CIVIL JUSTICE COUNCIL (CJC)
EXPERTS' COMMITTEE

REVIEW OF PART 35 CPR – EXPERTS AND ASSESSORS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

10 July 2007

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers to represent the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Allan Gore QC – Former APIL President, barrister, 12 King's Bench Walk, Temple.
Stuart Kightley - APIL executive committee member, solicitor, Osbornes, London.
Stephen Lawson – APIL secretary, solicitor, Forshaws LLP, Frodsham.
David Marshall – Former APIL president, solicitor, Anthony Gold, London.
John McQuater – APIL executive committee member, solicitor, Atherton Godfrey, Doncaster.
Amanda Stevens – APIL vice president, solicitor, Charles Russell, London.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Helen Blundell,
Legal Services Manager
APIL
11 Castle Quay, Nottingham NG7 1FW
Tel: 0115 958 0585; Fax: 0115 958 0885
e-mail: helen.blundell@apil.com

Part 35 CPR review
A response by the Association of Personal Injury Lawyers

The Ministry of Justice and the Civil Procedure Rule Committee have embarked on a series of reviews of key parts of the CPR. The Ministry of Justice has asked the Civil Justice Council's experts' committee to consider what changes could be made to strengthen Part 35, its practice direction and the *Protocol for the instruction of experts to give evidence in civil claims.* The committee has started a consultation exercise to which APIL is pleased to respond.

General

1. Do you consider that CPR Part 35, PD 35 and the Protocol are, in general, working satisfactorily? Apart from the areas covered below, are there any changes that you would like to see to CPR Part 35, PD 35 or the Protocol? Is there any need to vary the definition of "expert" in CPR 35.2?

APIL believes that it is useful to regularly review the CPR, but would caution against changing the rules simply because a review is due. There are many aspects of Part 35 which work very well and the CJC's review will, it is hoped, highlight that fact.

Range of opinion

One aspect on which Part 35 which is not particularly highlighted in the rule relates to range of expert opinion.[1] Further emphasis of this aspect could be incorporated into the rule or protocol as a result of this review. In the consultation paper, *Case track limits and the claims process for personal injury claims*, there is a template letter for the instruction of experts. In that template there is currently no place for asking the expert whether there is a range of opinion on his prognosis/comments. It is worth remembering that the claimant is entitled to trial by the court and not trial by expert and APIL believes that for this reason, the letter of instruction should refer to range of opinion. Concentration only on the value of a claim is incorrect and is probably one of the main reasons for the differing methods being used by district judges (DJs) to decide expert related issues in this Part 35.

APIL is not aware of any particular problems in this regard in the High Court, but in the county court there are two main concerns:

[1] See Practice Direction CPR PD 35 2.2 (6) where it says, "where there is a range of opinion on the matters dealt with in the report – (a) summarise the range of opinion, and (b) give reasons for his own opinion".

- The case must be proved and some DJs take the view expert evidence is not needed in order to do so when in fact this can only be achieved with expert evidence – where liability turns on what a reasonable employer ought to have known or done, the answer is a matter of opinion which only an expert can proffer; where the issue is the need, extent and value of care provided by family members, the answer is a matter of opinion;
- Unnecessary duplication of experts: a few DJs take the view that defendants are always entitled to obtain their own expert reports and this is not entirely correct. If there is a range of opinion, then both parties ought to seek their own expert evidence, whatever the value of the claim, but if there is not a range of opinion (ie: there is a settled medical view), then it is not necessary, again, whatever the value of the case.[2] In that circumstance, obtaining further reports is a waste of time, effort and incurs unnecessary expense. Unfortunately the mindset of some DJs seems to be that if the case is in the fast track, then the parties can have only one expert, regardless of the justice of that decision and if the case is in the multi track, it is necessary to have two of every expert.

APIL believes that these issues highlight how court case management can go wrong. By way of example, one of the contributors to this paper had recently been involved in a case where the defendants had been given permission in a multi track case to obtain their own orthopaedic evidence which it transpired was almost identical to that already obtained by the claimants. At the joint meeting they agreed on everything. Cost and delay had been incurred as a result of this unnecessary duplication of expert evidence.

However, it is accepted that defendants are often concerned that as the expert has been instructed by the claimant, that they want to 'double check' the evidence with one of their own.

Single Joint Experts

2. Last year we consulted in relation to SJEs. After considering responses and further discussions we proposed an amendment to PD35. That proposal is attached to this letter. The CPR Rules Committee decided to delay consideration of the proposed amendment pending the general review of CPR 35. Do you have any comments in relation to SJEs or the proposed amendment?

[2] See *Spinal trauma and degenerative disease: the range of expert opinion - a questionnaire survey*, T.J.D. Byrnes and Fred P. Nath, *Journal of Personal Injury Law J.P.I. Law* (2005) No.2 Pages 159-171. In this article, the authors, neurosurgical registrar and a consultant neurosurgeon, conducted a survey of their colleagues in which they asked, "What is the maximum time that a soft tissue injury to the spine (excluding disc prolapse) can give symptoms for? He found that the opinions of spinal surgeons ranged from 45% indicating less than four years to 54% indicating indefinitely. Contrast this with the virtually unanimous view of expert neurologists to epilepsy risks after head injury.

In personal injury claims, it is standard practice that the claimant instructs a jointly selected expert, rather than a single joint expert. This works well in the fast track and should be retained as an exception to the general rules on SJEs. It is worth recognising this development in the Rule or PD or protocol by requiring that there should be an evidential threshold to be satisfied (for example explaining or evidencing why the expert already instructed may be wrong and in what respects) before permission is granted to rely on a second or further expert.

Section 6.1 of the proposed amendment to PD35, para 6, seems almost to create a new presumption that a SJE is necessary. We disagree and support the current rule CPR 35.7 (1) which simply says:

> "35.7(1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only…

and

> 35.7(3) Where the instructing parties cannot agree who should be the expert, the court may –
> (a) select the expert from a list prepared or identified by the instructing parties; or
> (b) direct that the expert be selected in such other manner as the court may direct."

In addition, the personal injury pre-action protocol works well and clearly states that,

> "2.14 The protocol encourages joint selection of, and access to, experts. The report produced is not a joint report for the purposes of CPR Part 35."

(i.e. jointly selected, not jointly instructed).

If this is compared with the proposal in PD 6.1, where it says,

> "When a party seeks permission to call an expert or put in evidence an expert's report, the party and the court shall consider whether or not it is appropriate for such evidence to be given by a single joint expert …"

it becomes clear that this amended wording tilts the equation in favour of considering an SJE first, rather than as a consequence of failure to agree an expert from a list (35.7(3)(a).)

As long as the current status of the jointly selected, not instructed, expert report is preserved, then the other proposals for SJEs are acceptable. Around 80 per cent of personal injury claims settle pre-issue and the introduction of SJEs at that stage would complicate the process and lead to additional costs being incurred. APIL is concerned that imposing SJEs would or might foster 'trial by expert' which it deprecates.

See also our comments on range of opinion in answer to question one above.

Agenda

3. **Agenda for experts' meetings can play a significant role in experts' meetings. It has been suggested that there are relatively few problems in agreeing and following agenda in cases involving construction and surveyors, but that there have been problems in agreeing and following agenda for meetings in medical cases . Do you agree? Are there any changes that you would like to see to CPR Part 35, PD 35 or the Protocol?**

Firstly, we assume that by 'medical cases' the question refers to 'clinical negligence' cases. We believe that there are no real problems with agenda in these types of case. In such claims, there can sometimes be arguments about what should go onto the agenda, but that is a relatively rare occurrence and APIL believes there is no need to build a new rule around those small numbers of incidents. This is because, ultimately, and APIL submits that it is wrong to seek to prevent experts from discussing issues that are relevant to the case and within their expertise. This could be reflected in amendment to paragraph 18.7 of the existing Protocol. In exceptional cases, the current solution is to put the agenda to the court at the case management conference (CMC) and ask the court to sign it off. Clinical negligence masters are very good at being proactive in these circumstances. The more a process is created, the more there is the risk that it will increase costs for all cases when it will only be an issue in a minority of cases.

The only type of cases where there may be issues over the agenda is in a minority of clinical negligence cases where there are disputes about treatment / causation issues, but in the vast majority of PI cases there are no problems at all.

Questions to experts

4. **CPR 35.6 provides that written questions may be put to experts, but that they "must be for the purpose only of clarification of the report". Is this criterion still appropriate? Are questions to experts being put in a disproportionate way, simply as a first bite of cross-examination? If they are, is this wrong? Alternatively, would a widening of the criterion be appropriate?**

It is the experience of APIL members that defendants do sometimes go beyond the criterion, and need to be reminded that questions should be for clarification only. 'Trial by question' is inappropriate and ought to be discouraged. If the expert's opinion and reasoning is to be challenged, the time and place is to do so at trial, by cross-examination. It is always open to a party to put those challenges in correspondence and invite the other party to seek reconsideration of the report in question or withdrawal of reliance upon it. There is a danger associated with relaxing the criterion that it would give a signal to defendants that they can ask even more of the experts than they do already (beyond the existing criteria). At present, defendants who go beyond the criterion can be adequately dealt with on

a case by case basis. These observations in no small part also stem from the rule that s/he who instructs the expert must pay for answering the questions put by the other party, such that questions, if not limited by the present rule, can become a tool for oppressive conduct.

Enforcement

5. **A balance has to be struck between the need for compliance with orders and the CPR on the one hand and flexibility, proportionality and justice on the other hand. Some people have argued that if judges took a stricter line when there has been non-compliance with an order or the CPR (e.g. by refusing to allow a party to rely upon an expert's report), parties would be more likely to comply with orders. Do you agree that there is a problem? Are there any changes that you would like to see to CPR Part 35, PD 35 or the Protocol? Should there be a provision that an expert's report which does not comply with CPR 35 or PD 35 should not be admitted as evidence without the permission of a judge?**

In reality it is the experience of APIL members that judges do not keep evidence out even if it has been obtained without the permission of the court. What usually happens in such circumstances is that the court adjourns the trial etc to allow the other party to obtain their own evidence and issues a new set of directions to deal with this circumstance. If the enforcement rules were strengthened, then it would encourage the courts to exclude evidence which may well be crucial to the case. In reality no judge would want to do that, and the discretion to do so already exists in the CPR[3]. This question highlights a tension which has existed since the start of the CPR, but the proposals would not resolve that tension – it is more a question of the behaviour of the parties rather than the construction of the rules or protocol which is the main issue and that can be addressed when dealing with costs under CPR Part 44. Although the necessary flexibility is given in CPR Part 1,3 and 35, then, it is rare for proper costs sanctions to be imposed based on 'conduct' under CPR Par 44. Such behaviour does not look good for the administration of justice and ought to be penalised when it occurs.

Protocol

6. **How is the *Protocol for the Instruction of Experts to give evidence in civil claims* working? Do you consider that any amendments are needed?**

There are no major problems with the existing protocol. It is APIL's view that it replicates good practice. The standard letter of instruction under the protocol should refer to or send a copy of it. APIL takes the view that it is good practice to refer to or send a copy of it to the expert at the point of instruction ensuring the

[3] CPR 35.4 (1): No party may call an expert or put in evidence an expert's report without the court's permission.

expert is aware of it and its contents. In addition, APIL's comments about the need to ask the expert to indicate whether there is a range of opinion should also be considered in relation this question.

Low speed impact whiplash claims

7. **Over the last year it has been said that there has been an increasing number of cases in which defendants' insurers have argued that the claimant could not have suffered whip lash because of the low speed of the vehicles on impact. Do you consider that any changes to CPR Part 35, PD 35 or the Protocol are necessary as a result of this increase?**

There has recently been a Court of Appeal decision in the case of *Casey v Cartwright*[4] which has given very rigorous directions to follow in such cases. APIL sees no reason to depart from this authority.

Where individual cases have gone awry in the lower courts it is usually linked to case management decisions or errors which have allowed the parties to introduce unnecessary additional evidence to the court.

However, time passes and memory of the decision in *Casey* will fade from the immediate consciousness of all except those who are regularly involved in such cases and it would be useful if, in the form of an annex to the practice direction, a summary of the directions/procedures contained in *Casey* were produced, bringing the elements of good practice all into one place, rather than all parties and the court having to remember that there is a case on this particular issue each time this type of case comes before the court.

Expert's statement of truth

8. Is there any need to vary the form of the expert's statement of truth? (PD35 para 2.4)

No change is necessary.

The Association of Personal Injury Lawyers
11 Castle Quay
Nottingham NG7 1FW

[4] [2006] EWCA Civ 1280