
The new Civil Procedure Rules.

1. The process of dispute resolution and litigation

Keith Rix

In the second of my previous two articles on the role of the expert witness, I anticipated the implementation of Lord Woolf's proposed reforms to the civil justice system in England and Wales (Rix, 1999). These changes came into effect on 26 April 1999 and they represent the most radical changes to the civil justice system for a hundred years. In the previous article, it was not possible to do more than list a few of the key points relevant to experts. The purpose of this article is to describe the changes in detail and show how they will, or can be expected to, affect the role of the expert.

Existing and antiquated rules concerning procedures in the High Court and the county courts have now been replaced by a single set of 'Civil Procedure Rules' ('the Rules'). They are grouped in 51 sections, or 'parts', and the one of most relevance to experts is 'Part 35: Experts and Assessors'. These rules give statutory effect to the reforms, so they are binding on the courts and the parties to civil actions. There are penalties for those who break the rules!

The Rules begin by setting out the overriding objective, which is to deal with cases justly. They go on to set out how this objective can be achieved (see Box 1). The parties are required to help the court to further its overriding objective. In Part 35, there is set out a duty on the part of the court to restrict expert evidence to that which is reasonably required to resolve the proceedings. The court's permission is now needed in order for a party to call an expert or put in an expert's report. Part 35 goes on to set out the overriding duty of the expert to the court (Box 2).

An expert in the Rules is "an expert who has been instructed to give or prepare evidence for the purpose

of court proceedings". Thus, the Rules do not apply to experts who are engaged in an advisory capacity (see below).

Accompanying the Rules is a set of 'practice directions', which flesh out the Rules and show how they will be implemented. They include one concerning 'Experts and Assessors'. Also, in order to promote and accelerate the resolution of disputes, which includes resolution without going to court, a number of 'pre-action protocols' are being prepared and these also have implications for the expert. In particular, there is a 'Draft Protocol of Best Practice in the Instruction and Use

Box 1. The implications of ensuring justice under the new Rules

Ensuring that parties are on an equal footing
Saving expense

Dealing with the case in ways that are appropriate:

- to the amount of money involved
- to the importance of the case
- to the complexity of the issues
- to the financial position of each party

Ensuring that the case is dealt with expediently and fairly

Allotting to it an appropriate share of the court's resources, while taking into account the need to allocate resources to other cases

Keith Rix is a consultant forensic psychiatrist in the Leeds Community and Mental Health Services Teaching NHS Trust (High Royds Hospital, Menston, Ilkley, West Yorkshire LS29 6AQ) and a visiting consultant psychiatrist at HM Prison, Leeds. He is also a Member of the Academy of Experts and a founding Member of the Expert Witness Institute.

Box 2. The duty of the expert

**It is the duty of an expert to help the court on the matters within his or her expertise
This duty overrides any obligation to the person from whom he or she has received instructions or by whom he or she is paid**

of Experts'. This has not been formally issued and the group working on it has now been reconstituted and has produced a 'Draft Code of Guidance for Experts under the Civil Procedure Rules'. The particular significance of the draft protocol is that it was intended to incorporate and refer to the 'Model Form of Expert's Report' drawn up by the Judicial Committee of the Academy of Experts. Reference to this was made in my previous article (Rix, 1999) and also to the Academy's 'Model Form of Medical Expert's Report' (Torr, 1998). Although the draft Code does not specifically refer to the 'Model Form of Expert's Report', its influence is clear and so its use in civil cases is likely to increase.

Although the draft Code's status now, and when formally issued, will be as 'guidance', and parties will be free to decide to what extent to adhere to the guidance, the courts will take into account adherence to it. Where a failure to adhere to it has lengthened or added to the cost of the litigation, the court may take this into account when exercising its discretion as to the award of costs to the parties. It will have similar status to the pre-action protocols that already exist for personal injury claims and for the resolution of clinical disputes.

The changed role of the expert under the Rules is best considered by describing first the process of dispute resolution and litigation under the new system.

The process of dispute resolution and litigation

The preliminary or pre-action stage

A person who has been injured, for example in a road or industrial accident or through what may have been negligent medical treatment, can consult a solicitor with a view to making a claim against the person or persons whom he or she holds responsible for his or her injury. The former is called

the 'claimant' (previously the 'plaintiff') and the person against whom the claim is made is the 'defendant'. The solicitor is then responsible for gathering the evidence quickly and thoroughly (see Box 3).

If this investigation suggests that a claim is justified, the claimant's solicitors send a 'letter of claim' to the proposed defendant or insurance company. It must include sufficient information for the defendant's solicitors or insurers to carry out their own investigation and decide on the value of the claim. If the defendant does not respond within 21 days ('acknowledgment'), the claimant is entitled to issue proceedings.

From the date of acknowledgment of the claim, the defendants have three months to investigate the claim. It is during this time that in a personal injury case the defendants are expected to agree to the appointment of the claimant's proposed medical expert. The pre-action protocol for personal injury claims:

"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".

However, the protocol states that before any party instructs an expert he or she should give the other party a list of the name(s) of one or more experts in the relevant speciality whom he or she considers to be suitable to instruct. Within 14 days, the other party may indicate an objection to one or more of the named experts. The first party should then instruct a mutually acceptable expert. Nevertheless, the protocol maintains the flexibility for each party to obtain their own expert report, if necessary after the proceedings have commenced, with the leave of the court. However, if the second party has objected to all of the listed experts, the

Box 3. The preliminary or pre-action stage

Potential claimant consults a solicitor
Investigation of evidence by solicitor
Letter of claim
Acknowledgement by defendant
Investigation of claim by defendant
Agreement by defendant to appointment of claimant's proposed medical expert
Pre-action medical report
Written questions by either party or both parties to the expert
If liability is admitted, possibility of settlement of claim by agreement

court can decide subsequently whether either party has acted unreasonably. This might then be reflected in a financial penalty for the unreasonable party when costs are decided.

If the second party does not object to an expert nominated, he or she is not entitled to rely on his or her own expert evidence within that particular speciality unless: (a) the first party agrees; (b) the court so directs; or (c) the first party's expert report has been amended and the first party is not prepared to disclose the original report.

Certainly, in a complicated case and in many cases of alleged medical negligence, the defendants may need the assistance of an expert to advise them so that they can form an opinion as to their liability or the likely value of the case if liability and causation are admitted or proved. An expert *adviser* at this stage is not an expert within the meaning of the Rules. This means that the Rules do not apply to him or her at this stage, and although the expert advising the court under the Rules has immunity from suit, the expert advisor could be sued for negligence if it was subsequently thought that the advice was wrong and that this had led to the claim not being resolved as it ought to have been had the correct advice been given. It is therefore important for experts to be clear about the stage of the proceedings at which they are being instructed and the function that they are expected to fulfill.

Under the personal injury pre-action protocol, it is the responsibility of the claimant's solicitor to organise access to the relevant medical records. However, the suggested letter of instruction to medical experts includes as an alternative "and/or please request the GP and hospital records direct" – so medical experts, or more often their secretaries, may still find that they are having to chase general practitioners for records.

Either party can send to an agreed expert written questions on the report, relevant to the issues, via the first party's solicitors. The expert should send the answers to the questions separately and directly to each party.

If liability is admitted and agreement can be reached as to the settlement of the claim by negotiation, the case may conclude at this point and even without any medical expert opinion having to be sought. If liability is denied or agreement cannot be reached as to the settlement of the claim, the claimant 'issues proceedings'.

The proceedings

Proceedings are issued by serving on the defendant the 'Particulars of the Claim' (previously the 'Statement of Claim') (see Box 4). The defendant has

14 days in which to reply. If liability is denied, the defendant has to answer each allegation with reasons and provide documents to support the denial. All the cards must be on the table. This means that both sides are in a position to assess the strengths and weaknesses of the case. A bare denial of liability is struck out.

After the reply, the court issues an allocation questionnaire to the claimant's solicitor. One of the first questions he or she has to answer is which 'track' he or she considers most suitable for the case.

Personal injury claims are allocated to one of three tracks: a 'small claims track' for claims of up to £5000 and where the financial value of any claim for damages is not more than £1000; a 'fast track' in the county court for claims for which the small claims track is not the normal track and which has a financial value of not more than £15 000; and a 'multi-track' in the county court or the High Court for claims of over £15 000. There are rumours that £15 000 may soon be increased to £20 000 or even £50 000. At the allocation stage, the court identifies a three-week 'trial window' during which the trial will take place. Experts are not appointed if they are not available for the trial window, and it appears that availability will be a consideration even in fast-track cases where the trial will eventually be fixed for 1 out of the 15 working days – although it is rare for the expert to have to give oral evidence in fast-track cases. It remains to be seen whether or not, in fast-track cases, the courts agree to the appointment

Box 4. Stages of the proceedings

Issue of proceedings by service of 'Particulars of the Claim'

Defendant's denial of allegations with reasons

Court issues allocation questionnaire

Track allocation

Identification of the three-week trial window

Directions as to expert evidence

Court issues listing questionnaire seeking feedback on compliance with directions

Exchange of expert reports

If agreement is not possible, discussion between experts

Statement of agreement/disagreement by experts

Trial date fixed and listed

Trial

of an expert who is already appointed for a case with an overlapping or coinciding trial window.

The problem of experts', specifically doctors', holiday commitments is a matter upon which Lord Woolf has himself recently expressed strong views in a case that probably would not have reached the difficult stage it did had it been conducted entirely under the new Rules (*Matthews v. Tarmac Bricks and Tiles Ltd*, 1999). A county court judge had fixed a date for the trial of the action even though counsel had indicated that the defendant's two doctors were not available. It transpired that on the date fixed, one of the doctors would be giving evidence at another court and the other would be out of the country on holiday. At the appeal against the order, Lord Woolf said that it was apparently thought that all that was required was to tell the court the dates that the doctors had indicated would not be convenient and the court would thereupon find a date that would allow the case to be heard to meet the doctors' convenience. He said that this was no longer an appropriate approach and it explained why a great many personal injury cases up and down the country had been delayed inordinately, inconsistent with the due administration of justice. If the conflict of commitments had been explained, he had no doubt that in the case of the first doctor the two county courts would have cooperated to ensure that the doctor could give evidence in both courts. So far as the other doctor was concerned, no request had been made to him to consider whether his holiday could be changed. Lord Woolf said that an effort should have been made at least to ask him to change that date.

Although the draft Code of Guidance states that "those instructing experts should accommodate, as far as possible, the convenience of experts" it also goes on to state that "experts must take all steps to ensure availability to attend court, if and when required". Since experts' holidays are a problem that probably will not go away under the new Rules, it is worth noting further the judgement of Lord Woolf in this case:

"It was very important that in cases where doctors were involved as much notice as possible was given for the date of hearing. However, it was essential that it was appreciated that, whereas the courts would take account of the important commitments of medical men, they could not always meet those commitments in a way which would be satisfactory from the doctor's point of view.

Ways had to be found to meet the obvious requirement that cases should be heard expeditiously. That required cooperation between the parties, members of the medical profession and the courts...

Doctors who held themselves out as practising in the medico-legal field had to be prepared to arrange their affairs to meet the commitments of the courts where that was practical."

These views may be contrasted with those of Judge Robert Taylor (1999) who wrote to *The Times* on the subject of judges' holidays:

"A holiday is for recreation, being deprived of which is not going to make people better judges. As an American Supreme Court Justice once said: 'I can do a year's work in 10 or 11 months – but not in 12!'"

Is it one rule for judges and another rule for doctors?

The allocation questionnaire also requires solicitors to say whether or not they have complied with any pre-action protocol, and if they have not, why not. If there has been a failure to comply with an appropriate protocol, and the judge subsequently decides that the case could have been settled sooner had there been compliance with the protocol, then he or she may take this into account in relation to the claimant's costs.

There is a section on the allocation questionnaire that deals with 'experts' evidence': whether or not it is intended to use expert evidence at the hearing; whether or not experts' report(s) have already been copied to the other parties; the names and fields of expertise of the proposed experts; whether or not the parties will use the same expert(s) and if not, why not; and whether or not it is proposed that the expert(s) will give oral evidence at the trial and if so, why this is deemed to be necessary. There is a presumption against experts giving evidence orally, especially in fast-track cases, and the court decides.

When the court allocates the case, it also gives directions as to the expert evidence. Within two weeks of the court's notice allocating the case, a listing questionnaire is sent to the parties. This requires the parties to say whether or not expert reports have been agreed with the other parties, whether or not the experts have met to discuss their reports and whether or not permission is sought to call expert evidence to be given orally at the trial.

Fast-track cases

In fast-track cases, the allocation questionnaire has to be completed within 14 days. The trial has to take place within about 30 weeks and a strict timetable will be enforced. This includes a deadline by which experts' reports have to be disclosed. This is likely to be within 14 weeks of the case being allocated.

Upon allocation of the case, directions are given that include directions in relation to expert evidence. The court may rule that no party has permission to call or rely on expert evidence. In fast-track cases, a single expert jointly appointed by both or all parties ('single joint expert') is likely to be the norm.

Psychiatrists who have been instructed in recent years in child care cases may already have had an experience similar to that of being a single joint expert in civil cases. As in child care cases, the expert will probably receive one set of jointly prepared instructions, but failing such agreement both parties can give instructions as long as they send a copy to the other party or parties. The single joint expert is in the same position as a party's expert in having to comply with the Rules, the practice directions and the draft Code of Guidance in relation to his or her duties and the form and content of reports. Questions may be put by either, both or all parties to the single joint expert.

The parties may be given a deadline by which to inform the court whether or not such an expert has been instructed in relation to a specified issue. If the parties cannot agree who the expert should be or about the payment of his or her fees, either party can apply for further directions. The court may decide to set a limit on the fees and expenses *recoverable* (but it cannot set a limit on the total fees and expenses *charged*) and it can specify the latest date by which the report of the expert is to be filed at the court. Where both or all parties to the proceedings are allowed to obtain expert evidence, the court can order exchange of reports and specify the latest date by which the exchange must take place. Different deadlines may be set for reports relating to causation and damage. Where there is more than one report, the court can set a deadline for the reports to be agreed on by the parties if possible and then order a discussion between the experts if agreement is not possible. It then specifies a date by which a statement of agreement and/or disagreement as to the issues has to be filed with the court. The court specifies the number of days after service of the expert's report during which a party can put questions to the expert and also the number of days the expert is allowed to file his or her reply to the questions.

In the meantime, either party can make an offer to settle. The tactics of the parties in trying to negotiate settlement at this stage may take into account expert opinion on particular points.

Ten weeks before the trial window, the date for the trial is fixed and listed. Until then, the expert must remain available for any date during the window.

Trials in fast-track cases usually take one five-hour day, which begins with 30 minutes for the judge to read the papers and ends with 30 minutes for his or her judgement and 20 minutes for his or her summary assessment of the costs. However, it is rare for experts to be called to give oral evidence at fast-track trials.

Multi-track cases

Cases on the multi-track are subject to case management conferences at which the judge issues directions as to whether there should be a single joint expert or separate experts, sets timetables for the exchange of expert reports and orders discussions or meetings between the experts. The Rules allow the judge to give directions for a single joint expert on any appropriate issue unless there is a good reason not to do so.

Single joint experts are likely to be instructed for lower-value multi-track cases and where fairly straightforward evidence as to condition and prognosis is required to determine the value ('quantum') of the claim. Both parties are likely to be allowed to have their own experts on matters such as liability and causation. Thus, single joint experts are unlikely to be appointed in medical negligence cases unless in relation to condition and prognosis.

Timetables for multi-track cases are flexible. However, the aim is to reach the trial date within about a year, and not several years as has been the case in the past.

It has been suggested that some judges may create a fast-track at the bottom of the multi-track for simpler cases, with a two-day trial relatively early and no oral expert evidence.

It remains to be seen whether or not the new Rules will achieve their intended objectives of reducing the cost and speeding the process of civil litigation. What is in no doubt is that the system has changed.

References

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- Taylor, R. (1999) Judges' obligations. *The Times*, July 7.
- Torr, J. (1998) The model form of medical expert's report. *The Expert*, 3, 24.
- Matthews v. Tarmac Bricks and Tiles Ltd* (1999) *The Times*, July 1.

Multiple choice questions

1. Under the new Civil Procedure Rules:
 - a the overriding objective is to ensure that the parties are on an equal footing
 - b the overriding duty of the expert is to ensure fairness

- c in personal injury cases, the claimant's solicitors must obtain relevant medical records for the expert
- d if the defendant does not respond within 21 days to the letter of claim, the claimant is entitled to issue proceedings
- e the court can set a limit on an expert's recoverable fees and expenses.
2. A single joint expert:
- a cannot be instructed in multi-track cases
- b can give oral evidence in fast-track cases
- c appointed after the issue of proceedings can be an expert who has advised the claimant's solicitors at the pre-action stage
- d is likely to be the norm in fast-track cases
- e is likely to be the norm in medical negligence cases.
3. The fast track:
- a is appropriate for a personal injury case in which the claim for damages is £4000
- b employs only single joint experts
- c involves a trial that takes place about 30 weeks after the case has been allocated to the track
- d target is for a one-day trial of five hours beginning with the judge reading the papers and ending with his or her judgement and summary assessment of costs
- e is likely to involve exchange of experts' reports by about 14 weeks after allocation.
4. Multi-track cases:
- a are heard only in the High Court
- b proceed with the assistance of case management conferences
- c do not employ single joint experts
- d operate to a rigid timetable to ensure expedition
- e have a lower limit of £20 000 in terms of the financial value of claims.

MCQ answers

1	2	3	4
a F	a F	a F	a F
b F	b T	b F	b T
c F	c T	c T	c F
d F	d T	d T	d F
e T	e F	e T	e F

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