NORTHERN CIRCUIT

WORKING PARTY

ON JOINT MEETINGS

IN PERSONAL INJURY CASES

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INTRODUCTION

1.1.1 The Working Party was set up as a consequence of a suggestion of Mr. Justice Leveson made on 8th February 2002. The purpose was to consider the experience so far in relation to Joint Meetings between parties in Personal Injury Cases ('Joint Meetings') and to advise how such Joint Meetings can best be used and developed in future.

1.1.2 Mr. Justice Leveson is one of the two Presiding Judges of the Northern Circuit and has particular responsibility for civil work on the Northern Circuit.

1.2.1 There were thirteen members of the Working Party. The names of the members appear in the Appendix A. The membership of the Working Party was chosen in order to provide experience from both claimants' and defendants' perspectives and to cover cases of all sizes (in monetary terms).

1.2.2 Especially important to the experience provided by the Working Party was the knowledge of the members who were directly involved in the insurance industry.

1.3.1 The Working Party held three meetings.

1.3.2 The meetings proceeded under the joint chairmanship of Stephen Grime QC and Giles Wingate-Saul QC.

BACKGROUND

2.1 All members of the Working Party had direct experience of Joint Meetings. The range of *individua*l personal experience was between about ten (or less) Joint Meetings and approximately seventy-five joint meetings. The Working Party's *aggregate* experience was of over 400 Joint Meetings as a minimum.

2.2 Two members acted exclusively for claimants and three members were involved exclusively for defendants. All other members acted for both claimants and defendants.

2.3.1 The litigation experience of the members was nationwide, although all members carried out the majority of their work on the Northern Circuit.

2.3.2 It was the universal belief of the members that Joint Meetings were more common on the Northern Circuit than in any other area of the country.

2.4.1 The members' experience as to the success rate of Joint Meetings varied considerably.

2.4.2 Success was identified as a settlement which resulted either

(a) at the meeting: or,

(b) soon after the meeting and as a result of discussions at the meeting.

2.4.3 The lowest success rate spoken to was approximately 33% whilst a more common experience of members as to a success rate was *"50% or more"*.

2.4.4 The highest success rate experienced was in the region of 75%. This rate was spoken to by a significant number of the members. In general it appears that the greater the experience of Joint Meetings, the higher the success rate reported.

2.5.1 It was a clearly stated view by those Working Party members involved in the insurance industry that Joint Meetings are regarded by many insurers as an important part of the litigation process. However this is not a universally held view. There are a number of individuals within insurance companies who do not embrace the process in a positive way.

2.5.2 It was further the view of the Working Party members referred to above that they expected those acting for them to adopt a positive attitude to Joint Meetings.

2.6.1 Very few members had experience of Joint Meetings which had been ordered by the Court under its general power whether before or after the introduction of the Civil Procedure Rules (CPR).

2.6.2 Occasionally in the past certain judges appear to have made orders requiring Joint Meetings to take place. There is no discernable pattern to these orders which appear to reflect the attitude of individual judges. Recently there has been introduced in Manchester High Court and County Court a set of variable paragraph directions

(VPDs). One set of these VPD directions (STA1-6) covers amongst other matters the potential for Joint Meetings (see Appendix B). No useful experience yet exists of the result of any orders made under these VPDs.

2.6.3 The limited experience of Joint Meetings which have been ordered by the Court indicates that they have been less successful than voluntary Joint Meetings.

2.6.4 The reason for this lower level of success was not capable of detailed analysis. The general feeling was that the Court Orders had sought to make mandatory what was essentially a consensual process. Further, the Orders have drawn into this essentially consensual process parties who lack the positive attitude essential to the success of Joint Meetings (see below).

THE REASONS FOR THE SUCCESS AND FAILURE OF JOINT MEETINGS TO DATE

3.1 The members universally agreed that the use of Joint Meetings on the Northern Circuit had been a success.

3.2 The members further agreed that the following had been essential characteristics of the continued use and success of Joint Meetings

(a) The correct timing of the Joint Meeting.

(b) A willingness on the part of both parties to negotiate.

(c) Good faith and integrity in negotiation on the part of both parties.

3.3 As a reflection of the above, the most commonly experienced reasons for the failure of Joint Meetings were:-

(i) New material produced late at a Joint Meeting.

(ii) Unresolved issues still existing at time of a Joint Meeting which did not lend themselves to negotiation.

(iii) Absence of a critical party or adviser.

(iv) Lack of authority to negotiate on the part of a party.

(v) Lack of trust.

(vi) Lack of willingness to negotiate.

3.4 It is clear that there may be many different reasons underlying the individual circumstances identified in paragraph 3.3 above.

3.4.1 The late production of new material ((i) above) may be due to (a) inefficiency on the part of a party acting in good faith or (b) a deliberate tactical choice by a party acting in bad faith.

3.4.2 Unresolved issues ((ii) above) may result from one party believing the issue can be resolved by negotiation, whilst the other party believes it should be resolved by (for example) a joint meeting of experts.

3.4.3 Absence of a critical party ((iii) above) may be due to (a) a deliberate tactical choice to avoid commitment at a Joint Meeting or (b) lack of appreciation of the process of a Joint Meeting.

3.4.4 Lack of authority (under (iv) above) must be seen in context. A solicitor or counsel cannot bind a party under a disability: it follows that negotiation can only be on the

basis of what will be advised as an acceptable compromise on behalf of that party. Lack of attendance by a representative who has authority on behalf of a paying party however can rarely be excused by a paying party claiming to act in good faith.

3.4.5 Lack of trust and absence of willingness to negotiate at a Joint Meeting (under (v) and (vi) above) are the most difficult elements to correct.

PARTICULAR CONCERNS

4. Two particular concerns were raised by members and were acknowledged as potential obstacles to the success of Joint Meetings.

Part 36 Payments and Offers

5.1.1 All members recognised the concern, expressed particularly by those acting on behalf of claimants, that defendants would use Joint Meetings for an invalid purpose, namely **solely** to gauge their own level of a prospective Part 36 payment-in or offer.

5.1.2 It was also recognised that to a lesser extent claimants might use a Joint Meeting to gauge the level of a Part 36 claimant's offer.

5.2.1 Members recognised that it is not practical that Joint Meetings should be held or ordered on condition that the right to make Part 36 payment-in or offer was thereafter removed (such removal would have to apply to both parties).

5.2.2 It was also recognised that a party is entitled to use all information available to that party in assessing the optimum level of a Part 36 payment-in or offer.

5.2.3 The mischief identified was that, in an honestly conducted negotiation, each party may reveal to the other not only arguments which the other party can assess for the purposes of negotiation (and therefore potentially a Part 36 payment-in or offer) but also elements of the advice which the solicitor or counsel would give on a particular issue to the client. This information about the advice to be given to the client would be very useful to the opposing party in assessing his own Part 36 payment-in or offer.

5.3.1 After lengthy consideration the members were of the view that no solution was available which could prohibit or remedy such (mis)use of Joint Meetings.

5.3.2 In particular the members considered that there could be no reference to the contents of any discussions which took place during a Joint Meeting by a party wishing at a later stage to make good an allegation of misuse of the process on the issue of costs. The members considered that the confidential (without prejudice) basis of the discussions is of paramount importance.

5.4 Overall members were of the view that lack of trust or suspicion of misuse is a real threat to future success of Joint Meetings if the practice is to be extended on a non-voluntary basis.

Willing Parties. The Effect of Ordering Such Parties to Negotiate.

6.1 Members recognised that willingness to negotiate is no longer regarded as a sign of weakness as once was the case.

6.2.1 However members were concerned that a Court Order that willing parties must meet to negotiate might create a change in attitude in a party who, prior to the order, was willing to negotiate on a voluntary basis.

6.2.2 The above change would probably not be manifested by a refusal to meet as this would be in breach of the Court Order. The change would more probably be a reduction in that party's willingness to enter into the negotiations in a constructive way. This would especially be the case where that party perceived itself to be in a stronger position in the litigation than the other party.

6.3 The view formed by the members was that where both parties indicated to the Court that they were willing to hold a Joint Meeting on a voluntary basis, a Court should **not order** the parties to meet. The Court may however give assistance to the process (see Section 12 below).

7. PROCEDURES IN OTHER JURISDICTIONS

7.1 The members gave close consideration to Family Dispute Resolutions (FDR) procedure adopted in the Family Division under Family Proceedings Rule 1991 r2.61E.

7.1.2 The members further considered the explanation of the purpose of and practice as to FDR explained by the Court of Appeal in **ROSE v. ROSE [2002] 1 FLR 978**.

7.2.1 FDR involves a Judge of the Family Division (District Judge, Circuit Judge, High Court Judge according to the weight of the case).

7.2.2 The procedure in an FDR depends upon the style and practice of the individual Judge. In some cases (as in **ROSE v. ROSE**) the judge expresses a view in a form akin to an Early Neutral Evaluation. In **ROSE v. ROSE** the Court of Appeal did not recommend mediation by a judge as an appropriate method of involvement under FDR. Under FDR time is given before and during the hearing for the parties to negotiate.

7.3 The members discerned no useful parallels between Joint Meetings and FDR save to the extent that in most cases full preparation of the case is required under FDR as it is for Joint Meetings.

8. THE ROLE OF JUDGES

8.1 In contrast to FDR, Joint Meetings do not involve and are never likely to involve direct judicial input.

8.2 The limit of the input which a judge may have is that in some cases he/she may choose (or influence) the time of and framework for the Joint Meeting.

8.3 Members expressed concern (not limited to the subject of Joint Meetings) that many important procedural decisions in personal injury litigation (and in particular in complex catastrophic cases) are made by judges who have little or no experience of personal injury litigation in practice.

8.4 Members noted that by contrast in the Family Division it was usual for Judges at all levels to have experience in family work.

8.5 Members recommend that urgent consideration is given to greater specialisation of judges and to greater dialogue between groups of specialist judges and practitioners in the context of discussion groups, working parties and CPD events.

9. DISCUSSION OF ISSUES AND DISCUSSION OF OVERALL SETTLEMENT

9.1.1 There was a significant difference of opinion between members as to whether the primary purpose of a Joint Meeting should be:

(a) to achieve overall settlement;

or

(b) to reach agreement on individual issues.

9.1.2 The advantage of seeking overall settlement is that there can be a "trade-off" between two or more issues where each party has contrasting strength/weakness. The issues to be traded may be wholly unrelated (e.g. past care and pension loss). Concentration on identifying and resolving the issues in the case, risks leaving the potential for wider settlement unexplored.

9.2 Two members of the group with wide experience of Joint Meetings were generally opposed to the discussion of individual issues at Joint Meetings. Their reasons, however, were different.

9.2.1 The first member was of the firmly held view that a stated intention to agree individual issues obstructed the primary aim of a Joint Meeting, namely to achieve overall settlement.

9.2.2 The second member followed the practice of not reaching agreement on individual issues unless the Joint Meeting was very close to trial because of the potential for changed circumstances between the Joint Meeting and the date of trial.

9.3 However, other members took the view that, if overall settlement could not be achieved, then it would be preferable if something came out of a Joint Meeting in the form of reducing the issues by agreement.

9.4 This difference of opinion is fundamental. The mandatory introduction of an obligation to reach agreement on issues could in practice seriously affect the negotiating ability of one or both parties and thus their tactics and willingness to negotiate constructively.

9.5 The members decided that, given the strongly held views, it would be unwise to make it mandatory to negotiate on individual issues unless a Code of Best Practice could provide a safe solution.

9.6 In the event when the Code of Best Practice was considered and drawn up, no satisfactory solution to this difference was suggested.

THE WAY FORWARD – THE RECOMMENDATIONS

10. The Definition

10.1 The members recognised that many meetings and discussions took place face-to-face or by telephone which fulfilled the purpose of Joint Meetings.

10.2.1 For the purpose of the recommendations in this paper, a Joint Meeting is constituted by

> *"A structured discussion which is attended by those who are needed to reach a concluded agreement".*

10.2.2 This definition is modified in the case of claimants under a disability by reason of the matters identified in paragraph 3.4.4 above.

11. Minimum Value Criteria

11.1 The members were of the clear view that there was no justification in setting a minimum value below which a Joint meeting was not justified.

11.2 In voluntary Joint Meetings the parties have of necessity assessed that the cost of a Joint Meeting is justified as being proportionate to the value of the claim.

11.3 The members recommend that, if in any case a Joint Meeting is to be ordered, the Court must seek to ensure that the cost of the Joint Meeting is proportionate to the claim.

12. **Cases Involving Parties Willing to Meet**

[NOTE PARAGRAPHS 12.1 TO 12.2.3 WERE NOT INCORPORATED INTO CODE]

12.1 The members are of the clear view that (a) there is no purpose and (b) it may be counter productive to order a Joint Meeting in a case where the parties have indicated a willingness to hold a Joint Meeting.

12.2.1 The members accept that a Joint Meeting may engender a delay in the procedural timetable.

12.2.2 The members recommend that the optimum approach in these cases would be to record specifically in any Court Order the fact that the parties are willing to hold a Joint Meeting and to set out in any procedural timetable:

(a) the fact that the parties intend to meet:

(b) the date by which they intend to meet:

(c) the parties' intention to follow the Code of Best Practice (see below):

(d) the additional time (if any) included in the timetable to allow this to happen and any other change in the directions engendered by the prospect of the meeting.

12.2.3 The members in particular recommend reference to the Code of Best Practice as it may help willing parties beneficially to structure preparation of (and their attendance at) the Joint Meeting.

Unsuitable Cases

13.1.1 The members are of the view that there is likely to exist a small number of cases where a Joint Meeting is not appropriate. Typical cases are those in which one or both parties believe the matter to involve an important point of principle, to constitute a test case or a case which needs to be expedited (e.g. a case of mesothelioma).

13.1.2 In some cases (e.g. a true test case) the fact that a Joint Meeting would be inappropriate will be obvious. In other cases (e.g. matters of principle to one party) it may be less obvious.

13.2 The members recommend that when consideration is being given whether to make an order for a Joint Meeting, a Court should place considerable weight upon the objection of one (or both parties) where an argument is raised that a Joint Meeting is not justified. In the case of such an objection the party or parties should be asked to certify the objection in writing.

Suitable Cases

14.1 The members recognised that there are cases where an order that the parties shall meet to negotiate would be justified.

14.2 The members particularly have in mind cases in which one side or both sides have shown a disinclination or inability to bring the whole case together, to form a view

and to advise the client. Such cases commonly reach the Court door before such a position is achieved.

14.3 The members therefore recommend that in appropriate cases the Court should use its general power under CPR to order a Joint Meeting between the parties.

Summary

15. The members recommend that in all cases at an appropriate case management stage the Court should investigate the parties' intentions in relation to a Joint Meeting and act in accordance with the above suggestions.

The Timing of the Order

16.1.1 The members were strongly of the view that the timing of a Joint Meeting is critical to its success and that the appropriate time will vary from case to case.

16.1.2 In some cases (e.g. where the claimant has significant difficulty on liability) an early meeting may be appropriate even where the damages claim is not fully formulated. In other cases (e.g. involving a claimant under a disability with no issue on liability) a Joint Meeting could only be appropriate at a late stage.

16.2 The members recommend that consideration as to whether a Joint Meeting is ordered and, if so, when, must have regard to the critical factor of timing and that in most cases an order for a Joint Meeting which results in a meeting before the case is almost

completely prepared on both sides, is likely to be of much reduced value. The members see little prospect for a second meeting where a first meeting has failed.

Code of Best Practice

16.3.1 The members are of the view that flexibility is inherent in the nature of a worthwhile Joint Meeting.

16.3.2 However, they are also of the view that a degree of structure will help the efficient planning of Joint Meetings and avoid some of the causes for failure. This structure can be introduced by a Code of Best Practice.

16.3.3 In addition, the members are of the view that a Code of Best Practice would ensure that both (or all) parties to a Joint Meeting have broadly equal expectations.

16.4 The members therefore recommend that a Code of Best Practice be adopted which expresses the desirable minimum.

16.5 The Code of Best Practice should include (and exclude) the following.

	Include	**Exclude**
		Agenda
1	Index of Disclosed Reports and Documents	Bundles (except by agreement)
2	Schedule (at least an outline of the amounts claimed) delivered 7 days before the Joint Meeting	
3	Counterschedule (at least an outline of the Defendant's case) delivered 3 days before the Joint Meeting	

	Include	Exclude
4	List of persons attending on behalf of each party exchanged 7 days before Joint Meeting	
5	Decision maker(s) for each party identified on the above list	
6	Whether any expert will attend (if so, the reason) to be stated 7 days before Joint Meeting	
		Prescribed negotiation format
7	In default of agreement the negotiations will be conducted Counsel to Counsel (if involved) or by Solicitors (if no Counsel is involved) and not in plenary session	
8	Notice must be given 4 days before the meeting (a) if a party wishes a structured settlement to be discussed (b) whether the structured settlement is to be top down or bottom up (c) the period over which any annuities discussed are open for acceptance (d) the identity Life Office(s) offering the annuities (if any Life Office is involved)	
9	The details of CRU Benefits must be sent to the Claimant by the Defendant 2 days before the Joint Meeting	
10	Details of all interim payments made must be sent by the Defendant to the Claimant 2 days before the Joint Meeting	
11	In default of any agreement otherwise, the venue for the Joint Meeting shall be the Claimant's Counsel's Chambers or Solicitor's office	
12	The facilities at the Joint Meeting venue shall consist of a suitable room for each party and a	

	Include	Exclude
	separate suitable room for negotiation. Appropriate refreshments shall be provided	
13	In a multi-defendant action the defendants shall be in a position prior to their meeting with the claimant to make a unified offer to the claimant (preferably by holding an earlier separate meeting between defendants)	
14	At the conclusion of the Joint Meeting the parties' representatives should sign a Heads of Agreement which should include dates by which any payment are to be made	

Costs

17.1 The members recognise that the potential for success of any Joint Meeting may be significantly dependent upon (a) good preparation and (b) those involved taking significant responsibility.

17.2 The members hold the view that as a matter of principle the cost of Joint Meetings should allowed as a recognised cost and that the level of costs allowed should reflect the importance of Joint Meetings, responsibility, court time saved and saving of resources.

…….Stephen Grime QC

…….Giles Wingate-Saul QC

Joint Chair on behalf of the Working Party.

APPENDIX A
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APPENDIX B

MANCHESTER HIGH COURT AND COUNTY COURT

VARIABLE PARAGRAPH DIRECTIONS

(PART)

_____

STAY

STA1☐ The action be stayed until for settlement by mediation/negotiation or for narrowing the issues.

STA2☐ The stay ordered on is lifted.

STA3☐ The stay (imposed pursuant to Para 19 of the PD to Part 51) is lifted upon condition that ……..

STA4☐ Stay for……..days from this date during which period the parties shall engage in the pre-action protocol.

STA5☐ Within 7 days of the end of the period of stay the parties shall jointly notify the Court in writing of the outcome of negotiations and what, if any, directions are required. Failure to comply with this direction or properly engage in negotiations may result in the application of sanctions. On receipt of such notification the court file shall be referred to DJ……/a full time DJ for further directions.

STA6☐ The period of stay granted on ……. having expired and the parties having failed to comply with the terms of such stay unless either party shall by 4.00pm on ……(14 days) show cause in writing as to why such order should not be made the proceedings are hereby struck out.

Worpardrftrep020902