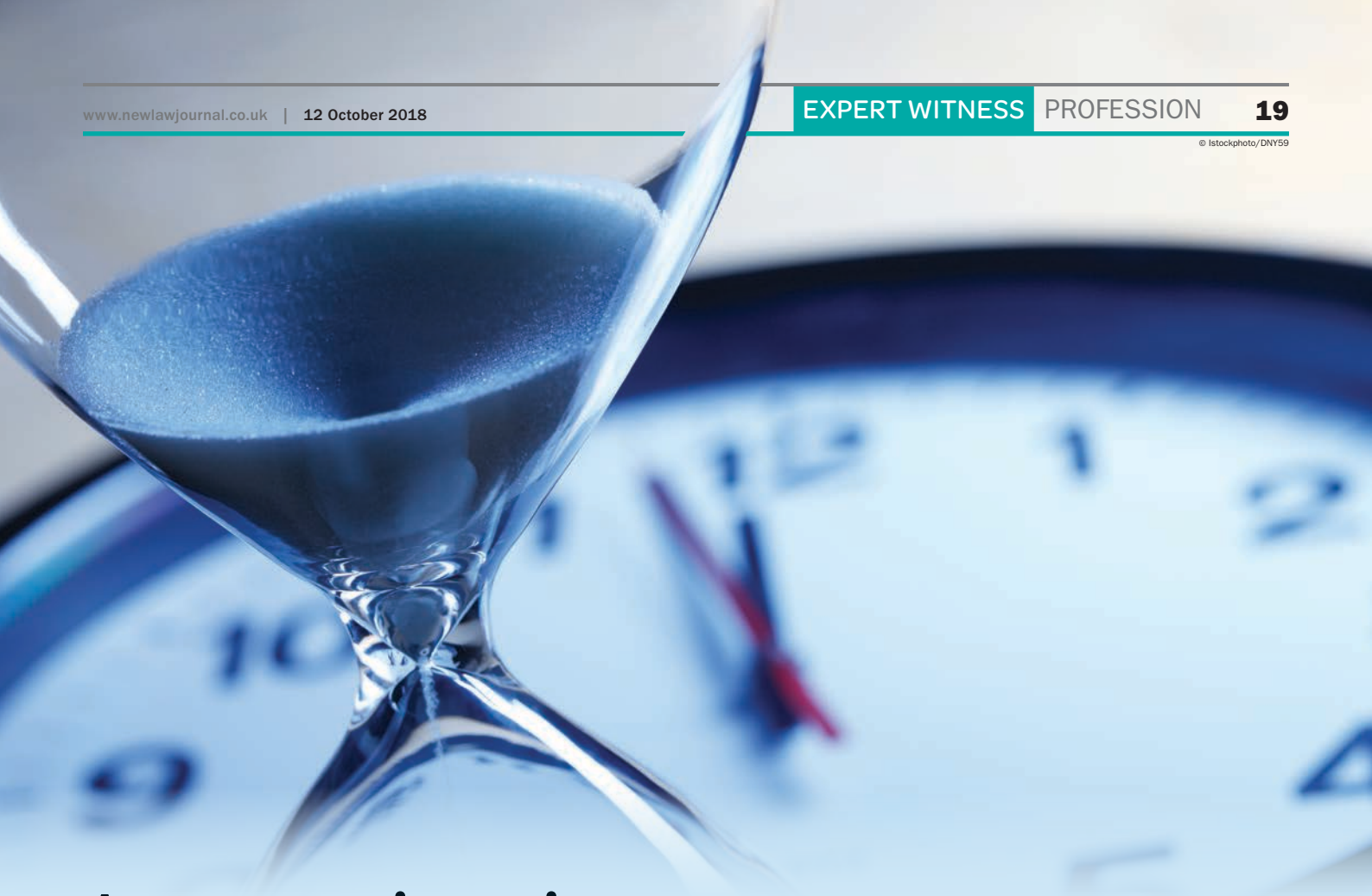

A race against time

Are the courts softening their approach to late changes to experts? Dr Chris Pamplin reports

There is a heavy burden on a party looking to change expert late in the day which, save in exceptional circumstances, will be difficult to discharge. However, there has been a steady stream of cases where the court has accepted that the particular circumstances of the case justify the application.

Guntrip: setting the bar high

The often-quoted authority of the Court of Appeal's decision in *Guntrip v Cheney Coaches Ltd* [2012] EWCA Civ 392 emphasises the nature of the burden. In that case, the decision of a trial judge to refuse permission to instruct new experts following a joint statement that was unfavourable to the claimant was upheld. However, this must be weighed against, and contrasted with, the decision in *Edwards-Tubb v JD Wetherspoon plc* [2011] EWCA Civ 136, [2011] All ER (D) 276 (Feb), which established that, in the ordinary course of events, a party should not be forced to rely on the evidence of an expert witness in whom confidence has been lost.

Generally speaking, the nearer the application is to the scheduled trial date, the less likely it is to be granted. The court will also consider any delay in making the application. For example, in *Clarke v Barclays Bank Plc* [2014] EWHC 505 (Ch), [2014] All ER (D) 71 (Mar), the claimant's expert had completed his report but had subsequently retired and was unavailable for trial. The claimant's solicitors had been fully aware of the situation but left it for several months before making application to the court to instruct a replacement expert. Permission was refused.

Guntrip established that whether permission should be granted, or whether leave should be given, to adduce additional or alternative evidence is a case management decision. The onus is on the applicant to explain the reason for changing the expert, and it is the role of the judge hearing the application to exercise his or her discretion in accordance with the overriding objective. The judgment in *Guntrip* placed considerable emphasis on the need to retain, where possible, the court timetable and preserve any trial date set. The later the application, the less ready the court should be to accede to the request.

Is the court softening its approach?

Since *Guntrip*, there seems to have been a discernible softening in the court's attitude towards the granting of permission to change experts. It has extended to some applications made at a very late stage in proceedings.

In 2015, the court gave permission to change expert where the claimant's expert stated that he had signed the wrong version of his report, although it later transpired that an amended version of the report had been created by the expert only after he had signed the original (*Cintas Corporation No 2 v Rhino Enterprises & Others* [2015] EWHC 1993 (Ch)). The trial judge in that case considered that such inappropriate and improper conduct by the expert justified the claimant in instructing a new expert to provide evidence to replace the evidence that had been tainted by the original expert's conduct.

In the same year, the court also allowed a late application to change experts where the original expert, although still in private practice, had been dismissed from his post within the NHS. The court recognised that this had so undermined the expert's credibility that it had created a crisis of confidence sufficient to merit a change of expert (*Lee v Colchester Hospital University NHS Foundation Trust* [2015] EWHC 1766 (QB)).

A second bite of the cherry

In 2017, the court made a ruling that permission may also be granted where there has been a change in circumstance, even if the change of circumstance comes after a previous application to change experts has been refused.

In *Murray v Father Martin Devenish* [2017] EWCA Civ 1016, a claimant had instructed an expert to prepare a report in support of his claim that he had been abused by a teacher at a Catholic seminary in the 1970s.

It was then discovered that the expert had been severely criticised by the court in another case, so a second expert psychologist was asked to provide a further report. On the advice of counsel, a third expert (a psychiatrist) was subsequently instructed to produce yet another report. The defendant instructed its own expert, who reported that the claimant had been seen by the discredited expert, and the claimant applied to the court to rely on the report of the third expert, together with a supplemental statement. The application was made very close to the trial window and the court refused permission, following the authority of *Guntrip*, ruling that the desirability of a change of experts was outweighed by the risk that the trial date would be lost. Permission to appeal the decision was given. However, there was subsequently a stay of proceedings for unconnected reasons and the original trial date was vacated.

The stay was later lifted and at the hearing of the appeal the claimant argued that the second expert had diagnosed him as suffering from narcissistic personality disorder, whereas the third had identified post-traumatic stress disorder, and that he should be allowed to rely on the expert of his choice.

The defendant argued that the appeal should be dismissed on the basis that the order made at the case management hearing had been within the ambit of the judge's discretion. The defendant argued that the proximity of the application to the trial date had been relevant and the claimant had not been clear about his previous reliance on the discredited expert. Furthermore, the defendant believed that there had been a switch in the nature of the claimant's application. At the directions hearing, the claimant's emphasis had been on the difference in status between the psychologist's and the psychiatrist's evidence, but at the appeal hearing it appeared to have been shifted to the differences in their conclusions. This, it was alleged, constituted expert shopping and should not be permitted.

Allowing the appeal, Gross LJ said that tough case management decisions were integral to an increased emphasis on proportionality and the overriding objective. He pointed out that this necessitated the careful scrutiny of expert evidence by the court and active discouragement of expert shopping. However, this assessment had to be balanced with the need to consider the reasons for changing, the interests of justice, and the candour of the application. The judge at the directions hearing had been concerned about the impending trial date and had believed that the second expert's report was sufficient to resolve proceedings. If he had allowed the introduction of the third expert's report there was a danger that the trial date would have been lost or, at least, preparation for trial would have been disrupted. Accordingly, he had acted correctly and was within his discretion in refusing permission. However, since the date of the original hearing, the proximity of the trial date was no longer an issue, and the circumstances and the balance of justice had changed. Accordingly, the Court of Appeal held that the claimant should not be confined to an expert in whom he had lost confidence and should be permitted, instead, to rely on the report of the third expert.

The court acknowledged that, at some point, it might simply be too late to change an expert. There is no unqualified right to change experts, but not every change will be disallowed or judged pejoratively. The inference is that in their directions, judges should not be too dogmatic in their adherence to the principles emphasised in *Guntrip* and should also have regard to the court's approach in *Edwards-Tubb*.

Changing expert after a joint meeting

In January 2018 there was a further development. In *Wright v First Group plc* [2018] EWHC 297 (QB), an expert instructed on behalf of the claimant in a personal injury case had made statements in a joint report which, on the face of it, appeared to constitute a change in his views. The views he had expressed were potentially very damaging and would severely undermine the claimant's claim for substantial damages for life-threatening and life-changing injuries. The expert had also failed to explain the reasons for his apparent change of view. A week prior to the date fixed for trial, application was made by the claimant to change experts.

The brief facts of the case were as follows. The claimant had been struck at a road crossing and seriously injured by a bus that was being driven by an employee of the defendant. The lights at the crossing had been in the bus's favour, but it was argued that the driver should have been alert to the danger and seen the claimant standing at the crossing. Consequently, he should have approached with caution. The claimant admitted that he had crossed when he should not have done and admitted that there was an element of contributory negligence. The issue was whether the driver should have been driving slower and whether he could have avoided the accident by breaking earlier or by swerving. The bus had been travelling at 27 mph before the driver started breaking and, at an earlier disciplinary hearing, the driver had admitted that he had been aware of the presence of the claimant. Both sides instructed experts in accident reconstruction.

In his initial report, the claimant's expert expressed the opinion that the driver should have been alert to the hazard and could have slowed sufficiently to avoid impact. However, following a joint meeting of the experts, the claimant's expert appeared to have had a substantial change of view when he signed a joint statement indicating the opinion that there was nothing the driver could have done to avoid the collision unless the speed before breaking was considerably less than 27 mph.

Hearing the application, the judge identified the lack of clarity in the claimant expert's views, exacerbated by his answers given to written questions and the failure to offer an explanation. The judge recognised that this was an important case in which damages on a full liability basis would be substantial. There was a real risk that refusal of the claimant's application, even at this late stage in proceedings, would place the claimant at an unjustified disadvantage.

The judge was mindful that the simple fact that an expert had expressed a view that might be disadvantageous to a party was not sufficient justification for allowing a change of experts, particularly at such a late stage in proceedings. He also recognised that one of the main reasons for a joint meeting of experts was to explore possibilities for agreement between experts on the various issues, and that discussions could sometimes lead to a shifting in ground. However, under Civil Procedure Rules Practice Direction 35 para 9(8), an expert who has significantly altered an opinion is required to include a note in the joint statement explaining the change of opinion. The claimant maintained that his expert had significantly altered his opinion, but the joint statement had contained no such explanatory note.

Allowing the application, the judge adjourned the trial to give the claimant time to instruct a new accident reconstruction expert. This was an exceptional course demanded by what the judge viewed as unusual circumstances. Indeed, the judge was at pains to stress that his decision should not be relied upon as a precedent. Nevertheless, the ruling does seem indicative of a trend towards allowing changes of expert, even very close to trial, where the court perceives real prejudice to a party and the risk of injustice if an application is refused. **NLJ**

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