Single joint experts: A new dawn?

Richard Formby considers the pros and cons of using single experts on quantum matters and asks whether appetite for their use with injury claims will increase

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The single joint expert (SJE) is not new. Lord Woolf introduced the concept some 20 years ago but it has not proved particularly popular. However, given the continual pressures on costs and efficiency, particularly in the injury litigation landscape, I can see the renewed attraction that the SJE may have to the courts. But what are the problems and can the single expert be made to work?

Little change

In his final 'Access to Justice' report (1996), Lord Woolf acknowledged that there was such a considerable strength of opposition to his proposal for the use of SJEs that it was not realistic to expect a significant shift towards single experts in the short term. Instead, he concluded that the parties and procedural judges should always consider whether a single expert could be appointed in a particular case (this led to Civil Procedure Rules (CPR) 35.7).

In terms of injury litigation and the use of single experts for loss quantum, my experience has been that things haven't really shifted since then. I have seen little appetite (from either side) for accountancy expert evidence in injury claims to be given other than by way of the party expert.

In contrast, I have found the use of SJE accountancy evidence reasonably common in family finance proceedings, where my experience suggests it works reasonably well. This is probably because the parties are dealing with a finite 'financial pot' and typically the issue being addressed is narrowly defined (e.g. the value of a business interest and/or scope for raising additional funds).

Cost savings

The 'driver' for using single experts has to be cost – that is, the theoretical potential to save costs by instructing just one expert with, in the majority of circumstances, just one report, and no meeting of experts or joint statement (which can take several drafts).

The saving of costs should not, however, be presumed to be a given. This is because there may be associated cost increases in other areas – as considerably more time and effort is taken over instructing the SJE, written questions are almost invariably more lengthy, and asked by both sides, and parties may even wish to test the expert's work (via a shadow expert), perhaps in order to decide whether they can muster sufficiently reasonable grounds to instruct a further expert themselves.

Risk of bias

There may be a natural presumption by procedural judges that it is cheaper to use just one expert, and that the SJE's evidence will be more impartial than that of a party expert.

However, stepping back a little from constraints of costs and efficiency, the downside for the court has to be that, with a single expert, it loses the opportunity to see the full range of opinion that may legitimately exist. Despite the stringent demands of CPR 35, it is still not uncommon in my experience to see experts across a range of disciplines, not just quantum, ignore such vital aspects of the rules (and the Civil Justice Council (CJC) guidance) as the range of opinion, which must be stated but is often ignored, and the importance of reporting on separate factual hypotheses.

As a result, the court often does not get to consider which evidence it prefers over the reasonable variation that may exist in a particular field of expertise.

Further, there is the danger that the court may be exposed to bias or prejudice on the part of a single expert – while the SJE may be impartial as between the parties, the same may not necessarily be true of bias towards a certain >>

>> school of thought or methodology. Experts can bring their own 'baggage' with them, without necessarily declaring it. With an accountant this can be in the interpretation of evidence; the likelihood of changes to a business or career; what a reasonable range of change (expansion or contraction) in, say, customer demand, income, or costs may be; or a host of other factors that typically have to be addressed when forming an opinion on loss quantum.

Unfortunately, I have encountered both extreme views and serious mistakes in calculations with party accountancy experts, which would have resulted in quite different settlement outcomes had they gone unchallenged or uncorrected. As such, it seems to me that there is also a real danger (particularly with quantum) of an error or an extreme view by the SJE going unchecked. This is particularly so if one party (and in an injury claim this will be the claimant) cannot afford the luxury of advice from a shadow expert.

Practical considerations

There will also be a tendency for each side to be mistrustful of candidates put forward by the other (and it is natural for solicitors to prefer a previously used expert or one who comes highly recommended).Those issues aside, key features of a good accountancy SJE in an injury claim are going to be experience, thoroughness, and integrity.

There can often lurk the fear that the SJE's evidence will decide the case on quantum, but that situation can be countered by careful instructions and by using an expert who knows exactly how they ought to participate in the litigation under the CPR and CJC guidance, setting out ranges and alternatives, dependent upon different findings of fact by the court.

That being said, the parties are losing the opportunities afforded by exploring the expert's evidence at conference. Such exploration of expert evidence, under the protection of legal privilege, is sometimes the crucible in which the foundations for potential settlements are forged. The alternative may be that the services of a shadow expert are used to check, interpret, and offer alternative quantum proposals – but with injury claims there will mostly be an 'inequality of arms' between the parties. It will be a rare claimant that has access to a shadow quantum expert where there is an SJE appointment (such inequality is specifically anathema to the overriding objective).

Successful SJE appointments

Situations where a single quantum expert might work are where earnings, pensions, and benefits losses, or variations thereof, are required in circumstances where both parties can clearly define their respective scenarios and cases.

The alternative would be for a quantum SJE to 'go in' relatively early in the process, with a brief to interview the claimant, gather evidence, and quantify losses. But that will only really work in the most simple of cases. If there is a range of alternative facts (some opposing) to be taken into account, and a plethora of separate calculations needed, then there is a danger that the quantum expert's evidence will become so watered down and obligingly disparate as to render the exercise unhelpful. A solution in some cases might be for the defendant to send someone to observe the claimant interview.

To achieve a successful SJE appointment, the parties will have to 'front load' effort on quantum and have a reasonably clear view of where their respective pleadings are going. So, for example, explanations about the impact of injuries on work are understood, financial records and evidence are available, and there is a reasonably clear view of the effects of the index event that can be translated into instructions to the expert. There also has to be a clear and adequate timetable which makes suitable allowance for the expert's questions, updates to loss calculations, and so on.

Paramount to success is having the right expert as SJE. This starts with the traditionally difficult area of identifying, selecting, and agreeing on the single expert, which will require a degree of compromise. However, the more quantum SJE appointments that occur, the more a culture of trust will – or should I say may – develop, making this process easier.

The SJE is still not a popular beast, and for a number of reasons is not felt to be ideal on matters of complex quantum with injury claims. However, it will be interesting to see if practices are forced to change in circumstances where the usual adversarial system is ultimately influenced by government intervention.

Might the more frequent use of the single quantum expert, while potentially fraught with its own set of problems, be less of a problem than the two evils of costs and proportionality? Maybe, if a good quality expert is used and solicitors invest in the process of tailoring instructions more to the peculiarities of an SJE appointment. There will be mistrust and a change in current practices will be needed, but it may be that SJEs, where they are properly instructed, guided, and questioned, can indeed make a considerable proportion of cases capable of being conducted at a significantly reduced cost. **SJ**

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