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# The Expert in Litigation and Arbitration

Mark Cato



THE EXPERT  
IN LITIGATION AND ARBITRATION



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# THE EXPERT

IN LITIGATION AND ARBITRATION

*by D Mark Cato*

**informa** law  
from Routledge

First published 1999 by LLP professional publishing

Published 2013  
by Informa Law from Routledge  
2 Park Square, Milton Park, Abingdon, Oxon OX 14 4RN

and by Informa Law from Routledge  
52 Vanderbilt Avenue, New York, NY 10017

*Informa Law is an imprint of the Taylor & Francis Group, an informa business*

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***British Library Cataloguing in Publication Data***  
**A catalogue record for this book**  
**is available from the**  
**British Library**

ISBN 13: 978-1-85978-662-8 (hbk)

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*I have gathered a posy of other men's flowers  
and nothing but the thread that binds them is my own.*

Montaigne

---

I dedicate this book to my beloved grandson, “Freddy”,  
born on 5 October 1998—may he never require the services  
of an expert. Also to that legion of friends and colleagues  
who are Life Members of *The Twisted Arm Club*,  
of whom a number have contributed to this book

Over the years, since I launched into authorship,  
I have been proud to enlist the assistance of those very many eminent academics  
and practising arbitrators and lawyers whom it is my privilege and pleasure to know.



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# THE EXPERT IN LITIGATION AND ARBITRATION

by  
*The Right Honourable The Lord Howe of Aberavon, CH, QC*  
*Former Foreign Secretary and Deputy Prime Minister of the United Kingdom*

Kosovo, Tiananmen, Chernobyl, Pinochet, CNN. Increasingly we all share the same worldwide satellite-borne vocabulary. Trade, travel, tourism, television, technology—all these are competing with each other in the demolition of time and distance.

Politics and technology alike have been boosting rather than obstructing the growth of transnational business. Sometimes the obstacles for trade have been demolished by conscious political decision: in the European Union or in NAFTA, for example. Elsewhere the process has been triggered by near-revolutionary upheaval: with the displacement of Maoism by Deng Xiaoping's "socialist" marketplace or with the Gorbachev disintegration of the Soviet Empire. Very often it has been (in Keynes' words) the "animal spirits" of the entrepreneur that have been the driving force for change.

So we have grown used to the idea of a single world marketplace. Not just for goods but for capital and cash as well—whisked across frontiers invisibly and, literally, at the speed of light. We think less often perhaps of the global marketplace of law and legal thinking that must accompany the growth in trade and investment. Yet inevitably there has been a corresponding increase in transnational disputes. So too there has grown a corresponding need for skill and guidance in avoiding and resolving such disputes.

Multinational trade is inevitably multijurisdictional. Very often the choice of jurisdiction is the most difficult question of all. So more and more it makes sense to create what is in effect a unique jurisdiction, through a tailor-made pattern of alternative dispute resolution. Sometimes even, in truly "adventurous" territories, one has almost literally to take one's own law with one.

And ADR, in whatever form and in whatever mix of territories, means more work not just for lawyers but for experts of every kind—and in a variety of roles. Perhaps too often we see ourselves as primarily involved in what Sir Mackenzie Chalmers, the Victorian jurist, described as the pathology of trade and commerce—in the forensic determination of head-on conflict. But the expert's role is now seen to be much wider than that. Even where disputation has already broken out, the expert's input to mediation, conciliation, to other means of dispute resolution—very often by the removal of technical or linguistic misunderstandings—will continue to grow.

So too in helping to shape relationships, to settle agreements, to formulate codes of practice that will make disputes less likely. And nowhere more than in the cross-frontier transactions—where often there can be significantly different perceptions of the role and standing of the expert himself. As between the United States, for example, and many other

## FOREWORD

common law jurisdictions, there are differences—or so it is often thought—between the balance that has to be struck between duty to one’s client and duty to the court or tribunal. Almost by definition, the scope for misunderstanding between Anglo-Saxon and Continental systems is different again.

And all the more so, when one is concerned with inter-cultural as well as intercontinental relationships. The contributors to this book, drawn as they are from Australasia as well as from China, from Continental Europe as well as from the United States and the United Kingdom itself, offer a broad perspective of advice on all these issues.

Yet even the most eminent professionals, said one commentator the other day, be they accountants, engineers or surgeons, can be reduced to simpletons in the witness box. That is why this is more than a book about experts, by experts, for experts. “The more a man looks at a thing,” said G K Chesterton, the master of paradox, “the less he can see it, and the more a man learns about a thing, the less he knows it. . . . He goes on seeing less and less of its significance. In the same way, alas! we all go on every day, unless we are continually goading ourselves into humility.”

This book aims to display humility and commonsense as well as expertise—and is all the better for that.

# ETHICS AND THE EXPERT

by

*The Right Honourable The Lord Saville of Newdigate  
Chairman of the Judicial Committee of The Academy of Experts*

*“The expert witness is not an advocate employed on behalf of a party.”*

I take these words from the Guidance Note on Contingency Fees issued by the Judicial Committee of The Academy of Experts. That Committee (of which I was a member and am now Chairman) holds the view that any form of contingency fee arrangement is incompatible with the expert’s duty of independence and impartiality.

The job of experts in litigation or arbitration is to give their independent, objective and unbiased opinions on the matter referred to them and falling within their area of expertise.

The job of advocates is to present the best case they properly can on behalf of their clients.

If an expert tries to adopt the advocate’s role under the guise of giving expert evidence, then that expert will necessarily not be giving an independent, objective and unbiased opinion.

In truth such an expert will be attempting to deceive the court or tribunal.

Such attempts may succeed or they may fail. If they succeed, then the expert has perverted the course of justice. If they fail (and more often than not it is only too apparent to an experienced judge or arbitrator that the expert is not acting with independence and impartiality) then the result will be that the court or tribunal concerned will be likely heavily to discount the evidence that expert gives, which will mean that, so far from assisting the client, the expert will have done the client a great disservice.

In its Guidance Note the Judicial Committee also observed that “An Expert Witness must not only be independent, but must be seen to be independent”. Hence the view of the Committee that contingency fees are not compatible with the duties of a true expert, since such fees could hardly fail to raise suspicions of partiality and lack of independence, even if in fact the expert was able to resist the temptation so to act.

There are those who do not share these views; indeed they regard them as idealistic and impracticable in the real world. However in my opinion unless they form the basis of the proper function and duties of experts, the argument that only court or tribunal appointed experts should be heard becomes very difficult indeed to rebut.

These points (and others of equal importance) are considered and discussed in detail in this book, which I would commend to all concerned with experts in litigation or arbitration.



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# ACKNOWLEDGEMENTS

- Norman Williams, Barrister—The Incorporated Council of Law Reporting for England and Wales
- *The Times Law Reports*
- *The Solicitors' Journal*
- *Family Law Reports*
- Donald Valentine, Barrister, Atkin Chambers—Commentary on Sandi Murdoch's article—see paras 8—555 to 8—566
- *The Arbitration and Dispute Resolution Law Newsletter*
- *The New Law Journal*



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*9 December 1998*



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# BIBLIOGRAPHY

*Used by co-ordinating author; other contributors include their own Bibliography*

- A no-win case for Experts*, Dr Christopher Pamplin, *The Lawyer*, 25 November 1997.
- A Review of Some Recent Cases involving Expert Evidence*, B Mahendra, *NLJ Practitioner*, 28 November 1997.
- Can I get a Witness?* Tony Bingham, *Building*, 12 December 1997.
- Official Referees' Solicitors Association, *Expert Witnesses Protocol—Version 1.0*.
- What's right and fair?—A report on Arbitrators/Independent Experts and Commercial Property Rent Review*, Nabarro Nathanson, Solicitors, February 1997.
- Root don't Toot*, Tony Bingham, *Building*, 27 February 1998.
- Giving Expert Witness? What the judge might throw out*, Jeremy Williams and Peter Garcia, *Chartered Surveyor Monthly*, April 1998.
- The Expert Witness and his Evidence*, Reynolds & King, BSP Oxford Press.
- Administration of Justice*, A Shilston (1992) 58, JCI Arb 4–251.
- Clarifying the Role of Experts in the Courtroom*, His Hon Judge Humphrey LLoyd, QC, *Building*, 13 October 1989.
- Construction Disputes—Liability and the Expert Witness*, Andrea Burns, Butterworths (1989) p. 241.
- The Independent Expert*, Michael Ludlow, (1993) 59, JCI Arb 4–231.
- Guidance on the Form and Content of Experts' Reports, *Counsel Magazine*, October–December 1993.
- The Expert Witness* (2nd edition) (*The Doctor's Dilemma*), Jean Graham Hall and Gordon D Smith, Barry Rose (1997).
- No Duck, no Dinner*, Tony Bingham, *Building*, 27 March 1998.
- The Importance of the Expert*, Construction Edge, Edge & Ellison bulletin, Issue 3, Spring 1998.
- Experts and Privilege*, Colin Passmore, *New Law Journal*, 18 September 1998.
- The Ikarian Reefer revisited*, Hon Mr Justice Cresswell, *The Expert*, Winter/Spring 1998.
- Expert Evidence under the new Civil Procedure Rules—It's never too late*, District Judge Frenkel, *NLJ Practitioner*, February 1999.



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## AUSTRALIA

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--	-----------

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# INTRODUCTION

- Are you an expert? If so, at what?
- Can a party paid expert really be independent and free of partisanship?
- To whom does an expert owe a duty? Can you subpoena an expert?
- What about privilege, professional liability and fraud when it comes to expert evidence?
- What is the expert's position concerning legal aid and would the whole process be improved if there was one expert—tribunal appointed—instead of two or three (one for each party and one possibly to advise the tribunal)?

These are typical of the questions which are dealt with by the “Introductory Articles”, reproduced in chapters 1 and 9 of this book. All have been written by leading exponents in their field; most have appeared in learned journals; and all have been reviewed by the original authors and, in almost all instances, updated for the purpose of this book.

When I first conceived the idea of a book on the expert, it was with a view to exploring ways of making the introduction of expert evidence in arbitration and litigation more cost-effective. It was whilst researching what had been written about the subject that I came across most of these Introductory Articles and decided that they were too good to be buried and forgotten in the inevitable pile of such similar articles which we all accumulate over the years—hence their reproduction in this book.

From bitter experience, in my own discipline of construction, I am only too aware that the costs of experts' reports and subsequent giving of expert evidence can form a significant part of a party's total costs. It follows that any procedure which effectively reduces the length of time that experts are being cross-examined—i.e. the most costly part of any case—must be worth exploring.

In order to derive the maximum benefit at the least cost from experts, they need to be clearly and effectively instructed. Get the instructions right and you are well on the way to getting the best out of your expert. Give your expert poor, or too broadly-based, instructions, and you might as well say “Here is a spade, go home, dig a hole in your garden and pour my client's money into it”.

It is a short step from these initial concerns to deciding to explore how experts are used in other disciplines and to see if we could improve our own use of experts by adopting procedures followed in these other disciplines. This led to chapters 2–7 in Part I and, when I decided to cover expert determination as well, to chapters 10–14 in Part II.

It was clearly sensible to embrace litigation as well as arbitration and thus consider how experts are currently used in court—again, to see what lessons could be learned. When I first drafted this Introduction, the word “currently” applied to the situation of experts in court as it then was. Shortly after this, the new Civil Procedure Rules were published which completely

## INTRODUCTION

revised the courts' approach to the use of experts. As a result, publication of this book was deferred and all the UK contributors were sent Parts 27, 32 and 35 of these new Rules and asked to amend their article or chapter where appropriate.

Having decided to include a new short section on the Civil Procedure Rules (Chapter 1/1) and how these rules are likely to affect the role of the expert in court, to avoid undue repetition the contributors have limited their own comments on these rules to those specific changes which may have to be made to their own procedures in relation to their specific discipline and the subject matter on which they are writing.

These Rules have sprung from the Woolf Report, *Access to Justice*—chapter 13 of which is reproduced in full as Appendix A/1 to this book by kind permission of the Lord Chancellor's Department.

Looking at the contents of this book in more detail, Part I commences with a series of seminal articles concerning the expert (Chapters 1/1 to 1/22) which have appeared from time to time in various learned journals. All of the authors were given the opportunity of updating these articles, or amending them, for inclusion in this book, including, as noted above, any additional necessary commentary on the new Civil Procedure Rules.

Although the titles of the contributions from various experts from different disciplines, and various parts of the world, broadly speak for themselves, it is not always obvious from the title of the article exactly what aspect of expertise the author is covering. For this reason, I give below a very brief outline of their contents.

### THE NEW CIVIL PROCEDURE RULES AND THE EXPERT WITNESS— JUDGE JOHN FRENKEL (CHAPTER 1/1)

As consulting editor for the *Practical Civil Court Precedents*, Judge Frenkel is particularly well placed to comment and speculate on the application of these new Rules to civil proceedings, which take effect after 26 April 1999.

He summarises very succinctly the effect of the application of these new Rules to the expert and to expert evidence given in the civil proceedings.

### ARE YOU AN EXPERT?—DR ALBERT W KNOTT, PE (CHAPTER 1/2)

Dr Knott is a forensic engineer and in this article he recommends the development of a personal philosophy for anyone giving expert evidence in this extremely important field. He then sets out and discourses on 27 different lessons which he recommends a forensic expert to learn and observe.

### INDEPENDENCE, PARTISANSHIP AND THE CONTENT OF EXPERT EVIDENCE— ANDREW BARTLETT, QC (CHAPTER 1/3)

Here the author deals with the quality of expert witnesses under the headings included in the title and in doing so covers the difficult problem of the tension which arises over the expert's various roles and how an expert should deal with a change of mind.

### INDEPENDENCE, AND USE, OF EXPERT WITNESSES—NABARRO NATHANSON (CHAPTER 1/4)

This article first appeared in a report entitled "What's right and fair?" which dealt with surveyors acting as experts in Commercial Property Rent Review.

The reader may be misled, from the title, into thinking this covers some of the same ground as the previous article, whereas it explores specifically the difficulty experienced by a surveyor acting as an expert witness whilst at the same time representing his client. It goes on to set out

## INTRODUCTION

guidelines as drawn up by the Royal Institution of Chartered Surveyors in such cases, which are lifted from *The Ikarian Reefer*.

These guidelines appear more than once in various parts of this book, for which I make no apology; apart from not being able to edit them out of individual contributions without perhaps losing the sense of what is being said, these guidelines strike at the epicentre of what giving expert evidence is all about and this cannot be repeated too often in a book dedicated to the subject. (See, in particular, the following article by The Honourable Mr Justice Cresswell.)

### THE IKARIAN REEFER REVISITED—THE HONOURABLE MR JUSTICE CRESSWELL (CHAPTER 1/5)

“Since the decision in the leading case, the need for clear guidance for expert witnesses has been increasingly recognised, and is now reflected in the new Civil Procedure Rules under the Woolf reforms. This article summarises the guidance which will apply to expert evidence, including expert reports and meetings of experts, in relation to Commercial Court Practice.”

Logically, Mr Justice Cresswell shows how *The Ikarian Reefer* guidelines relate to the all-important Appendix 12 of *The Guide to Commercial Court Practice*, 5th edition (reproduced as Appendix L to this book).

### TO WHOM DOES THE EXPERT OWE A DUTY?—MICHAEL CHAPMAN (CHAPTER 1/6)

Michael Chapman deals with the seemingly conflicting interest of the expert’s duty to assist the tribunal and his duty to the client, who is paying his fees. The author cites a number of sources, including some reported cases, in support of his view that there has been much comment but little debate, barring repetition of entrenched opinions, on the subject.

Dr Chapman finally reviews the early draft of his article against the background of the new Civil Procedure Rules and concludes that these Rules “heighten the conflict between those who search for the truth and those who must ‘pick a winner’”. In support of his conclusion the author takes the reader through various aspects of these new Rules.

### SUBPOENA OF AN EXPERT WITNESS—JOHN BOLTON (CHAPTER 1/7)

The author deals with the topic of subpoenaing an expert witness and how the experience of being subpoenaed is not half so unpleasant as the anticipation of the event. He then explores the motive behind a subpoena and the unwilling witness. He concludes with a useful appendix on “The Defective Subpoena”.

### HOW PRIVILEGED IN IS AN EXPERT?—GARY HICKINBOTTOM, MA (CHAPTER 1/8)

Having started with the general articles about the expert and his approach to the task, we then have the first of the narrower, but important, articles devoted to various aspects of expert evidence. This one deals with privilege and not only covers the historical case law on the subject, but also includes two 1997 cases where the judge came to opposing conclusions concerning privilege and the expert.

In the *Clough* case it was held that reference to an undisclosed privileged document in a disclosed expert’s report waived the privilege in the other document.

In the *Vista Maritime* case the judge expressly rejected a submission that the inclusion in a statement, or report, of references to privilege matters is an irreversible step which necessarily involves a waiver of privilege in all connected material.

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Obviously this contradiction is something that hopefully the Court of Appeal will hopefully sort out at the earliest opportunity.

### PROFESSIONAL RESPONSIBILITIES AND LIABILITY OF EXPERTS AND EXPERT WITNESSES—PAUL NEWMAN (CHAPTER 1/9)

Apart from some general comments concerning the expert, his skills and his report, this article deals with the duty of care to be expected of an expert, his liability if he makes a negligent mis-statement, and the remedies for such negligent mis-statement, including limitation problems.

### THE EXPERT AND THE INVESTIGATION AND PROSECUTION OF SERIOUS FRAUD—GEORGE STAPLE, QC (CHAPTER 1/10)

The title of this article, by a former Director of the Serious Fraud Office (SFO), speaks for itself. Apart from dealing with the special features of serious fraud and how the expert should approach the task of giving evidence in such cases, the author also deals briefly with the function of the SFO as prosecuting authority and concludes with a consideration of the international dimension and extradition.

### LEGAL AID—THE EXPERT'S POSITION—SIMON MORGAN (CHAPTER 1/11)

This article explores the controversial topic of legal aid in both criminal and civil cases with particular emphasis on the expert's position *vis-à-vis* his fees. The article is an update of a paper delivered in 1994 to The Academy of Experts and includes verbatim questions and answers which followed it. Specifically, the author deals with how the new Civil Procedure Rules impact on legal aid.

### THE "SINGLE JOINT" EXPERT WITNESS—RICHARD FREEMAN (CHAPTER 1/12A)

The topic addressed by the author of this article is particularly apposite at the time of publication being the immediate aftermath of the introduction of the new Civil Procedure Rules.

The general feeling seems to be that the court's power to appoint a single expert is not a favoured option and the parties will appoint their own "technical adviser" willy-nilly. Thus, the objective of cost saving is likely not to be achieved—only time will tell how this laudable objective will work out in practice.

### A SINGLE ACCOUNTANCY EXPERT IN MATRIMONIAL PROCEEDINGS—RICHARD FREEMAN (CHAPTER 1/12B)

Again, as with the previous article by this author, the vexed question of appointing a single expert is addressed. However this time, as the article suggests, it concerns the single accountant in matrimonial proceedings.

The article was originally written prior to the implementation of the new Civil Procedure Rules, and suggests that "lawyers should voluntarily and regularly make neutral appointments now and not wait for the proposed rules of civil justice to be enacted". Well, they have been enacted and whether or not lawyers heed Mr Freeman's advice remains to be seen. In any event the author is quite clear that such a single expert should never be forced on the parties although judges certainly have been given this power by the new Rules. The author is in no doubt that an independent accountant would undoubtedly remove much unproductive confrontation and attrition and be employed to advantage in matrimonial cases.

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### A NEUTRAL EXPERT FOR CRIMINAL CASES?—RICHARD FREEMAN (CHAPTER 1/12C)

In his third article, the author suggests that complex legal issues in criminal cases are best put to juries by a neutral, rather than party-appointed, expert.

Compare this with the extract from the Woolf Report at Appendix A/1, where this report argues for the wider, but not uniform, use of a “single” or neutral expert in both criminal and civil actions

Interestingly, Woolf suggests that “Given the strength of opposition to my proposals, it would not be realistic to expect a significant shift towards a single expert in the short term”.

My own experience as an arbitrator confirms this view. Whenever I have suggested the use of a tribunal-appointed expert to deal with such complex issues as computer-generated programming to demonstrate the actual effect of delay on the building project, in every instance the suggestion has been rejected on the grounds of expense, as each party has felt the need to appoint their own expert, in any event, to deal with the report of the neutral expert.

See also Appendix K/3 for a typical agenda item in an arbitration providing for the appointment of a neutral expert.

### THE PRACTICAL ROLE OF AN EXPERT IN COMPUTER DISPUTES—KEITH SALMON (CHAPTER 1/13)

Although much of what the author of this article says is, as expected, common ground with the duties and obligations of experts in other disciplines, the value lies in the specific advice given to experts giving evidence in computer disputes. With the growth of IT and system made software such disputes will, undoubtedly, become more prevalent. Even as we go to publication, the UK government is experiencing severe problems with its computer hardware/software involving the issuing of passports, social security cheques and student grants, all of which could end up either in litigation or arbitration.

### SOME PRACTICAL POINTS FOR EXPERT WITNESSES—TIM COOPER (CHAPTER 1/14)

The concluding general article in Chapter 1 gives some very useful guidance, from a very experienced rent review arbitrator, to the inexperienced expert witness. Of course, it begs the question as to whether someone really inexperienced in giving evidence is a suitable choice to act as an expert but on the premise that there is always a first time, even for expert witnesses, anyone who may be cautious about accepting an instruction to act will find these guidance notes provide a degree of comfort, as well as covering some of the fundamentals associated with the role.

### EXPERTS IN FOREIGN JURISDICTIONS (CHAPTERS 1/15 TO 1/21)

The succeeding six articles are all written by leading academics, or practitioners, in Germany, France, Italy, the USA, Australia and mainland China and Hong Kong.

I started on the exercise of comparing and contrasting the approach in each of these jurisdictions but abandoned the attempt as being a fruitless task—the reader would be far better served to read what each of these distinguished authors have written from their own wide experience and research.

### THE ROLE OF THE ACADEMY OF EXPERTS—MICHAEL COHEN (CHAPTER 1/22)

Chapter 1 concludes with a short article by the chairman emeritus of the leading body of experts—Michael Cohen. Mr Cohen tracks the Academy’s pursuit of excellence and shows how far the Academy has come in 10 years in raising the standard of experts, both in litigation and arbitration.

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### EXPERTS IN VARIOUS DISCIPLINES IN THE UK (CHAPTERS 2 TO 7)

The next six chapters are all written by acknowledged leading experts in the following disciplines:

- Medical negligence
- Crime
- Construction disputes
- Insurance and Reinsurance
- Maritime disputes
- Rent Review disputes.

The brief given to the authors of the various chapters on these different disciplines was for them to base their contribution on their most interesting cases and, if they were arbitrations, then sanitise them to a point beyond recognition—and broadly cover the following:

1. General background to the work of the expert in their particular discipline, including headline cases with full quotes from the judgments on those parts where the judge may have commented on the quality etc. of expert evidence.
2. The background facts to a typical case.
3. How you came to be appointed.
4. How you were instructed and, if appropriate and available, a model form of those instructions and/or alternatively how you believe you *should* have been instructed.
5. How you tackled the task.
6. A report or an appropriate extract from a report prepared (to act as a model to other practitioners).

It will be seen that this brief was interpreted differently from one contributor to another but whether or not the brief has been followed to the letter does not detract from the authoritative nature of the sound practices reflected in these chapters.

As with the experts in foreign jurisdictions, my initial intention was to try to draw some common thread from each of these separate disciplines that could possibly be applied universally; however, that simply did not work. Inevitably, I was biased towards practices associated with construction disputes which, frankly, are not necessarily readily adaptable to cases involving other disciplines. So I strongly recommend reading all six chapters, whether or not they cover the same discipline as that in which you, the reader, is engaged and then drawing what lessons you can from the practices of other professionals and applying them to your own practice where appropriate.

### CHAPTER 8

All of the following issues, including an introductory piece on the “Expert Generally”, are addressed by me in the 70-plus “problems” dealt with in Chapter 8 “Interlocutory and Trial/Hearing Problems” (trial, of course, in litigation and hearing in arbitration):

- Is a doctor any different from any other expert?
- One party appointed an expert and the other party failed to do so.
- Expert omits to deal with material facts.
- When an expert’s report consists mainly of hearsay, advocacy and submissions, can it be struck out in its entirety?
- Independent expert or arbitrator?

## INTRODUCTION

The introductory piece sets out to deal with the duties, obligation and liability of an expert generally, setting the scene for the problems which follow. I have specifically avoided attempting to amend either this introductory piece or the suggested “Course of Action” in the “problems” speculating on the application of the new Civil Procedure Rules but instead added a short section covering these Rules at paras 8–053 *et seq.* The time to make such amendments, is, I suggest, when these rules have been in operation for a year or two and we see how they work in practice.

This substantial section on problems likely to be encountered by the expert is a little more, I admit, than the “thread” referred to in the quote from Montaigne on the dedication page of this book.

As a construction arbitrator a substantial element of these “problems” arose out of my own experience. However, where possible and practical, I have adapted the facts of the case to cover general application—both litigation and arbitration—as many of the situations are common to both jurisdictions.

The approach of taking some facts, deriving a question and then proposing a “Course of Action” is a style I have previously used, particularly in my book *Arbitration Practice and Procedure—Interlocutory and Hearing Problems* (now in a greatly enlarged second edition) from whence a number of the examples in this book were derived.

In the Preface of the First Edition of that book I said of the “Course of Action”:

“Faced with a new situation to which the solution is not immediately obvious the sensible arbitrator will take time to consider his preferred ‘Course of Action’ and, of course, there may well be a number of ostensibly satisfactory solutions. In this book we have either used situations drawn from reported and unreported cases, or hypothesised facts in order to illustrate a particular point in a ‘Course of Action’. For ‘Course of Action’ read ‘just one reasonable and sound solution to the problem posed by the question’.

... The facts of individual cases are rarely identical and even where they are very similar, different considerations may apply. The authors entirely accept this reservation however and we trust the good sense of practitioners using this book to realise its limitations.

If they do that and remember that the ‘Course of Action’ is by no means gospel but merely one possible solution, they should find this book an extremely useful tool.

This conveniently leads me to the question of authorities. The solution suggested to the problems posed in this book could be likened to a party citing authority to a tribunal in support of their contentions except that the ‘Courses of Action’ given here are *not* authority. As a judge or arbitrator would weigh the authorities given to him, against the facts of the case he was hearing, so readers of this book should view the ‘Course of Action’ proposed here, against their own particular problem.”

It will become immediately obvious to the reader that where the “Course of Action” relates to a procedure to be followed by the tribunal, it is not intended to suggest that judges would adopt a similar “Course of Action”. Indeed, as all arbitrators are individuals, and will have their own ideas about how best to proceed, so no two judges will proceed on precisely the same lines. All of which serves to illustrate that although the “Course of Action” proposed illustrates one sound and sensible way of resolving the particular problem, it is precisely that, just one way—possibly of many.

The other feature of these “problems” which may well cause the reader puzzlement at first encounter, is when they suddenly come across Thomasina. This is best explained by the following extract from the Second Edition of *Arbitration Practice and Procedure* where this phenomenon was explained thus:

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“Another ploy I have used is to introduce Thomasina (from my other book, *The Sanctuary House Case*). Thomasina, it will be recalled for those of you who have read the other book, was the arbitrator’s pupil. She is a dear girl who is very keen to learn and frequently tries the patience of my ‘alter ego’, the kindly arbitrator in *The Sanctuary House Case*—Mr D Emsee. By listening to what he has to say on a possible course of action and then asking ‘but what if . . .’, Thomasina stands in the shoes of all of us who would like to ask ‘what if’, but perhaps feel that, either we should know the answer and therefore should not be asking, or we are reticent about putting that question to the person to whom we are talking.

To confuse matters further, Thomasina has a boyfriend called Charley, who is what is known in the trade as a ‘rent boy’ or, more correctly, the pupil of a rent review arbitrator. Charley occasionally adds his comments to solutions to problems from a rent review arbitrator’s perspective. Having said that, let me assure the more serious reader who finds these characters intrusive and distracting that there is very little input into this book by either of these pupils; they have merely been used, *very occasionally*, as a transparent didactic device for exploring situations from different angles. My own reason for even mentioning this is to avoid the reader suffering the same fate as a colleague of mine who, coming across Thomasina for the first time, in one of my examples, asked who on earth she was?”

From the reviews received for both books it is clear that there are those readers who find Thomasina and Charley a “reader-friendly” device and others who consider that even this very occasional “transparent didactic device for exploring situations from different angles” detracts “from the serious quality of a major work”. For those readers then who share this criticism, my apologies. The references to these two “characters” are, as I say, scant and really should not detract from this book which, indeed, like my other three books, is meant to be a serious work.

Hopefully, one way or the other, I have covered most of the pitfalls faced by experts and dealt with many of the situations that they could find themselves in, either in court or before an arbitrator.

I know, however, from my own experience, that no matter how long I practise as an arbitrator, entirely new problems arise almost daily in my work. They may well be similar to previous problems but they often present some new point which I have simply never encountered before and is certainly not covered by any text book that I have come across.

For this reason I invite you, dear reader, to send me details of any situation you have faced which is not covered by the examples in this book. Of course, any such problems used will be acknowledged in any future editions of my books and you will have contributed to the nexus of knowledge for future generations of experts.

I reiterate what I said above. What I have specifically not attempted to do is to speculate, in any suggested “Course of Action”, where this is likely to change as a result of the publication of the new Civil Procedure Rules and Guidelines.

The reason for this is two-fold.

- (a) it would be pure speculation and thus of limited value to the reader; and
- (b) the new Rules and their application have been addressed fully by other contributors in both articles and chapters. In subsequent editions of this book (should there be any!) I may well expand on a “Course of Action” where appropriate, to reflect these new Rules, which by that time will be at least partially tried and tested.

Before I delve into the Appendices I should mention the obvious for anyone who has studied the contents pages of this book, and that is that the whole process for the expert

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witness is repeated in Part II—Expert Determination—but, inevitably, in considerably decreased volume, as expert determination is not practised in as wide a field as that which uses expert witnesses.

Rent review disputes are by far the largest application of expert determination, followed by construction, accountancy, energy and, increasingly, disputes concerning computers.

The fundamental difference between expert determination and arbitration is that for the former there is no statutory system of court review of the experts' decisions. The expert's determination is usually final and binding on the parties and can only be challenged (before determination) on jurisdictional grounds or, less commonly, on grounds of fraud, collusion or mistake.

Inevitably there is overlap between the Introductory Articles in this book and the chapters which follow, as each has been written by leading exponents in their own field who are going to be only too aware of the milestone cases where judges have devoted time and thought to the role and duty of experts. The guidelines for the expert witness from *The Ikarian Reefer* are inevitably repeated a number of times, not only in the text but also in the judgments cited. Similarly, *Jones v. Sherwood* inevitably appears on a number of occasions when expert determination is under consideration.

I make no apology for such repetition, or indeed for perhaps occasionally straying onto the same ground once more in my own chapter 8 and chapter 14. Such repetition serves only to reinforce the importance of the cases cited and the lessons to be learned from the judgments which follow.

So much for the substantive element of the book. What of the Appendices, mentioned earlier in this Introduction? Each is worthy of some short comment.

### APPENDIX A/1—EXTRACT FROM “ACCESS TO JUSTICE”—THE WOOLF REPORT

The opening paragraph of this report sums up the entire *raison d'être* for this book.

“It was a basic contention of my interim report that two of the major generators of unnecessary cost in civil litigation were uncontrolled discovery and expert evidence. No one has seriously challenged that contention.”

Long before Lord Woolf's Report there was judicial concern about the use of expert witnesses, as is evidenced by Richard Southwell, QC's comment in his judgment in *Burroughs Day v. Bristol City Council* [1996] 1 EGLR 167, where he said:

“Some of the expert witnesses apparently thought that it was an essential part of their function as experts to act as supplementary advocates for their clients.”

Commenting on Lord Woolf's Interim Report, in the summer of 1996, Dibb Lupton Broomhead's *Property Newsletter* said this:

“In preparing his Report, Lord Woolf took account of a 1995 Official Referee's court decision to appoint a court expert. That case has now been heard in the Court of Appeal. The judgment delivered by Sir Thomas Bingham, Master of the Rolls, gives some indication as to whether court appointed experts are likely to receive judicial backing.

*Abbey National Mortgages Plc v. Key Surveyors Nationwide Ltd and Others* (1996) EGCS 23.

*Facts:* The plaintiffs alleged negligent valuations of 29 properties in various parts of the country. The defendants sought leave to appoint 29 experts (one for each property) on a basis that local experience would be necessary. The Official Referee made orders that a court valuation expert be appointed (under RSC Order 40) and that expert valuation evidence be limited to one witness for each side.

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The defendants appealed, arguing (*inter alia*), that a court-appointed expert would *not* be an 'expert' as he would necessarily lack personal knowledge of the values in many of the areas upon which he had to report.

*Held:* The Official Referee had jurisdiction to make these 'bold and innovatory' orders. 'The Judge plainly made them with his eyes open, conscious that he was breaking new ground' said the Master of the Rolls and: 'There can be no purpose in commissioning expensive and far reaching reports on civil procedures if lessons which emerge are not heeded. Exhortations to trial judges to be interventionist and managerial would be futile if every managerial initiative by a trial judge were to be condemned as an unwarranted departure from orthodoxy.'

Sir Thomas Bingham went on to consider whether the court expert was entitled to consider hearsay evidence. In practice, a valuer is 'fully entitled to rely on what reasonably appears to him to be reliable information'. 'We do not accept that any valuation expert is confined to giving evidence based on comparables of which he has direct first-hand knowledge.'

Finally, on the independence of an expert witness compared with that of a court-appointed expert, the Master of the Rolls said that expert witnesses often tend to espouse the cause of those instructing them 'on occasion becoming more partisan than the parties'. 'There must be at least a reasonable chance that an expert appointed by the court, with no axe to grind but a clear obligation to make a careful and objective valuation, may prove a reliable source of expert opinion.'

In the light of these comments, opponents of court-appointed experts may have cause for concern."

In April 1996 in *Construction & Engineering Law*, Richard Fernyhough, QC—Head of Keating Chambers in Essex Street, London—responded to Lord Woolf's Interim Report *Access to Justice* by highlighting problems relevant to the context of the report. In particular he addressed six areas of interest to those who engage or are dependent upon the performance of experts and rely on their advice and evidence.

### *"Question of Independence*

The main problem as I see it is that of the independence, or lack of it, of experts. It has been noticeable over the last 15 years how experts have become more and more partisan.

The trouble is that many experts now make their living out of giving expert evidence and they fear that, if they express views contrary to their client's interest, they may not be instructed again. This may very well be true, but if so, it is a sad reflection on our system. Generally, one finds that experts who are still fully occupied in private practice are more independent than those who are full time experts.

Another major problem is that many experts tend to 'over-investigate' the case. They often expend huge amounts of time and therefore money in investigating every fact of the case. Much of this work is of no value whatsoever yet it considerably increases the costs. If the court kept control of expert evidence and selected the issues upon which it wished to hear such evidence, this mischief could be controlled. Alternatively, the court should be ready to apply costs sanctions if it appears that experts have been guilty of 'over-investigation'.

### *Court-appointed or neutral experts*

The concept of the court-appointed expert is not popular. I understand that the French experience, for example, has not been happy and often the court-appointed expert, because the pay is so bad, is of low quality.

Where there is a legitimate difference of opinion between opposing experts it is difficult to see how a court-appointed expert could help. In most cases he would be likely to come down in favour of one of the parties' experts or the other.

If so, the judge would almost invariably accept his viewpoint. This would hardly be fair to the losing party who would have had the outcome of the case taken out of his hands. But a court-appointed expert might be appropriate where, for example, the sum in dispute was small or neither party had yet appointed an expert.

Similarly a direction to the parties to jointly instruct an expert might very well be helpful provided it was given early in the proceedings.

The best compromise to this problem which I can suggest is as follows: in all ordinary cases the

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parties should be required, as soon as the matter comes to court, jointly to instruct one expert to give his opinion on the technical issues in the case. If he were jointly instructed the expert would be far more likely to remain truly independent. The jointly instructed expert would then report to the parties and to the court. After consideration of his report and after hearing the parties, the court would then decide whether or not to permit the parties to call their own experts. If the court allowed them to do so then their own experts would give evidence in the ordinary way and the jointly-appointed expert would drop out of sight. But if, on the other hand, the court declined to permit this, then the report of the jointly-instructed expert would be the only expert evidence in the case.

This approach, it is thought, would encourage settlement since both parties would see the view of a truly independent, competent expert at the outset and might well accept it. If not, they would have to persuade the judge that the case was appropriate for a fully developed battle between experts. The court might not incline to this view. Similarly, this system should save costs or, at least, potentially might do so in many cases.

### *Experts' meetings*

I am quite clear that no one but the experts themselves should be present at without prejudice experts' meetings. I am also quite clear that, with a suitably worded direction from the judge, it would be professionally improper for a solicitor to instruct his expert not to agree anything at such a meeting.

The standard direction ought to direct the experts to attempt to agree facts and issues at the meeting and, at the end of the meeting, to draw up a document to be signed by all experts recording the agreements and disagreements (together with the reasons for them) reached at the conclusion of the meeting. The expert must feel free, in accordance with his professional conscience, to agree whatever he feels proper at the meeting. Of course, it should be made clear that any such agreement is not binding on the client who may reject it or ratify it as he wishes. However, any such agreement is binding on the expert who should be held to it by his colleagues and the court.

It is usually most helpful for experts to meet both before reports are exchanged and after their exchange. It is not usually a good idea for them first to meet after the exchange of reports since by then the experts will have pinned their colours to their respective masts and may be reluctant to change their views.

Sometimes it is helpful to order the sequential exchange of experts' reports in cases where, for example, one party has a monopoly of knowledge of the facts of the particular case. The classic case is in respect of *quantum* experts.

Usually only the plaintiff knows the details of the sums which he is claiming and how they are calculated. In such cases it is sensible for the plaintiff's expert to produce his report first, then to meet the other parties' experts to explain his report and answer their questions and then for the other parties to serve their reports.

If the court does permit the parties to call their own experts, then I would suggest that those experts should attend before the judge who should instruct them as to the issues which he would find most helpful for them to deal with and, at the same time, the judge should encourage them to keep their reports short and to reach as much agreement as possible.

I am all in favour of the court taking a positive line with experts from an early stage so that the experts feel brought in to the judicial process which should help to reinforce their feeling of independence.

### *Impartiality of experts*

I am not in favour of the waiver of legal professional privilege in relation to experts. I am sure than [*sic*] any such rule would frequently be circumvented in practice and I think it is an unnecessary intrusion into the privacy of the parties.

On the other hand, I do think that experts should be encouraged by the court to be independent. Such encouragement should include a statement within the body of every report in which the expert declares whether he has any and, if so, what, interest in the proceedings. Equally, if the report is addressed to the court and deals with the technical issues which the court has identified, then the expert is more likely to retain his impartiality.

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### *The quality of experts' reports*

Broadly speaking in the Official Referee's Courts, I do not think that this is a general problem. Usually the experts' reports are of a high quality even if, sometimes, they are far too long.

Some bodies provide considerable amounts of training for experts which has served to improve the quality over recent years. But I am not in favour of a compulsory system of training and accreditation for experts. This would serve to turn experts into a separate and recognisable profession of its own which I consider would be a retrograde step.

The best experts are usually those who are in full-time practice in their own fields and who only give evidence in court occasionally. Such persons are up to date with developments in their field and retain their impartiality because their expert work only forms a small part of their earnings. It would be a great pity to lose some people from the system by requiring compulsory education and accreditation.

Equally I am not in favour of a standard format for the instruction of experts. In complex cases I do not think this would be practicable and it would unduly hamper the expert's discretion as to the way he approached the investigation and prepared his report. On the other hand I *am* in favour of the court taking close control over the issues upon which the expert should be entitled to give evidence.

### *Expert's attendance at trial*

I quite agree that the present system whereby some experts sit for day after day at the back of the court listening to the evidence is a terrible waste of time and cost. Ordinarily the Taxing Master should, in my view, disallow the costs of an expert who attends court to sit through the evidence. Nowadays with the exchange of detailed statements of the witnesses, it is quite unnecessary for the expert to hear their evidence: he can simply read their statements. There may be cases, however, where it is desirable for the expert to hear the cross-examination of a key factual witness.

On the other hand, when it comes to giving evidence, I consider that experts must attend to give evidence orally and should obviously also attend to hear their counterpart giving evidence. I think this is inevitable. I am not sure that using video conferencing or other methods of recording evidence would in fact be practicable or save very much money.

But since the judge is going to lay down a firm timetable for the trial and will, within that timetable, control the length of cross-examination of all witnesses including experts, then the problem of an expert being in the witness box for day after day should be brought under control.

### *Last word*

I do not think it is sensible to make reforms in the area of Expert Evidence without as [*sic*] the same time considering the related topics of Assessors and Referees for Enquiry and Report (for Special Referees). The court should, ideally, have the full range of expert assistance available when it consists [*sic*] how best the technical issues in a case should be investigated.

### *Footnote March 1999[—Positively the Last Word]*

Now that the Civil Procedure Rules have been published it is clear that they proceed very much along the lines foreseen in 1996. The key question now will be how the rules are used by the court. A lot of discretion in case management is given to the judge who will need to have extensive experience of the type of litigation which he is 'managing'. A 'hands on the wheel' approach is fine so long as the driver is experienced and sensible."

Although I had described Richard Fernyhough's Footnote as positively the last word, of course, in a sense it is a prologue rather than an epilogue. Just how these rules work out in practice remains to be seen, but it is clear that much of what Richard Fernyhough said about the Interim Report *Access to Justice* is still pertinent to these new Civil Procedure Rules.

Despite these comments being made about the Interim Report much of what Mr Fernyhough said is equally applicable to the final published report.

The "over-investigation" point has echoes of my "hole in the garden" illustration, mentioned earlier.

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Despite the strong opposition to the “court-appointed expert” Lord Woolf has retained that as a viable alternative which should not be overlooked.

Lord Woolf has stuck to his guns, in that, in the majority of cases he sees no reason why the experts should not meet alone, although he accepts that there are circumstances in which this will not be appropriate. He does not specifically mention “without prejudice” meetings in this regard, but it may well be that in this respect Mr Fernyhough and Lord Woolf agree.

On the impartiality of experts, I like the idea that all experts’ reports will, in future, be addressed to the court. I see no reason why the same practice should not be adopted by arbitrators.

On waiver of legal privilege, with which Mr Fernyhough was not in favour, Lord Woolf seems to have softened his approach by suggesting that the draft reports should not be disclosable, but he sees no reason why privilege should apply to the experts’ instructions. At least this might avoid experts being given conflicting instructions in the future.

I agree with the Woolf Report, as indeed does Mr Fernyhough, in that the tribunal should control the issues over which the expert is entitled to give evidence. I believe that arbitrators have this power by virtue of s. 34(2)(h) of the Arbitration Act 1996.

### THE STATUS OF THE RSC AND THE BODY OF COMMON LAW

It has been said that with the advent of CPR out goes the White Book (and the Green Book) and the body of precedent built up in the common law. Whilst this might be an admirable objective—a clean slate, so to speak—the CPR are far from comprehensive and, where they are deficient, lawyers and judges, I believe, will inevitably turn to the old RSC for guidance.

Similarly, there is far too large a body of authority, for example concerning the courts’ interpretation of the rights, duties and obligations of the expert both in litigation and arbitration, not to refer to it from time to time, even if such reference can only be considered to be persuasive rather than binding.

For this reason, references throughout this book to the RSC should be considered against any equivalent in the CPR; if there is none then the old rules may well give guidance. Similarly, for the reasons stated above, I consider that the judgments cited herein are still of seminal importance.

### APPENDIX B—OFFICIAL REFEREES’ SOLICITORS ASSOCIATION EXPERT WITNESS PROTOCOL—VERSION 1.0

The ORSA protocol arose out of ORSA’s response to the Issue Paper on Expert Evidence from the *Access to Justice* team in the hope that it would encourage independence and impartiality of the expert. What changes will occur to this protocol is a matter of speculation, but see the comment on the following page entitled The Technology and Construction Solicitors’ Association (TeCSA) Expert Witness Protocol.

In the ORSA protocol it is suggested that the instructing solicitor ensures that the documentation and information made available to the expert is carefully chosen. The “Brief” will normally include:

- Area in which the expert is called upon to give his opinion.
- Specific issues on which the expert is asked to advise.

If these guidelines are observed in every appointment involving an expert, it should go

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some way to avoid the “over-investigation” justifiably complained of by Richard Fernyhough and also meet my own criticism concerning poor or inadequate instructions.

A secondary point of importance is the recommendation that “the solicitor and the expert should keep the brief under review at all times”. It may well be wise in a complex case to set out formal review meetings rather than leaving it to the solicitor or the expert to raise the matter.

The expert should be advised of any hearing or trial date “on which he is likely to be required to attend . . .”. I do so agree with Richard Fernyhough when he says that experts sitting “day after day at the back of the court listening to evidence is a terrible waste of time and cost. Ordinarily the Taxing Master should, in my view, disallow the costs of an expert who attends court to sit through the evidence.” (As, indeed, I would myself when determining the winning party’s recoverable costs.)

ORSA echoes Richard Fernyhough’s view that lawyers and clients should not be present at “without prejudice” meetings of experts. However, not all meetings of experts need to be “without prejudice”. I have in mind meetings of *quantum* experts and here, particularly in arbitration, it can be fruitful for the arbitrator to sit in on these meetings with the *quantum* experts in an attempt to assist them to reach an agreement on *quantum* for what may be hundreds of individual items, subject, of course, to liability where appropriate, being determined after he has heard and considered the oral evidence.

Note paragraph 28 of this protocol, which, *inter alia*, states:

“It is not the role of the expert to make a finding of fact which is in issue. Where an opinion depends upon facts which are in issue, this should be clearly stated.”

I certainly agree with the guideline in paragraph 32, a budget for the experts’ costs and ensuring that the fees charged are proportionate to the value or importance of the matters in issue. “Proportionate” clearly implies to me a percentage of the amount in dispute.

Consider this in relation to an arbitrator’s duty under s.33 of the Arbitration Act 1996 to “avoid unnecessary expense” and his powers under s.63 (subject to no agreement otherwise by the parties) to determine, as he sees fit, what costs are recoverable by the winning party. Also, possibly, any agreement by the parties or directions given by the arbitrator under s.65 where the arbitrator may well have directed that the recoverable costs of the arbitration, *or any part of the arbitral proceedings* (i.e. the expert evidence) be limited to a specified amount.

Finally, I was interested to read what ORSA said in paragraph 36 concerning cancellation and commitment fees for expert witnesses. I agree that these should only apply if they have been agreed in advance, and where the expert can establish that he has no other appropriate work to undertake. However, under these circumstances, and bearing in mind the strictures in paragraph 13 to the effect that the “expert shall not take on any new commitment which might interfere with his responsibilities under the appointment” which might well mean that after consultation with his instructing solicitor, the expert has turned down other remunerative work, I question why it would be unreasonable to provide remuneration for the whole of the period cancelled.

THE TECHNOLOGY AND CONSTRUCTION SOLICITORS’ ASSOCIATION (TECSA)  
EXPERT WITNESS PROTOCOL—COMMENTARY BY MARCUS HARLING, BURGESS  
SALMON, BRISTOL

The Technology and Construction Solicitors’ Association (formerly known as the Official Referees’ Solicitors Association—ORSA) published its Expert Witness Protocol in 1996.

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The TeCSA Expert Witness Protocol grew out of the Association's response to the Issue Paper on Expert Evidence from the *Access to Justice* team. The Expert Witness Protocol was developed out of a need to find a way to encourage the legal profession and experts to address key issues early to avoid problems later, or as the Protocol says "... assisting clarity of communication ... to provide a framework within which experts and solicitors are able to operate freely ...".

So, why was the protocol needed, and what is its status after 26 April 1999? What will be the effect of Part 35 of the Civil Procedure Rules on the protocol and what changes are likely to be reflected in Version 2.0 of the TeCSA Expert Witness Protocol?

*Why the Protocol?* TeCSA is composed of solicitors who satisfy significant and objective tests of experience in construction and technology dispute resolution. TeCSA wanted to communicate better practice to a wider constituency. Early day consultation identified three key problem areas, where guidance would be welcomed by solicitor and expert alike:

- the commercial relationship between solicitor and expert not being dealt with fully and properly at the outset, thereby prejudicing the relationship and potentially the expert's and solicitor's duties to the tribunal;
- misunderstandings about the expert's role at the different stages of a dispute;
- wide range of concerns relating to "without prejudice" meetings.

Whatever the causes of these concerns they were issues where guidance could be given in a general way. The protocol was not prepared so that it should be applied in a rigid way. It exists to encourage issues to be addressed. If expert and solicitor consider the issues in the protocol, but decide to do things differently, then the protocol has achieved its objective. The important thing is that key issues are not ignored.

*Woolf Reforms, 26 April 1999—What happens now?* The TeCSA Expert Witness Protocol reproduced in Appendix B is Version 1.0 (published as the ORSA Expert Witness Protocol). After 26 April 1999 it should be read together with the Civil Procedure Rules. Do not read only Part 35, "Experts and Assessors". Start with Part 1. Some key words from Part 1 will illustrate the extent to which we now all operate in a different climate.

"... the overriding objective is to enable the court to deal with cases justly which involves, so far as practicable, putting the parties on an equal footing, saving expense and dealing with the case in ways proportionate to the amount involved, the importance of the case and complexity of the issues and the financial position of each party."

Those who felt that the courts did not provide sufficient control over the use of expert evidence should fear no more. There should be sufficient control mechanisms to prevent a party with resources engaging in what I have heard referred to as "bludgeoning by expert".

In his Foreword to the Civil Procedure Rules the Lord Chancellor emphasises that the Rules are essentially a change of culture. Any culture change has its promoters and detractors. Not one person whom I have talked to pretends the changes will be easy to apply in the area of expert evidence. Some regret the passing of the relevance of much procedural case law, others look forward to delivering a better service.

*The Civil Procedure Rules* The Civil Procedure Rules create some big issues and make significant changes. The way in which case management conferences are run in the early days

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will be a significant factor. There will be problems. There will be apparently inconsistent orders made in different courts. The feedback process, both within the Lord Chancellor's Department and through the involvement of lawyers, experts and their respective professional organisations is a valuable part of the implementation of the reform.

The Technology and Construction Court (in its former guise of the Official Referees' Court) has for many years promoted active case management. Those of us familiar with that forum may see less change than others.

Significant areas of tension have been identified. It remains to be seen whether these concerns are justified. Particular issues in relation to Part 35 are:

- the duty to restrict expert evidence and how that is applied by the courts. Will courts be tempted to unduly restrict the disciplines and numbers of experts?;
- the wording of the Statement of Truth in paragraph 1.4 of the Practice Direction: "I believe that the facts I have stated in this report are true and the opinions I have expressed are correct".

*When do the provisions of Part 35 begin to bite?* Views on this are polarised. Group A (I shall call them the "non-believers") say that until an "expert" is named as such following the case management conference, or is subsequently instructed in terms that he is to be such an expert, the rules do not apply.

Group B (I shall call them the "ever-faithful") believe that the rules should apply in full as soon as any technical person is appointed to consider any matter in relation to any dispute as there will be a possibility that that dispute may result in litigation.

Group C (in which I place myself) accepts that a flexible and positive approach is needed. Once the Civil Procedure Rules begin to bed down and clarification is given, the point at which a person is an "expert who has been instructed to give or prepare evidence for the purpose of court proceedings" may well vary from case to case.

The wording of Part 35 acknowledges that an expert can be an expert outside the remit of Part 35. Imagine, for a moment, the difficulties of applying Part 35 to an expert appointed to support statutory adjudication in the construction industry.

*TeCSA Expert Witness Protocol—Version 2.0?* The answer to whether TeCSA will produce Version 2.0 is not yet clear. This is not an attempt to back-track on the need to update the existing document, but a wish to reflect:

- actual practice in at least the period to October 1999 so that Version 2.0 can address real and not perceived issues;
- the progress of the Lord Chancellor's Department's working group on expert evidence within Part 35 which is aiming to produce a guidance note later in 1999.

In the meantime the TeCSA Expert Witness Protocol should be read together with the Civil Procedure Rules. TeCSA would welcome comments on particular issues or problems that might be dealt with in Version 2.0. The revised version of the protocol may become a much more straightforward document if the Lord Chancellor's Department's working group produce clear guidance covering all key areas.

It is widely recognised that the *Practice Note* which accompanies Part 35 requires clarification. I sit as a representative of TeCSA on the working group established by the Lord Chancellor's Department. Its terms of reference are:

## INTRODUCTION

- to prepare a draft code of guidance for the appointment and use of experts and assessors under Part 35 and the practice direction thereto of the CPR;
- to submit a draft to the Civil Justice Council and the Master of the Rolls for consultation;
- to consult generally with the legal profession and other interested bodies.

We expect to produce consultation material shortly.

### APPENDIX C—SURVEYORS ACTING AS EXPERT WITNESSES: PRACTICE STATEMENT & GUIDANCE NOTES (PUBLISHED BY THE ROYAL INSTITUTION OF CHARTERED SURVEYORS)

This is a first-class document which, as the title suggests, is broken down into two parts: the Practice Statement, of which, in the opinion of the RICS, “A Member conforming to the practices recommended in these Guidance Notes should have at least a partial defence to an allegation of negligence by virtue of having followed those practices”; and the Guidance Notes, which provide advice to Members and are recommended for specific professional tasks. “They are intended to embody ‘best practice’, i.e. procedures which in the opinion of the RICS meet a high standard of professional competence.”

Of the Practice Statement the principal message is: “Expert evidence provided by chartered surveyors must be, and must be seen to be, the independent product of the surveyor.”

I will not attempt to paraphrase either the Practice Statement or the Guidance Notes, they are well worth reading in their entirety.

Matters which deserve highlighting however are:

- The primary duty of the surveyor is to the Judicial Body.
- The duty applies as much in an arbitration or elsewhere.
- A surveyor must, prior to accepting instructions
  - (a) advise that this Practice Statement will apply;
  - (b) ensure that there is a written record as to the matters on which expert evidence is required;
  - (c) agree Terms of Business.

The experts’ reports must:

- Distinguish between matters of plain fact, expert observation and expert inferences.
- Use plain language and explain any technical terms.

The surveyor must notify all concerned if after issue of the evidence he identifies a material inaccuracy or changes his view of the matter material to his stated opinion.

The Guidance Notes set out what is considered “good practice” and are prepared against the background of the Woolf Report *Access to Justice*.

Inevitably they set out the duties and responsibilities of expert witnesses culled from *The Ikarian Reefer*.

I particularly liked the section on written reports where the structure and nature of the content of a typical report was suggested.

Also commendable is “good practice” concerning the meetings between the experts.

Finally, there is an interesting comment on contingency fees which the RICS accept are incompatible with “the duty, impartiality and independence required of an expert . . . and

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accordingly, contingency fees should be avoided if at all possible". (Note: no distinction is drawn between contingency fees and conditional fees. For a discussion of the difference see Tony Bingham's article in *Building*, "No duck, no dinner", 27 March 1998.)

The Guidance Notes goes on to accept that some members charge "on a contingency basis as a matter of normal practice" and "... while the Institution would not expect any of its Members to allow the quality of their evidence to be influenced by the potential fee, should the Judicial Body become aware that such a fee basis has been agreed, that Body may consider that the evidence and opinion proffered is not entirely unbiased".

That surely has to be an understatement. I certainly should be sceptical about an expert who was being wholly and totally remunerated on a contingency fee basis. I strongly advise arbitrators to ask the question of experts who they suspect might well be on contingency fees. In this context, however, note the Court of Appeal decision in *Lusty v. Finsbury Securities* (1991) 58 BLR 66 where it was held that even where an expert has an interest in the decision, his evidence as to the value of the work is admissible.

Finally in this Appendix there are some useful sample Terms of Engagement for expert witnesses and a useful note on the changes of hearsay evidence which have occurred as a result of the Civil Evidence Act 1995.

(NOTE: MAY 1999—In relation to the Civil Procedure Rules the RICS have said that they see no reason to change what is there, but suggest adding the following: "*The Practice Statement is in the process of being updated to take into account the new Civil Procedure Rules but the principal change will be the form of wording to be used in the declaration which has to be made at the end of each report. The Guidance Notes are to be expanded.*")

### OTHER PROTOCOLS AND GUIDELINES ARISING FROM THE NEW CIVIL PROCEDURE RULES

At the time of publication two protocols have been issued, one on personal injury and the other on clinical negligence. In addition there is a general Practice Direction Protocol. Others will undoubtedly follow. However, it is hoped that these first two protocols should give a broad indication to the reader as to how these new Civil Procedure Rules are likely to affect all expert evidence in other disciplines.

### APPENDIX D—PROFESSIONAL ARBITRATION ON COURT TERMS (PACT)

What, you might ask, is this doing in a book on The Expert?

PACT is a scheme designed and developed by the Royal Institution of Chartered Surveyors and The Law Society as an alternative to the court determining lease renewal terms and rent for commercial property (Landlord and Tenant Act 1954).

The parties may elect to have the rent and terms of their new lease determined by an experienced professional acting as an arbitrator or an independent expert—thus, the inclusion of this relatively new scheme.

The full scheme is included as Appendix D to this book, so I will comment no further than to say that there are four alternative procedures offered through four versions of Consent Order which must be approved by the court on joint application by the landlord and tenant.

These are:

- *Model Order 1* For referring all outstanding issues to arbitration.
- *Model Order 2* For referring the initial rent to independent expert determination and interim rent to arbitration.

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- *Model Order 3* For referring issues other than rent to arbitration before endeavouring to agree the rental issues, and then, failing agreement, referring the initial rent to independent expert determination and interim rent to arbitration.
- *Model Order 4* For expert drafting of the text of the lease.

Model Orders 1 and 2 are the basic forms which it is anticipated will be of most use to the parties and their advisors.

“Model Orders 3 and 4 illustrate the extra flexibility which can be built into the basic approach. Form 3 adopts a two-stage approach allowing time for agreement, which may avoid the need for the second stage. Form 4 selects one specific aspect of the process, namely drafting the new lease itself. The parties can therefore agree which matters should be decided by the court and which by an independent professional.”

PACT was commented on in an article entitled “The role of the single expert” by Michael R. Curry—The Lands Tribunal, Royal Courts of Justice, Belfast, which first appeared in the *New Law Journal—Expert Witness Supplement*, 28 November 1997, and is reproduced below with the kind permission of both author and publisher.

“There appears to be widespread concern about the proposal to lean heavily towards the use of only a single expert to assist the court to determine expert issues. The recent working paper (*Access to Justice Judicial Case Management Working Paper* (July 1997)) identifies fears about how the role of the single expert might evolve and whether the parties would employ their own experts anyway to review the findings. I have some experience of giving and receiving expert evidence and this article has two purposes. The first is to suggest greater initial flexibility in the proposals. The second is to draw attention to a scheme which may provide an alternative role model. I claim to be relatively neutral as I am not directly affected by either the proposals or the scheme.

As the reform proposals are not a solution recognised as being clearly the best, it may be prudent to keep options open and initially encourage the use of alternatives, even if it means widening the spectrum of solutions available. After review at a later date, which would include practical experience of a wider range of options, either the scope of choice might be reduced generally or particular solutions allocated to the particular types of problem where they worked best.

Clearly, some expert issues will be such that they cannot be severed, and there may be no alternative to having experts assisting within the court.

Useful information may come from experience of the new scheme for arbitrators, who now have a power (s. 37 of the Arbitration Act 1996) to appoint experts to report to them and the parties, or appoint assessors to assist them. There is a simple obligation to give the parties a reasonable opportunity to comment on any information, opinion or advice offered by any such person.

Rather than a single expert assisting the court, one preferred option, in suitable cases, may be to have expert issues finally determined separately by an expert, who may act as an arbitrator or independent expert. Different users will have different views, but the roles and their relative merits are well documented and both have merits which may not have had the consideration they deserve. Both options result in experts determining the issues rather than assisting the court to determine them so there is no confusion about the relationship with the court.

If issues are capable of being severed and put to a single expert, and that is what those who have a stake in the outcome prefer, there should be no great obstacle to putting them to an expert for determination. The machinery to open the door from the court to what is really a range of ADR schemes need not be complex.

The proposed stay for mediation simply could be enlarged to encompass all forms of ADR, i.e. including arbitration and expert determination. Although it is an option for the parties, not the courts, it may be that at a future date, unreasonable refusal to go down that route might be considered in the question of costs.”

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Of PACT, Mr Curry had this to say:

“The appointments are made by the RICS or the Law Society in exactly the same way as arbitrators or independent experts are currently and have been for many years, appointed for rent reviews. So the scheme builds on established principles and practice to provide a service which is complementary to, rather than within, the court. Those who have a stake in the outcome have a choice in the method—court or expert, lawyer or surveyor, independent expert or arbitrator, and, if the latter, the parties have the flexibility of the new Act [Arbitration Act 1996]. It is a scheme yet to be tested but it could be a role model for others. In this jurisdiction, commercial lease renewals have been referred to an expert tribunal for more than 30 years (Business Tenancies Act (N.I.) 1964):

“The relative speed and informality of proceedings before the Lands Tribunal, and the awareness shown by members of the Tribunal of contemporary commercial life, seem to have gained the confidence of those who deal with business tenancies on a regular basis. By contrast, delays in court proceedings in England, often exploited by tenants, led to the introduction in 1969 of a special procedure for interim rents to be paid pending renewal, a procedure which has been unnecessary—so far—in Northern Ireland.” (Professor Norma Dawson, *Business Tenancies in Northern Ireland* (1994, p. 3).)

The author was referring to my predecessors.”

### APPENDIX E—COURT OF INTERNATIONAL ARBITRATION AUSTRALIA: EXPERT DETERMINATION RULES

I have included the above Rules in Appendix E firstly because they are Rules which could have a universal application either without amendment or, at least in other cases, only minor amendment, and secondly because these Rules, although directed to international disputes, can also be applied domestically.

The objective of these Rules is summarised by the author—the President of the Court of International Arbitration, Australia, A A de Fina (by whose kind permission these Rules are reproduced)—as follows:

“These Rules govern a process for the determination of disputes where the subject matter of the dispute relates particularly to an area of expertise such as but not limited to science and technology, computers, finance and accountancy, and shipping and transport.

Particularly these Rules

- (i) provide flexibility of process but at all times reliant on specialist expertise;
- (ii) provide a fabric for dealing with transnational matters;
- (iii) allow for the appointment of more than one person or a partnership or corporation as the Expert;
- (iv) allow for submission of a wide range of matters;
- (v) allow in certain circumstances of the application of merchant law;
- (vi) avoid concepts which may be limited to a particular culture or system of law.”

### APPENDIX F—THE ACADEMY’S MODEL TERMS OF ENGAGEMENT FOR EXPERTS (ON BEHALF OF A PARTY INVOLVED IN A DISPUTE BEFORE ANY COURT OF LAW OR AT ARBITRATION OR ANY OTHER TRIBUNAL)

These Model Terms, compiled by The Academy of Experts (by whose kind permission they are reproduced) are commented on in an article by Dr Roger J Maddrell which precedes them in this Appendix.

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### APPENDIX G—THE ACADEMY’S MODEL FORM OF EXPERT’S REPORT

In pursuit of raising the standards of expert reports, The Academy of Experts have produced a very useful Model which is reproduced in full in this Appendix.

Experts of any discipline are well advised to follow this recommended format and if they do they are unlikely to miss any important aspects which should be covered by all such reports.

### APPENDIX H—THE ACADEMY’S MODEL CODE OF PRACTICE

This Appendix speaks for itself and is a code by which all experts should abide.

### APPENDIX J—THE ACADEMY’S FORM OF DECLARATION FOR EXPERTS

This is the recommended form of declaration to be included at the end of every expert’s report.

### APPENDIX K—MODEL FORMS OF DIRECTION FOR EXPERTS

The first of these directions (Appendix K/1) was drafted by Sir Laurence Street, the former Chief Justice for New South Wales, Australia

Like my own direction which follows (in Appendix K/2), it is designed to substantially reduce the time taken to cross-examine experts at the arbitration hearing and gives the arbitrator/referee the additional role envisaged by the Arbitration Act 1996, in pursuit of the arbitrator’s duty *to avoid unnecessary delay and expense*.

Finally, in Appendix K/3, I have included the standard item which I include on all of my agendas for preliminary meetings. It offers two alternatives. The first is a normal direction to experts, but expanded to include an exchange of written questions to be posed by the respective experts to each other following exchange of their respective reports. These questions are to be answered in writing following which the arbitrator himself may require written answers to any questions he may have on the experts’ reports.

This form of direction, which I have used from time to time, is designed to reduce to a minimum the time for cross-examining experts at the hearing.

As I said earlier, this direction was developed by me in pursuance of my duty under s. 33 of the Arbitration Act 1996 *to avoid unnecessary delay and expense*.

However, I must confess that it is not frequently adopted by parties, particularly when they are represented by solicitors and I do not believe in imposing this sort of direction on the parties when they are so represented.

Perhaps I can be criticised for not being robust enough—at least on this one occasion!—but there we are. The reader must make up his own mind and try this out or something like it, if it appeals.

An alternative form of direction is also included, where, in consultation with the parties, it seems desirable to use a tribunal-appointed expert.

Then follows a typical direction that I would give in a case where I have convinced the parties, or their representatives, to adopt my earlier direction to exchange written questions.

Unless the parties have agreed otherwise—and as they can rarely agree on the time of day, this is unlikely—the Arbitration Act 1996 gives the arbitrator absolute discretion over such matters as requiring the experts to exchange and answer written questions (s.34(2)(h)) with an eye on his s.33 duty—“to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense . . .”.

However, having said that, I prefer persuasion over such matters rather than imposition.

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That then brings an end to the summary of the contents of this book on The Expert. Many eminent academics or leading practising experts have contributed to this extremely comprehensive coverage of the subject, for which I am immensely grateful. It is to be hoped that by a judicious use of the full index those elements in which the reader is particularly interested can be readily accessed.

I shall finish with a quotation from Edge & Ellison's newsletter *Construction Edge*—Issue 3 Spring 1998—on “The Importance of the Expert”:

“The importance of identifying the correct expert or experts to deal with the issues arising in the case has been underlined by a recent Court of Appeal authority. The case concerned the alleged negligence of a chartered surveyor. However, the parties chose experts of different disciplines, one a structural engineer and the other a chartered surveyor. On appeal the court considered that it was almost always necessary to hear evidence from an individual within the same profession to ascertain whether there had been failure to meet the required professional standards. Indeed, the court considered that the evidence of an expert from another discipline was not, strictly, admissible. See *Sansum & Another v. Metcalf Hambleton & Co* (1997) *The Times*, 19 December.”

## ABOUT THE AUTHOR

**D Mark Cato** is a Chartered Surveyor and has worked in many countries of the world, including the USA, Australia, France, Italy, the Southern Republic of the Yemen, Bahrain and throughout the Persian Gulf, Ethiopia and Somalia.

Since the late 1980s he has been a full-time arbitrator and has been appointed in well over 100 references. He lectures at various universities and speaks regularly at seminars and conferences on arbitration in the UK and overseas.

He is a well-known author on arbitration with three other major works to his name:

- *Arbitration Practice and Procedure—Interlocutory and Hearing Problems* (Second Edition)
- *The Sanctuary House Case—An Arbitration Workbook*
- *So You Really Want to be an Arbitrator?*

He is a Registered Arbitrator and, at date of publication, a member of the General Council, member of the Executive Board and Chairman of the Professional Committee of the Chartered Institute of Arbitrators. He took an internal Masters Degree in Construction Law and Arbitration in King's College London in 1993.

He is the Founder President of The Arbitration Club which, together with its off-shoot, The International Arbitration Club, has over 400 members in seven branches.

He is married, with two grown-up children and lives with Alice, his wife, on the Herts/Essex border. In October 1998 he became the very proud grandfather of little Freddy.



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PART I

THE EXPERT WITNESS



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CHAPTER 1

INTRODUCTORY ARTICLES



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# THE NEW CIVIL PROCEDURE RULES AND THE EXPERT WITNESS

*Judge John Frenkel*

## IT IS NEVER TOO LATE

**001** The Civil Procedure Rules 1998 (CPR—not cardio pulmonary resuscitation) and most of the practice directions were published on 29 January 1999. They can be obtained from the Stationery Office (020 7873 9090) (price £250 for two loose-leaf volumes plus service supplements) or from the LCD Website <http://www.open.gov.uk/lcd>. The commencement date is 26 April 1999. You must start planning post-CPR strategy now.

**002** In a claim where the court will need to receive expert evidence, the critical path through the preparation stage is making ready the expert evidence. The case management requirements of the CPR need investigation. Although actions issued before 26 April 1999 will generally proceed under the old rules, once a defended pre-April action comes to the notice of a judge, the court will—so far as is practicable—bring the action within the CPR. That means allocation to a procedural track and a timetable order that contains the date of trial. The normal track for a claim worth no more than £5,000 is the small claims track, over £5,000 but no more than £15,000, the fast track and above £15,000, the multi track.

## NO COMPROMISE

**003** The introduction of the CPR requires a partnership between practitioners, judges and the Court Service. We shall all have to adjust to and accommodate each other's shortcomings. However, there is one principle that cannot be compromised. The court must set the trial date or the period for the trial when it gives directions. The case management practice directions are quite specific. Unless civil disputes can be resolved within the time set by the court, the reforms will fail. The lesson learned from other jurisdictions is that a trial date set at an early stage will cause the claim to manage itself because the parties must complete their preparation within the timetable.

**004** In the small claims track the court will give allocation directions that include the hearing date. In fast and multi-track claims the court will give directions at the allocation and listing questionnaire stages. The practice direction encourages paper directions whenever possible. Smart solicitors will manage the claim and set their own timetable rather than leave it to the district judge. Give the court proper information in the allocation questionnaire and you will not generally have to attend a case management conference except, in the heaviest and most complicated claims or, where one of the litigants is in person. A common reason for

the district judge to appoint an allocation directions appointment in the multi-track will be the failure to propose a trial period in the proposed timetable order.

005 The principle of the new procedure is: “There should be a fundamental transfer in responsibility for the management of civil litigation from the litigants and their advisors to the court.” Part 28 CPR and the fast track practice direction require the court when it allocates a claim to make “allocation directions”. A typical fast track timetable will direct the listing questionnaire to be filed within 22 weeks and the trial within 30 weeks. Part 29 CPR and the multi-track case management practice direction state that the court cannot approve allocation directions agreed by the parties unless they include a date for the trial or the trial period. The claim will be included in something like a warned list. It is probably not generally appreciated that set down, as a concept, will disappear. In all three tracks the timetable will always include the date of trial or the period of trial.

## EXPERT EVIDENCE—THE WOOLF VIEW

006 Lord Woolf was forthright in his views of expert evidence. They are views which are reflected in the CPR and practice directions. Over to his final report:

“It was my basic contention of my interim report that two of the major generators of unnecessary cost in civil litigation were uncontrolled discovery and expert evidence. No one has seriously challenged that contention.

A large litigation support industry, generating a multi-million pound fee income, has grown up among professions such as accountants, architects and others, and new professions have developed, such as accident reconstruction and care experts. This goes against all principles of proportionality and access to justice. In my view, its most damaging effect is that it has created an ethos of what is acceptable which has in turn filtered down to smaller cases. Many potential litigants do not even start litigation because of the advice they are given about the costs, and in my view this is as great a social ill as the actual cost of pursuing litigation.

There should be no more than one expert in any one speciality unless this is necessary for some real purpose. The appointment of a neutral expert would not necessarily deprive the parties of the right to cross-examine, or even to call their own experts in addition to the neutral expert if that were justified by the scale of the case.

In fast track cases the exercise of the court’s discretion will be more restricted. The principle of proportionality of cost dictates that the scope of expert evidence must be limited. The rules on expert evidence on the fast track will therefore limit the parties generally to one expert per side in any single speciality (with an overall limit of two per side) with no oral evidence. Single experts will be used wherever possible.

The present system has the effect of exaggerating the adversarial role of experts, and this helps neither the court nor the parties. As the Court of Appeal has recently remarked: ‘For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend to espouse the cause of those instructing them to a greater or lesser extent. On occasion they become more partisan than the parties’ (*Abbey National Mortgages plc v. Key Surveyors Nationwide Ltd* [1996] EGCS 23).”

## EXPERTS—AND THE RULES

007 Judicial training encourages every judge to try to foster a new approach to the use of expert evidence, particularly the employment of a single expert. It is the very approach which

the CPR accommodates. Most district judges deal with family work. We are all aware that in family work no expert evidence may be adduced without the court's permission. The result is that the single expert is customary. Family work is no less contentious and emotional than non-family civil work.

**008** Part 35 CPR restricts expert evidence to that which is reasonably required to resolve the proceedings.

**009** It is to be the duty of an expert to help the court on the matters within his expertise. This duty is to override any obligation to the person from whom he has received instructions or who pays him.

**010** No party may call an expert or put in evidence an expert's report without the court's permission. If permission is granted under Part 35, it shall be in relation only to the expert named or the field identified by the court's direction.

**011** The court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party. Where the court gives a direction for a single joint expert to be used, each instructing party may give instructions to the expert.

**012** When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties. The court may give directions about the payment of the expert's fees and expenses; and any inspection, examination or experiments which the expert wishes to carry out.

## THE PRACTICE DIRECTION ON EXPERTS

**013** Part 35 CPR is complemented by a practice direction. This is how it sets the scene.

"Part 35 is intended to limit the use of oral expert evidence to that which is reasonably required. In addition, where possible, matters requiring expert evidence should be dealt with by a single expert. Permission of the court is always required either to call an expert or to put an expert's report in evidence."

**014** Consider using a single expert before the district judge does so. Questions about why one is not being employed will be another common reason for the district judge to appoint an allocation directions hearing (fast track) or case management conference (multi-track). The burden lies on the party who wants to instruct a separate expert to show why a jointly instructed expert is not in the interests of justice. It is unlikely to be enough to say, in a post-26 April claim, "the expert was instructed before the commencement of the new procedure". Everyone knows that change is coming. If after April the defendant wants an expert's report it is likely that the court will insist on a single expert, jointly instructed. Many judges will consider that it will do no one a kindness if the old system is allowed to continue while everyone gets used to the new one.

**015** How will the CPR affect everyday practice? I fully accept that experience may show my remarks to be incautious and that events may prove me wrong.

## EXPERT EVIDENCE ON THE FAST TRACK

**016** The Part 28-relating fast track practice direction contains directions for expert evidence.

“On it appearing to the court that expert evidence is necessary on the issue of . . . and that evidence should be given by the report of a single expert instructed jointly by the parties, the . . . shall no later than . . . inform the court whether or not such an expert has been instructed.

The expert evidence on the issue of . . . shall be limited to a single expert jointly instructed by the parties.

If the parties cannot agree by . . . who that expert is to be and about the payment of his fees, either party may apply for further directions.

Unless the parties agree in writing or the court orders otherwise, the fees and expenses of such an expert shall be paid to him by the parties equally [. . .] and be limited to £. . . .

The report of the expert shall be filed at the court no later than . . . .

No party shall be entitled to recover by way of costs from any other party more than £. . . for the fees or expenses of an expert.”

**Direction on experts at allocation stage**

**017** There are two questions to be asked about every request for permission to use expert evidence. Is that expert necessary? Why should there not be a joint report? At the allocation stage the court gives permission to prepare expert evidence. At the listing questionnaire stage, after everyone has considered the report, the court decides if the expert will give evidence by report or orally.

## PREDICTIONS

**018** The LCD guesstimate that there will be 110,000 small claims, 7,300 fast track claims, and 2,700 multi-track claims per year. My remarks apply principally to lower value claims; there are plenty of them.

## A NEW START? IS THE “EXPERT” NECESSARY?

**019** The conclusions of road traffic accident reconstruction experts differ because each expert must assume that their different instructions are correct. Frequently, an employment expert’s report will merely quote the New Earnings Survey, local job advertisements and employment agencies’ letters. The judge must decide the plaintiff’s capacity for work. In matrimonial ancillary relief proceedings, solicitors produce a bundle of relevant documents to establish earning capacity or the lack of it. Money is never spent on employment experts. Lord Woolf also mentions care consultants and accountants. There is no doubt that in larger claims, experts will be necessary and permitted. In smaller claims the court will ask if the cost of the report outweighs its value. The claimant’s solicitor can frequently obtain the evidence to prove damages without outsourcing the enquiries.

**020** Rule 32.4 CPR provides “No party may call an expert or put in evidence an expert’s report without the court’s permission”. This is a dramatic inroad into the freedom of litigants to conduct their cases as they wish. Hitherto many judges would not have thought it right to deny a party the right to pursue a particular line of expert evidence. Rule 32.1 puts the court under a duty to restrict the expert evidence “to that which is reasonably required to resolve the proceedings”. That will be the law. The burden will lie on the party seeking permission to call an expert witness to justify doing so. There is to be a crucial balance: on one side is the requirement that the cost of the proceedings shall be proportionate to the weight of the claim, on the other side is the need to ensure that justice is not sidelined by a drive for economy.

**021** Should expert evidence be given in a single report? Under the present regime, the total cost of calling two orthopaedic experts can be £2,000—20 per cent of a £10,000 claim. In the majority of claims under £15,000 the defendant relies on the plaintiff’s medical report. The protocols and the CPR extend this sensible policy.

**022** The claimant must now consult the defendant to identify the expert. The future income of all experts will depend on a reputation for impartiality. Recently, whenever I have suggested to parties that a joint expert be instructed, I have been told that there would be no difficulty identifying the expert and agreeing a fee.

**023** The Law Society has published in *The Directory of Experts*, a model letter of instruction to medical experts. Another example is to be found in the Pre-Action Protocol for Personal Injury Claims (obtainable from the Civil Justice Division of the Lord Chancellor’s Department, 54–60 Victoria Street, London SW1E 6QW—telephone Liam Collingridge on 020 7210 0663.

## IMPARTIALITY PLEASE

**024** The appointment of the single expert is probably the area of greatest uncertainty in the whole reform package. How can the court make single expert orders until experts have demonstrated that lawyers and court can have confidence in their ability to be impartial? How will experts ever acquire the culture of impartiality unless judges make single expert orders? We will break out of this vicious circle only if judges exercise the power imposed on them by the overriding objectives and make single expert orders whenever possible. It is suggested that the principle of proportionality means that in fast track, an order for a single expert should be the norm, particularly, but not exclusively, in those cases governed by pre-action protocols.

## OBJECTIONS

### **“The use of a single expert will usurp the function of the judge”**

**025** This suggestion is not made about the reports of court welfare officers in family proceedings.

### **“My clients have a panel of experts whom they instruct me to use”**

**026** The aim of the protocols is to prevent the perpetuation of adversarial experts. Although, there is no general litigation pre-action protocol, the personal injury protocol has

the capacity to be a model for a wide range of disputes. Rule 3.1(4) CPR requires the court, when it exercises its case management powers, to take into account whether a party has failed to observe a protocol. And Rule 44.3 CPR “General Rules about Costs” requires the court when it assesses the costs to take into account a party’s conduct, before, as well as during proceedings.

**“The claimant has an expert, why shouldn’t I have one?”**

027 If the claimant obtains an expert’s report without consulting the defendant and the defendant now wants his own expert’s advice, what will the court do under the new procedure? In some claims the court will make the normal order and will direct a single expert’s report. The claimant will not be permitted to use the earlier report obtained without consulting the defendant. The cost of obtaining the first report will fall on the claimant, come what may. If the defendant unreasonably refused an offer to select an expert, the court may refuse the defendant permission to obtain a separate report. Rule 1 CPR requires the court to consider the overriding principle of proportionality. An order that is appropriate in a smaller claim may be unjust in a larger one. It may be easier to persuade the court to order separate reports on the question of liability, than damages.

**“The instruction of a single expert will increase my costs!”**

**“I shall need to instruct a separate expert to advise my client of the points on which to cross-examine the single expert”**

028 The district judge may ask how you know this when you have not yet seen what the jointly instructed expert has to say?

## NEW POWERS FOR OLD CLAIMS

029 The practice direction on transitional arrangements provides that if automatic directions (High Court or county court) have begun to apply to existing proceedings, they will continue to have effect after 26 April. When proceedings come before a judge (whether at a hearing or on paper) for the first time after 26 April, he may direct how the CPR are to apply. This practice direction will give the court the same dramatic power to restrict the parties’ freedom to call expert evidence in pre-26 April claims as it has in post-26 April claims. It remains to be seen how this power will be exercised. The important point is, the power exists. *Sullivan v. West Yorkshire PTE* [1985] 2 All ER 134 heads for the dustbin.

**“DO YOU REALLY WANT TO BE MY EXPERT?”**

030 The practice direction on “Experts” (which complements Part 35 of the CPR) sets out the usual matters that you would expect a competent expert to include in his report. And the report must:

- contain a statement that the expert understands his duty to the court and has complied with that duty and,
- set out the substance of all material instructions and that includes telephone as well as written instructions (privilege will not attach to the instructions) and
- state that the report is true.

## CROSS-EXAMINATION BEFORE TRIAL

**031** Here is quite an innovation. The CPR allow each party to put one set of pre-trial written questions to the opponent's expert(s) without permission. Questions, whose purpose must be to clarify the report, should be asked not later than 28 days after receipt of the report.

## WE MUST MEET, SOME TIME

**032** The court now has power to direct separate experts to meet and prepare a statement of their reasons for disagreement. The spirit in which these discussions are held will be a factor for the court to consider when it comes to exercise its discretion on the costs of the case under Rule 44.3. Instructions given to the expert about the conduct of the joint meeting will not be privileged.

## DIRECTIONS ON EXPERTS AT LISTING STAGE

**033** In the fast track there is a presumption that there will be no oral expert evidence and that the expert's evidence will be given in a report. After all, fast track trial costs are fixed, the trial time estimate does not exceed one day and there is no discretion to allow the costs of a second day. The court has the power to permit expert oral evidence. If the trial will last more than a day the court may transfer the claim to the multi-track. The court must apply the proportionality test. The burden lies on the party wanting to cross-examine an expert to show that the effect on the probative value of the expert evidence outweighs the additional cost to the parties.

**034** In the multi-track, because the parties receive permission to instruct separate experts, they will not necessarily be permitted to call their experts at the trial. The court must consider whether any questionnaires to the experts have been answered? Has there been a meeting of the experts? The proportionality test must be applied. Where there are experts of more than one type, the court may permit one class of expert to testify but direct that another class will give evidence by a report.

035 The listing questionnaire directions must confirm the trial date. If the expert evidence is given by report, the “unavailability date” problem disappears. This is important in the fast track with its presumption that the date of trial will be within 30 weeks of the date of the allocation directions.

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*(The above first appeared, as two articles, in the New Law Journal, 12, 19 February 1999 by whose kind permission they are reproduced.)*

## ARE YOU AN EXPERT?

*Dr Albert W. Knott, PE*

**001** In this article, the author describes the task facing an engineer in providing expert testimony. He discusses and recommends the development of a personal philosophy. Recommendations are made regarding standards of excellence in honesty, thoroughness, and the exploration and elimination of bias. Forensic engineering is a demanding arena requiring personal integrity as well as technical competence.

### INTRODUCTION

**002** A normal witness in court is allowed to tell the jury what happened, but is not allowed to state opinions. The witness tells the jury the facts but is not allowed to draw conclusions from those facts. The jurors must reach their own conclusions about the relative guilt or innocence of the litigants based on their interpretation of the facts.

**003** The court defines an expert witness as a person who has sufficient special knowledge to be allowed to interpret the facts for the jury by expressing opinions and conclusions. A normal witness gives testimony without compensation. An expert witness is paid for his or her work. This is a discussion about experts, and about you.

### ARE YOU AN EXPERT?

**004** To an engineer, an expert is a practitioner who has risen to a position of pre-eminence in his or her profession by years of education; by extensive design, laboratory, or field experience; and through having his or her work published. To an engineer, a young person with a bachelor's degree in engineering is not an expert. However, to a court, a young person who knows how to design "the beam in question" is an expert, because he or she has sufficient special knowledge above that of the jury to be allowed to express an opinion about the beam. To an engineer, not only in-depth, but broad knowledge is required for a person to become an expert. To a court, in-depth special knowledge is required. It certainly helps to have broad knowledge, and the credentials of a broadly educated person can be impressive to a jury. However, when a lawyer looks at you and asks, "Why do you (of all people) think you are an expert?", your calm, confident answer should be: "Because of my special background, training, and experience." Of course, you had better be prepared to itemise that special background, training and experience and to show how it bears directly on the question at hand.

## DO YOU QUALIFY?

**005** You probably do qualify as an expert in the eyes of the court, because you do have special knowledge beyond that of the jury sufficient to allow the judge to let the jury hear your opinions. However, having said that, I would like to discuss separating the wheat from the chaff. Being an expert witness allows you to influence justice. This is an awesome responsibility, and one seldom appreciated by engineers preparing for their first court case. What you say will be bitterly contested by your opponents, and what you say will influence the lives, fortunes, and futures of people. This is time for very serious thought.

**006** You are a technologist. You are educated in a field that the average person holds in great esteem. What you do is not understood. What you say is important. I would like to talk about you becoming a good expert witness.

**Lesson 1: Your purpose in court is succinctly to teach seemingly complex technology to people who do not have a technological background**

**007** Teaching people you like is great experience for learning to be an expert witness. Teaching, by itself, is not what I am talking about—teaching people you *LIKE*, is. The jury wants to know what you are saying. This experience is unique in their lives. They have a sense of the importance of their task to mete out justice. They want you to teach them the truth. So speak to them. They are your audience. Do not be condescending or pompous. Be genuine in your feeling toward them. Develop a rapport. Speak to them as you would to an intelligent, and enquiring neighbour.

**Lesson 2: You must be a good teacher, with an ability to make technology sound simple, and straight-forward**

**Lesson 3: Learn to speak to, and with, people. Learn to be genuine, and to relate. Learn to teach people as if you like them**

**008** An important job requirement is to be able to write clearly. I feel that my written report is my most effective selling tool. Each report is turned over to competent people on the other side. If it stands up well under that kind of scrutiny, then I may have impressed a future client, the opposing attorney.

**009** Putting down words is not writing. The report must be concise, clear, and correct. A wordy report hides the truth in verbiage, and wastes the time of the reader in ferreting out what you are trying to say. Be concise.

**010** Be clear. There is a combination of words that will precisely state what you are thinking. Study what you have written. What do the words really say? How else can someone interpret what you have said? Is each sentence in a paragraph important to that paragraph? Is each sentence in the paragraph on the same topic? If not, your writing may be illustrating to the other side your inability to think and your inability to express yourself. You may be showing opposing attorneys how you can be attacked.

**Lesson 4: Learn to write. Nine out of ten of your peers, with your current level of education, cannot**

**011** To be an expert witness, you should strive to be the pre-eminent practitioner that your peers expect. That is your long-term goal. This means you should have or should get a good education. You should have good design and field experience. You should conduct tests. You should be actively involved in furthering the public image of your profession. You should write, give papers, attend society meetings, hold office, and be aggressive in helping others to learn. You should be active in continuing education. You should take courses, attend lectures and conferences, read extensively in your field, and give seminars. You should place yourself into teaching and oral presentation situations. You should at least occasionally teach a course at your local university.

**Lesson 5: Know yourself, and carefully define your area of expertise**

**Lesson 6: Acquire sound experience in your field**

**012** To solve a problem in, for example, electrical engineering, I would rather hire a person who can think, than a person with a degree in electrical engineering who can not. It is a fact that good people can change fields in forensic engineering. Broadly educated people make better thinkers.

**013** We do not like to have an “expert” who does not have degrees in the field in which he or she is giving testimony. That is a somewhat unfortunate situation. When I hire a person, I do so because that person can think, and then I try to get him or her to think in the field in which he or she holds degrees. However, I do not keep the person in that narrow field; I encourage him or her to branch out.

**014** A fundamental characteristic needed in a person working in the field of failure analysis is the ability to reason through a complex set of real-world facts to identify the true cause, the core of the problem. This person must use scientific reasoning and must be able to prove a case to a competent listener. The more broad a person’s experience, the more knowledge and experience that person can bring to bear on a problem.

**015** I once had a case in which a roofing board made of shredded wood fiber and gypsum (glorified shredded wheat) was used to support normal asphalt shingles on a sloping roof surface. The board material was supported on steel bulb tees, small beams that look much like a railroad rail in cross section. The roof leaked like a sieve. The owner had counted 432 individual leaks one day.

**016** The way an asphalt shingle is nailed onto this roofing board is for the nail to be driven in and cleated, or hooked into the material, as it is seated. The nails are built-up sheet metal mechanisms to get themselves to hook. Hence if water gets to the head of the nail, it will pour down through the nail mechanism and leak into the shredded wheat. The shingle overlap keeps the water from getting to the nail head.

**017** The expert on the other side disassembled several sections of the roof, found many nails misdriven (the mechanism tends to squash over if not driven squarely), and concluded that the cause of the leakage was improper construction. The expert had been hired by the architect.

**018** Logan Donnel, a roofing expert from Boulder, Colorado, whom I had asked to join me in the investigation, came up with the correct answer. The roof will not leak unless water gets to the nail head. If water gets to the head, it makes no difference whether it was correctly driven or not; it will leak. Therefore, the problem was the water getting to the nail head, not whether the nail was misdriven. What could cause water to flow uphill, up under the shingle, to reach the nail head? Normal shingle roofs with a slope of 4-in-12 do not leak.

**019** The days of leakage did not correlate with weather data on rain. They did not correlate with wind-driven rain. However, they did correlate well with snow. The roof would leak two or three days after each snowfall.

**020** Logan pointed out that the roof board fits between the steel bulb tees, not on top. The board was supported by the bottom flanges of the bulb tee. Hence the head of the bulb tee is up, just under the shingles. Heat from the building interior was conducted up through the metal of the bulb tee, and melted a strip of snow on the roof surface just above it. The resulting water seeped down through the snow into the shingles supported by the roof board; and because the roof board was good insulation, the water froze. This ice dam caused the water to back up under the shingle and reach the nail head—thus the random, generally distributed leakage.

**Lesson 7: Be a person who thinks. The real answers are not in your textbooks**

**Lesson 8: Never base your opinions on judgement alone: Base it on facts, logic, tests, and proof**

**021** A dishonest expert prostitutes the very concept of justice. However, do not conclude that an opponent is dishonest, merely because you believe you are honest, and he or she is saying something else. Honest men can differ diametrically in their final opinions, because we are asked to distinguish between “reasonable” and “unreasonable”. We must decide “yes or no, black or white”. We have to make up our minds. Although there is a major difference between black and white, there may be almost no difference between “reasonably dangerous” and “unreasonably dangerous”. Where is the dividing line? Does bias play a role?

**022** If my daughter had been killed by a drunk driver, I would probably have an unreasoned hatred for such drivers. However, if I killed another man’s daughter through my own drinking, I would be deeply sorry, but my feeling toward drunk drivers would be a deep concern for their health, not a hatred against them. These are forms of bias.

**023** A remarkable experiment was once conducted at an eastern university. A professor in psychology divided his class into two groups to conduct parallel opinion polls. He met with the first group, passed out packets of photographs of people, and asked the students to go to the *even*-numbered houses in a section of town, knock on the door, and ask the respondent if the pictures were of *successful* or *unsuccessful* people. The professor confided to the group that, oddly enough, people are basically *optimists* and that they would find that statistically the respondents would be found to answer that the photos were of *successful* people. He sent them out to conduct the poll.

**024** He then met with the other half of the class, sent them to the *odd*-numbered houses in the same neighbourhood but told them that, oddly enough, people were generally *pessimistic* these days, and that they would find that the majority of the respondents would conclude that the pictures were generally of *unsuccessful* people. He sent the second group out.

**025** The class reassembled, compared their results, and found, generally 60 to 40, that their responses matched the special biases the professor had suggested. The first group got 60/40 for *successful* people, and the second got 60/40 for *unsuccessful* people.

**026** The class discussed how they could have obtained such results. They concluded that something about the way they had asked the questions must have biased the homeowners to respond in accordance with the bias of the poll taker. Therefore, they decided to mend their ways and take the poll again.

**027** They took the poll three times. The third time the students read their question

monotonically from a card. They got the spread of results to narrow, but they did *NOT* eliminate the original built-in bias.

**028** If bias is that insidious and natal, then how can we be unbiased when we are hired to be right? We are trained to be right; we have staked our professional reputations and our way of life on being right. We are all little children who like to be patted on the head and congratulated. As adults, we like to be paid for our work. We have a build-in bias to be agreeable to, and hence to agree with, our clients. In my own practice, I find that I find *FOR* my clients about 80 per cent of the time. We have a good reputation for calling the shots as we see them, and clearly advising our clients when we can *NOT* find *FOR* them. My clients say they respect me for my candor. They cry a lot, but they say they need it to minimise their losses. In addition it can be argued that there are two sides to every question, and pointing out the good points in my client's case is what my client wants me to do. However, does that justify finding *FOR* my clients on an 80/20 basis? Do I just get the clients with the white hats?

**029** An honest person must have, or must develop, the ability to see him or herself as biased. If we admit we are biased, then and only then can we begin to cope with bias. Tell yourself that you are biased and believe it. Develop ways to explore your bias. For example, psyche yourself up to believe that you were, in fact, hired by the other side. Can you say to your "new" client precisely the same thing you are contemplating telling your "old" client? If you cannot, it is bias.

**Lesson 9: Tell yourself you are biased, and believe it. Then eliminate it (if you can)**

**030** By the way, do you speed when the cops are not around? Did you take your son to the movie when he was twelve, and tell the cashier that the kid was really eleven? If you do these things, two things accrue: you are dishonest, and you have taught your son to be a liar also. You will not be an honest expert witness.

**031** On the other hand, if someone makes a mistake in your favour when making change, do you point it out? Do you ask the waitress to correct the bill, so that you can pay the full price? If you do, then two things accrue: you are honest, and you have a marvellous time surprising waitresses. You will be a good expert witness.

**Lesson 10: Study and practise honesty and professionalism. You do *NOT* have a price**

## THE INVESTIGATION

**032** If your client is an insurance company, it is usually interested in proof that it should or should not pay a claim. For example if a wall blows over in a wind, you may have to distinguish between a collapse due to an unusual wind, or a collapse due simply to ageing of the wall. Ageing is normal and is not covered. Poor construction is the responsibility of the builder and is not covered. Insurance covers the unusual, such as vandalism, extreme wind, or hail. Foundation failure due to normal soil settlement is not covered. If the soil moved because a pipe broke and flooded the basement, then it is covered.

**Lesson 11: Learn to identify the problem your client has. Learn to solve HIS or HER problem**

033 The normal process of an investigation leading to the presentation of court testimony is as follows. First, you are hired by an insurance company, a lawyer, a builder, a manufacturer, or an irate or injured citizen. You listen carefully to the assignment and design an investigation. Usually, your work is done on a time-and-materials basis. You give an estimated upper limit of cost, which you agree not to exceed without prior client approval. You are careful to discuss the scope of your work and the potential for changes in scope as the findings come to light. Your work is research in nature, hence you can seldom do it for a fixed price.

034 The work is done to determine the probable cause of a failure or an accident. The lawyer will have to prove the case in court, and a proof in law is *not* the same as a proof in engineering. The law has evolved into distinct arenas. For example, strict liability, negligence, and warranty. You may be able to show that the manufacturer had a first-rate quality control program. This is an excellent defence in negligence but has absolutely no application in strict liability. Hence, as an engineering investigator, you must design the scope of your work around what the lawyer wants to be able to prove.

**Lesson 12: Work with the lawyer. Learn what he or she needs to show. Learn proof in law. Learn to listen**

035 A common problem is that the insurance representative usually wants a report for his file, so that he or she can show the supervisor the completeness of his or her work and the scientific support for the decision to pay or deny the claim. If you found that the fire was caused by faulty wiring in the coffee maker, the claims adjuster wants the report to justify paying the claim to the homeowner. However, the lawyer for the insurance company does *NOT* want a report, because he or she can sue the manufacturer of the coffee maker and recover the company's money. The lawyer will want your report to support his or her argument in court and has not yet decided what theory or theories of law to use. He or she does not want your report floating around just yet, because it was not written with the law suit in mind. Your report may be an excellent proof in engineering, but it is not a proof in law. The lawyer may wish you to do more work before reaching your final conclusions.

**Lesson 13: You must identify the assignment in terms of the end use of your work**

036 Never do less than a thorough investigation. You are toying with the lives and fortunes of the people involved in the law suit. As a professional, you have a duty to your client to give proper advice. But you have an equal duty to the people on the opposite side to be fair and honest with that advice.

**Lesson 14: Use the scientific method for proof or denial of causal theories. Be thorough. Carefully explore and eliminate your biases**

**037** You will be asked to critique the report of an opposing expert. Usually your attorney will ask you to suggest questions to ask the expert during the deposition. Your tendency while reading the report will be to denigrate the writer and his or her opinions. That is bias. Study it. Would you be so vocal in downgrading the author if he or she had written the same thing in a technical article published in a national journal? You might not have agreed with the article, but would you have been so adamant about it? Treat your opponent with courtesy and fairness. Be thorough and insightful, clearly identifying the fundamental assumptions the writer is making and clearly explaining to your attorney the agreements and disagreements you may have with the writer's methods or conclusions.

**Lesson 15: Be fair to your opponent. Instruct your attorney on where you agree and disagree**

**038** You may find, if you have defeated your bias, that the other person has some good opinions and may even be right. You may find to your horror that you are wrong. It will do your client a fundamental disservice to hide your findings in order to save face. That is dishonest. If you are truly a professional, you will bring out your findings in time to allow your client to minimize losses. If you do not, the client may have a viable law suit against you.

**Lesson 16: Receptively explore the truth of other opinions**

**039** The federal government has been experimenting with a technique of decision making that has applicability in law. For example, if the authorities want to predict how much grain the Soviets will want to buy next year, they ask five or six experts. The experts furnish their reports. Each report is then circulated to the other experts for their review. Then the experts again are asked for their opinion. The second time, the opinions have coalesced into a more common opinion. This opinion is adopted for making federal policy. It has been found that this coalesced opinion is much better than the original spread of opinions.

**040** The operative in this federal decision-making process is flexibility. The experts are allowed to be flexible. If you are professional, you will be open minded and ready to explore the validity of the concepts of others. Knowing the opposition makes you stronger. It is, of course, absolutely disastrous to your attorney's case if you change your mind while on the stand. That would simply be extremely poor preparation on your part. Take the time upstream to find the truth.

**Lesson 17: Modify your opinion in the light of new evidence or more thoughtful analysis, but do it early**

## IN DEPOSITION

**041** Usually your report is written after your investigation and after discussing your findings with your client. This report is then made available to the opposing attorneys,

assuming suit has been filed, and these attorneys give it to their experts for analysis. Your report is analysed, and the opposing attorney asks you, or subpoenas you, to appear at deposition.

**042** Your deposition, taken by the opposing attorney, is a detailed oral response by you to any questions the attorney may ask. You will usually be asked to bring your complete file. The attorney who hired you or who represents your client will attend, and will occasionally object to the way questions are being asked. If your attorney feels you may not have understood the question asked by the opposing counsel, he or she will ask for clarification and, for your benefit, will state the several ways the question could have been interpreted. When an attorney objects, I take it as a signal that I may not have fully thought through my answer. The attorney is giving me time to think again.

**043** I have found that there are two philosophies in giving depositions. First, your attorney may suspect that the opposition wants to settle the case out of court. In that case, your attorney may ask you to be talkative, to offer additional supporting evidence, and in short, to thoroughly impress the opposing attorney with the solidity of the engineering arguments given.

**044** The second philosophy, based on your attorney's assessment that the opposition has no intention of settling, is to tell no more than is necessary to answer succinctly only the questions asked. Your attorney will want you to give the opponent no more than is required by propriety and honesty. Anything else you say can and will be used against you in a court of law.

**045** My own approach is to be honest and complete, or honest and brief, as my attorney wishes. We, as engineers, have an obligation to tell the "whole" truth; we can do that with brevity. But if an opposing attorney does not ask a crucial question, we are not obligated to point out the omission during deposition. Your attorney will be glad to bring it out for the opponents' discomfort during the trial.

**046** Your deposition is taken by the opposition for three reasons: first, to explore what you have to say; second, to evaluate you as a witness, and third, to solidify you in a position from which you can not easily stray. Beware of questions like, "Have you told me everything related to your opinion?" or "Is this all the work you intend to do on this case?"

**Lesson 18: In giving a deposition, listen carefully to the questions, and answer them truthfully**

**Lesson 19: In general, do not extend your answers into areas not covered by the question. Be succinct and clear and as complete as the question requires. If your attorney asks you to be a teacher, be one. If not, don't**

## IN COURT

**047** On the day of court, show up early and sit in the courtroom to calm down and get a feeling for the courtroom dynamics. When you take the stand and are sworn in by the judge, the first task of your attorney will be to get you accepted as an expert. Your attorney will ask you to list your education, training, and experience. He or she will ask about your activities in

professional and technical societies. The judge is specifically interested in seeing that you are qualified in the specific field at hand.

**048** In your pretrial preparation meeting, the attorney should have discussed with you how to state your qualifications. The two of you should have decided on what words to use. For example, one attorney, after finding out that I had expertise in dynamics tried to qualify me as an expert in “physics” simply because dynamics was a topic in physics. The other attorney, older and wiser, did not object to having me qualified to give expert testimony in the case, because I was an expert. But I was not a physicist. You should discuss with your attorney the definition of your branch of engineering and how it applies.

**049** The attorney will eventually turn to the judge and offer you as an expert. The opposing attorney will either accept the offer, in which case you will be allowed by the judge to give opinion testimony, or the opposing attorney will ask to *voir dire*, a French phrase meaning to “speak the truth”. You should take it to mean “here I come, ready or not”. The opposing attorney will try to ask questions that will show that you have limited expertise in the specific field at hand, and therefore your testimony should be limited or disallowed. The attorney is really trying to prevent certain opinions from being introduced and is doing it on the grounds that your expertise does not extend into that area. He or she will ask you questions and, on the basis of your answers, will move to reject you as an expert.

**050** Note: You will not be allowed to say anything more in your defence. The judge will assume the answers you gave during *voir dire* were complete. Your own attorney may ask you additional questions to clear up the confusion, but don’t count on it. Note that if the opposing attorney is successful, he or she may have destroyed you and your client’s case.

**Lesson 20: Work with your attorney in the preparation meeting to forestall this counter attack before it starts. Be prepared to show that you are an expert**

**Lesson 21: Be prepared to explain why you are sufficiently qualified to be classified by the court as an expert in the specific case at hand**

**051** Finally, you will be asked to present your findings. Your preparation will have included your absorption of the evidence available to you, absorption of the details of your analysis, absorption of your final report, and absorption of the text of the deposition you gave. Be totally prepared on all details in these four pivotal data sets.

**052** Your attorney will normally ask to meet with you a few days before trial. If not, seek him or her out. The purpose of the meeting is to have each prepare the other for trial. Your attorney may have his or her questions for you already written out. Help refine them. Your attorney will need to know what opinions you will express and what you will not. Will you say the product was (or was not) defective? Will you say the designer was (or was not) negligent? What specifically are your proofs?

**053** You will need from your attorney at least the following:

1. A refresher course in what your attorney wants to prove;
2. The specifics of what the opposing attorney will want to prove;
3. What questions you should expect from the other attorney;
4. How your testimony will fit into the presentation;
5. What if any changes have occurred in the background information or testimony by others since you last talked.

**Lesson 22: In preparation for court, never memorise answers but fully understand your opinions and the logic on which they are based**

**Lesson 23: Know yourself, and know your opposition**

**Lesson 24: Be a firm and confident proponent of your final opinion**

**054** One of the fundamental characteristics of being an expert witness is that you are a target; you will be attacked. Your integrity will be questioned in public. You will be told you are wrong. Very competent people will try to prove just that, with varying degrees of success.

**055** Most engineers live a very sheltered life. They design things that don't fall down. The neighbours respect them for their competence. Their major concerns in life are doing good work, being honest, collecting their bills, and not getting sued.

**056** If one of their buildings ever does collapse, engineers disintegrate, professionally, mentally, and personally. Their lives are shattered. It takes a strong, introspective person to square his or her shoulders, and face the world again when that happens.

**057** Being an expert witness has many of the characteristics of facing personal failure. I do not recommend the life for any one who does not tend naturally to be thoroughly prepared.

**Lesson 25: Develop a thick skin. Never get angry. Calm down and answer the question confidently, professionally, and helpfully**

**058** Normally, in giving direct testimony, I like to be allowed to teach the jury. The attorney will ask, "Dr Knott, please tell the jury in your own words what you did to investigate this problem." Then you are off.

**059** The other attorney will often object on any basis possible, such as: "Your honour, 'Mr' Knott is going into areas beyond the scope of the question asked. I respectfully request the court to make 'Mr' Knott answer just 'yes or no'." The opposing attorney wants to make your attorney ask all of the questions leading to the proof in law, hoping that he or she will overlook some link that is essential to prove your attorney's case. The opposing attorney wants your attorney and you to bore the jury with the awkwardness of your presentation. You and your attorney have to be prepared to go either route. This gamesmanship is the arena in which a confident, experienced witness is at home. A good attorney and a good witness are a team.

**060** After your attorney has brought out the evidence, logic, and proof in support of your opinions, he or she will ask you if you have reached an opinion on the basis of reasonable, scientific probability. Your answer is, "yes, I have". Your attorney will then ask you what it is. You state your opinion to the jury. Your story is now complete.

**061** The opposing attorney will then question you to show through well-formulated questions, largely based on your deposition, that you overlooked something, are not telling the truth, that what you said in your deposition is not the same as what you are saying now, and/or you are a paid accomplice of the attorney or client who hired you. If you are fully qualified and have reached sound opinions, the opposing attorney's only area of attack will be: "You are being paid to give the testimony your attorney wants, aren't you?" Your answer is, "I am being paid my normal consulting fee". If he or she asks you your fee, state calmly and confidently what it is. Finally the attorney will finish. Leave the stand with an air of confidence.

**Lesson 26: Be professional, courteous, and helpful during cross examination**

**Lesson 27: Be fundamentally confident in yourself**

### SHOULD YOU BECOME INVOLVED?

**062** Some of my engineering friends have asked why I am involved in court. Somehow, being associated with scheming lawyers, and casting blame on otherwise innocent people, seems to be a degrading occupation. My answer is that I enjoy problem solving; I enjoy debate with good, thoughtful opponents; and the pay is good. That is probably why I stayed in it, once I got started.

**063** However, the fundamental reason why you and I should get involved in the presentation of expert testimony is that technology is not understood by lay juries, nor is it understood sufficiently by lawyers and judges. If the truth on engineering subjects is to be found, it must come from engineers. Leaving justice up to the uninformed is not appropriate. The courts have recognised the complexity of the technological problems being litigated. It is for this reason that engineering experts are used.

**064** Bringing the truth about technology into court so that a jury can make just decisions is one of the highest callings to which an engineer can aspire. If you are honest with yourself, and are professional, you will be an attribute to the process. Civilisation is built on fairness to others. You will be a gladiator in that arena. (But you will often find yourself up to your neck in lions.)

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*This article first appeared in Forensic Engineering, Vol. 1, 1987, pp. 7–16, and was reproduced in Arbitration, May 1993, when Dr Knott confirmed that the paper did not require updating. It is now replicated by kind permission of Pergamon Press's successors Elsevier Science.*



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# INDEPENDENCE, PARTISANSHIP AND THE CONTENT OF EXPERT EVIDENCE

*Andrew Bartlett*

**001** It is possible for there to be differing views on the quality of expert witnesses. Reference to an “Academy of Experts” conjures up a lofty image of august and olympian figures qualified to make infallible pronouncements on even the most arcane subjects. At the opposite end of the spectrum, a consultant, referring to forensic scientific witnesses, was recently reported as saying: “There are a lot of people out there talking rubbish” (*The Independent*, 9 September 1994). Most often the truth is somewhere between the two. Most expert witnesses are busy professional people, working under pressure, trying to do their very best, but without any claim to infallibility.

**002** Party-appointed experts have an important role to play in litigation and arbitration, that is, in helping to achieve just resolutions of disputes and the attainment of justice. This function requires high standards of conduct, which reduce so far as possible the effects of human fallibility. The promotion of high standards is not helped by unrealistic idealism concerning the role of experts. High standards need to be built on firm foundations, not on unsustainable myths.

## NOT FULLY INDEPENDENT

**003** The chief unsustainable myth is the complete independence of the expert. There is an idealistic point of view which sees the expert witness as a wholly dispassionate and independent outsider, whose function is to assist the court by offering a reliable and scientific opinion which is totally objective and free of bias.

**004** In the legal context the well-known *dictum* of Lord Wilberforce on this topic is more quoted than any other. He stated that expert evidence “should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation” (*Whitehouse v. Jordan* [1981] 1 WLR 246, 256). This *dictum* has frequently been quoted in articles and lectures, and by judges in subsequent cases. Read too literally, it is incorrect and misleading. It should be understood in its context. In *Whitehouse v. Jordan* there were special circumstances concerning the preparation of the experts’ reports to which a number of the judges involved in the case took exception. In practice—as everyone involved in litigation or arbitration knows—the *dictum* is honoured more in the breach than in the observance. It would be more satisfactory if the courts were to grasp the nettle and say that the

*dictum* is wrong. They would be free to take this course. It was an *obiter dictum*, not necessary for the decision in the case, and therefore not binding in law. In their Lordships' opinions only Lord Fraser expressed agreement with it. Lords Edmund-Davies, Russell and Bridge did not associate themselves with it.

**005** Such entirely independent evidence exists only in never-never land. Judges and arbitrators make the difficult task of judging yet more difficult if they pretend that the evidence of reputable experts is as independent as Lord Wilberforce suggested it should be. This idealistic view ignores the practical context in which the expert comes to give evidence to the court. The expert is often not independent, but is appointed by one party. From the very nature of the appointment, he or she is, in a certain sense, partisan, having been engaged by one side to help that side. Pursuant to the appointment, the expert generally fulfils a variety of roles:

- *candid adviser*, expressing frank and possibly adverse opinions to the client,
- *hired gun*, whether in negotiations with the opposing party's expert, or supplying to counsel material with which to shoot down the opposing expert in cross-examination, and
- in writing reports, *justifier or defender* of those parts of the client's case that can properly be justified or defended.

**006** Experts are paid by their clients to fulfil these roles, and they often work as part of a team consisting of the clients, the experts, and the lawyers: a team with a common objective of advancing the client's case. When people work in a team, it is normal for team spirit to develop.

**007** Giving evidence at trial, experts become professional witnesses, sworn to tell the truth. It is unrealistic to suppose that at trial the experts (however hard they try) can shake off entirely their former roles so as to become wholly independent and perfectly impartial.

**008** Dr Knott, an engineer in Colorado, illustrates the insidiousness even of *unconscious* bias by reference to a psychology experiment conducted at a university:

"... A professor in psychology divided his class into two groups to conduct parallel opinion polls. He met with the first group, passed out packets of photographs of people, and asked the students to go to the *even*-numbered houses in a section of town, knock on the door, and ask the respondent if the pictures were of *successful* or *unsuccessful* people. The professor confided to the group that, oddly enough, people are basically *optimists* and that they would find that statistically respondents would be found to answer that the photos were of *successful* people. He sent them out to conduct the poll.

He then met with the other half of the class, sent them to the *odd*-numbered houses in the same neighbourhood but told them that, oddly enough, people were generally *pessimistic* these days, and that they would find that the majority of the respondents would conclude that the pictures were generally of *unsuccessful* people. He sent the second group out.

The class reassembled, compared their results, and found, generally 60 to 40, that their responses matched the special biases the professor had suggested. The first group got 60/40 for *successful* people, and the second got 60/40 for *unsuccessful* people.

The class discussed how they could have got such results. They concluded that something about the way they had asked the questions must have biased the homeowners to respond in accordance with the bias of the poll taker..."

Dr Albert W Knott, "Are you an expert?" (1993) 59, JCI Arb 2-111, 113.  
(Reproduced in this book as Chapter 1/2; see paras 1/2-023 to 1/2-026 above.)

**009** If unconscious bias can operate in such circumstances, how much more is it likely that

an expert witness will be unconsciously biased in favour of his client, who remains his paymaster and (perhaps) his friend?

010 It is better to recognise the reality that experts are not likely to be entirely independent or unbiased. A 1967 *dictum* of Cross J accepted that experts are only human and can hardly avoid having some faint desire that their side should win—simply because it is their side (referred to in the JUSTICE report *Science and the Administration of Justice*: see the article by A Shilston at (1992) 58, JCI Arb 4–251, 256). In the real world the expert’s evidence will rarely be exactly the same as it would be if acting for the other side. The closer it is, the stronger it is likely to be. But there will be the inevitable and insidious influence of having approached the problem from the client’s side.

011 This is not to suggest that the expert’s evidence will not be honest. There are always different ways of expressing facts and ideas, and there are often ranges of legitimate opinions on a given set of facts. But the expert’s choice of words and formation of opinions will inevitably be influenced by the one-sided nature of the expert’s appointment. The expert is not truly independent.

## IF NOT FULLY INDEPENDENT, HOW PARTISAN CAN OR SHOULD THE EXPERT BE?

### “Partisan”?

012 “Partisan”, as defined in *Chambers’ English Dictionary*, means an adherent of a party, especially “a blind or unreasoning adherent”. For experts to be partisan in the latter sense is as improper as it is unwise. Even if experts are engaged by one party, it is vital that they remain open-minded and reasonable.

### Influenced by the needs of the litigation?

013 Despite Lord Wilberforce’s *dictum*, it is permissible, and indeed usual, for the input given by experts to be influenced by the needs of the litigation *in certain respects*. At the very least it must be directed to the particular issues on which the evidence is required. (This is implicitly recognised by rule 35.7(1) of the Civil Procedure Rules which is predicated on the understanding that expert evidence relates only to particular issues in the case.) In some circumstances it may be disastrous for the client if the expert’s report is “the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation”. Such a report may raise points which have nothing to do with the pleaded case and which provoke a different and damaging claim to be made against the client.

014 That experts’ reports ought not to be influenced by the needs of the litigation is unsustainable myth number two. Of course the content of experts’ evidence and reports must not be determined by the need to win the litigation. Of course they must not be dishonestly or recklessly devised, slanted, or “massaged” for the purpose of supporting the client’s case. Of course the substance of the experts’ views must not be modified to suit the client. But, within the limits of propriety, an expert witness is entitled, and ought, to receive guidance from the party’s legal advisers as to the form and content of his written evidence, so that it is suitable for the needs of the litigation.

**015** The proper contents of such guidance are discussed in the Appendix to this chapter below.

### **Propriety, as a limit on the duty to the client**

**016** In *Polivitte Ltd v. Commercial Union Assurance Co plc* [1987] 1 Lloyd's Rep 379, 386, Garland J made the somewhat Delphic statement:

"I have almost considered the role of an expert to be two-fold: first to advance the case of the party calling him, so far as it can properly be advanced on the basis of information available to the expert in the professional exercise of his skill and experience; and, secondly, to assist the court, which does not possess the relevant skill and experience, in determining where the truth lies."

**017** The word "almost" was well chosen. Everyone concerned in litigation knows that the purpose of employing an expert is to advance the case of the party calling him. Humphrey Lloyd QC (now one of the judges of the Technology and Construction Court) is on record as having pointed out that in reality "opinion evidence is presented to assist a party rather than the Court" ("Clarifying the Role of Experts in the Courtroom", *Building*, 13 October 1989). Yet if that purpose is baldly stated, without suitable qualification, it gives an incorrect impression of the expert's true role and duties, which require a degree of objectivity and the exercise of independent professional judgement, and above all, propriety. The expert only advances the case of the party calling him as far as that can with propriety be done.

**018** The additional concept of "assisting the court" is a noble one, but is not necessarily the most helpful analysis for the purpose of giving experts practical guidance as to their duties. The concept of a duty to the court can be misunderstood. It can tend to take on a life of its own, and make an expert witness feel that he is "piggy-in-the-middle", being pulled in different directions, owing conflicting duties to client and to court, and in difficulty knowing which should prevail in particular situations. As a concept it serves unnecessarily to create an uncomfortable antithesis. Rule 35.3 of the Civil Procedure Rules seeks to resolve the conflict in the most direct fashion, stating:

"(1) It is the duty of an expert to help the court on the matters within his expertise. (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid."

**019** There is another way of looking at this problem. Joseph Molony, QC (a leading advocate and former chairman of the Bar Council) wrote a now famous letter to *The Times* in which he took issue with the concept that expert witnesses have an overriding duty to the court. In his view there was not such a duty. He wrote:

"The only duty of expert witnesses that I know of is to answer the questions they are asked truthfully and in accordance with their knowledge of the facts, combined with their experience and understanding of the subject. A supplementary duty, I would say, is not to allow to pass any apparent misunderstanding of their evidence which the court or either advocate may entertain."  
*The Times*, 28 October 1966 (conveniently reprinted at (1992) 58, JCI Arb 4-257).

**020** For the purpose of deciding what to do in borderline situations, it can be more helpful for experts to think of themselves as having only one duty, which is the duty to serve their clients—but only within the limits of proper behaviour. The most important feature of the

expert's "duty to the court" is that the expert is required to conform to proper standards of behaviour. What matters is not the idea of the duty, but the requirement of proper behaviour. Propriety can therefore be seen as a limiting factor which helps define the duty to the client. Part of the definition of the duty to the client is that the duty can never in any circumstances oblige the expert to engage in unethical or dishonest behaviour. Adopting this analysis, there is no collision between conflicting duties, and no undue difficulty in making practical decisions.

021 If a yet clearer limit is needed, expert witnesses are unlikely to go wrong if they are guided at all times by the ninth of the Ten Commandments: "You shall not give false testimony".

022 Thus experts can hardly avoid being partisan, in the sense that they are employed to assist their clients, but they must not be partisan if that means acting other than with integrity, probity, and honesty.

### Not acting as an advocate

023 "An expert witness in the High Court should never assume the role of an advocate" (*National Justice Compania Naviera SA v. Prudential Assurance Company Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68, 81 *per* Cresswell J). It is one thing to write a report and give honest evidence with a view to assisting the client and advancing the client's case. It is quite another to adopt the role of advocate.

024 An expert who descends into the arena as a combatant invites personal attack. This happened in *University of Warwick v. Sir Robert McAlpine*, where "counsel felt it necessary to challenge not only the reliability but also the credibility of experts with unadorned attacks on their veracity". As the judge said, "This simply should not happen where the court is called upon to decide complex scientific or technical issues" ((1988) 42 BLR 1, 22–23, *per* Garland J).

025 To seek to advance the client's case by giving expert evidence is not the same as promoting it as an advocate. There is a critical difference. An advocate argues the client's case *irrespective of the advocate's personal beliefs as to whether it is well-founded or not*. Barristers or other advocates must not interpose their own judgement between their clients and the court: it is for the court to judge. Hence the duty of barristers to defend those whom they privately believe may well be guilty. In contrast, expert witnesses must put forward only *their own genuinely-held views*. This is the true meaning of the independence of the expert. It is an independence of mind and of judgement. The expert is not a mouthpiece for the client.

### Criminal cases

026 The above remarks would need some further qualification in criminal cases. The duty of the prosecution side in a criminal case is not to secure a conviction come what may, but is to place the facts before the jury so that they may decide on the guilt of the accused. Moreover, there is a different burden of proof in criminal cases. In a civil case the court determines the facts in accordance with the balance of probabilities. An expert giving an opinion in a criminal case is doing so in a different context, where the court is concerned not with probabilities but with whether there is certainty or doubt, since criminal charges must be proved beyond a reasonable doubt.

**The tension that arises from the experts' varying roles**

027 Experts move from being candid advisers, hired guns and justifiers to being professional witnesses, sworn to tell the truth. Although their position is far from independent, and they are under obligation to assist their clients, they must attempt to exercise independent and objective professional judgement.

028 There is often tension here. But there are ways in which it can be reduced:

- (1) By being courageously candid with the client from the start. If there are defects in the client's case, it is best to say so plainly and at the first opportunity, so that these can be considered and taken into account. Then, if the case goes to court, experts should never find themselves in the witness box trying to defend the indefensible.
- (2) By being open-minded and thoughtful. The expert should consider very carefully the opposing side's point of view. It is not good enough merely to think of arguments to counter it. It must be fully understood and acknowledged. The expert should not be blind and unreasoning but perceptive and reasonable.
- (3) By remembering that it is self-defeating to be too opinionated. The opinionated expert is a gift to the opposing side, since such evidence will carry little weight with the tribunal. Therefore part of the expert's duty, for the purpose of assisting the client, is to strive for objectivity.

**The problem of omissions**

029 What can properly be omitted from the report or from the expert's oral evidence? This is one of the thorniest questions that can arise.

030 Sometimes there are known facts which tend to weigh against the opinion that the expert has formed and the question arises whether these should be omitted from the report. In *The Ikarian Reefer* Cresswell J said that the expert's report should state facts or assumptions on which his opinion was based, together with material facts which could detract from the concluded opinion. This is clearly right. If the expert's opinion is to carry proper weight he must show that he has already taken account of all facts which might tend to weaken his stated conclusions on the issues with which his report is concerned.

031 A more difficult situation arises where there are matters which might be used against the interests of the expert's client, but which are not directly relevant to the pleaded issues. Should these be included in the report? Stated shortly, the traditional position is that there is no duty to include such matters. This is examined more fully in the Appendix below.

032 Nevertheless, while in principle it is legitimate to exclude unfavourable matter by confining the report strictly to the issues raised on the pleadings, an expert witness must not mislead by omission (see *per Cazalet J in In re J (a Minor) (Expert Evidence)* [1990] TLR 568). It is therefore necessary, when something is omitted, carefully to avoid forms of expression which may be misinterpreted as carrying undue implications of a favourable view on a matter not expressly dealt with. Misleading selectivity must be avoided: *Cala Homes (South) Ltd v. Alfred McAlpine Homes East Ltd* [1995] FSR 818; [1995] CILL 1083.

033 It is important to remember also that the line dividing legitimate from illegitimate omissions is one that may depend on the character of the litigation. Where the proceedings are of an inquisitorial character, the expert's duty to disclose unfavourable material may be a

higher one. The foremost example is wardship proceedings, where the interests of any adult parties are made subject to the paramountcy of the welfare of the child. In such cases there are no pleadings to limit the issues; the task of the experts is to assist the court as best they can in a straightforward and objective manner, and they certainly must not omit to mention any factor which does not support their opinion: *In re J (a Minor) (Expert Evidence)* [1990] TLR 568.

**034** Evidence given in court or in an arbitration is normally sworn evidence. The witness swears, or solemnly affirms, that his evidence will be “the truth, the whole truth, and nothing but the truth”. It is important to appreciate that this does not mean what at first sight it appears to mean. One of the first things a young policeman learns about giving evidence in court is that the very last thing he must do is to tell the whole truth. If he mentions an accused’s previous convictions, this usually results in the trial being aborted, the jury discharged, and public money wasted, and he incurs the wrath both of the judge and of his superiors. The witness’s answers must be given within the framework of the law of evidence (which excludes much information that common sense would suggest is relevant) and, in a civil case, within the framework of the pleadings (which define the issues to be addressed by the evidence).

**035** In *Derby v. Weldon (No 9)*, Staughton LJ said: “I do not think that an expert witness, or any other witness, obliges himself to volunteer his views on every issue in the whole case when he takes an oath to tell the whole truth. What he does oblige himself to do is to tell the whole truth about those matters which he is asked about”. (This passage in the judgment of Staughton LJ is cited by Simon Carne, (1994) *The Expert* Vol. 1, No. 3, p. 24. It is not included in the shortened *Times* newspaper report, [1990] TLR 712.)

**036** Judge Newey wrote in a textbook in 1989: “. . . since the procedure in both courts and arbitrations is adversarial, an expert is not obliged to speak out, or write in his report, about matters concerning which he has not been asked . . .” (*Construction Disputes: Liability and the Expert Witness*, ed. Andrea Burns, Butterworth & Co (Publishers) Ltd (1989) p. 241).

**037** The problem of omissions was less acute when it was understood that experts’ reports should not cover anything beyond the pleaded issues, and the experts’ promise to tell the truth in their oral evidence applied only to those matters which they were asked about. How far the new Civil Procedure Rules have altered this situation remains to be seen.

### **What if experts change their minds?**

**038** A candidate for pupillage in my chambers was asked in interview how he would handle a situation where the expert came to him in court as the case was about to start and said he had changed his mind about a critical matter. The interviewee said he would tell him firmly to “get into that witness box and lie, lie, lie”. Needless to say, his application for pupillage was unsuccessful.

**039** A recent judicial *dictum* proposed: “If after exchange of reports, an expert witness changes his mind on a material matter, then the change of view should be communicated to the other side through legal representatives without delay and, when appropriate, to the court” (*The Ikarian Reefer* [1993] 2 Lloyd’s Rep 68, 82, *per* Cresswell J).

**040** This *dictum*, although approved *obiter* by the Court of Appeal ([1995] 1 Lloyd’s Rep 455, 496), surely requires qualification. The judge’s choice of words may have been influenced by the large amount of court time that had been wasted in the particular case on expert evidence which ultimately proved to be irrelevant and useless. The duty of the legal representatives is more complex than appears to be suggested. The *dictum* has been forcefully and convincingly criticised in an article by a highly respected and very experienced solicitor

(see Michael Ludlow's excellent article "The independent expert" (1993) 59, JCI Arb 4–231 at 234). Commonly it will be the duty of the lawyers to seek clarification or a second opinion before making any communication to the other side.

041 If the expert changes his view, it may be that he is entitled to communicate the change to the other side without first informing his client (this was the view of Otton LJ in *Stanton v. Callaghan* [1998] 4 All ER 961). Whether that is right or not, the wiser course is for him to tell the lawyers on his side, and tell them promptly. It will then be for the lawyers to decide what is proper to be done. It is their duty to give him proper guidance. There can be considerable difficulties in knowing what is the proper course to follow, as illustrated by *Vernon v. Bosley (No. 2)* [1997] 1 All ER 614, where counsel acted in accordance with advice received from the Bar Council, and was supported by one member of the Court of Appeal while being criticised by two members of the Court.

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## APPENDIX: GUIDANCE ON THE FORM AND CONTENTS OF EXPERTS' REPORTS

(The following material first appeared in its original form in *Counsel* magazine October 1993 and November/December 1993. It is reproduced by kind permission of the publishers. A few changes have been made in the light of the Civil Procedure Rules introduced as part of the Woolf reforms.)

The *form* of an expert's report should not be left to chance, or to the personal views of the expert. Some experts are well versed in legal matters and have experience of what is required. But many, while true experts in their own fields, will have had no practical experience of litigation, and will need detailed guidance as to a suitable form for their report. If justice is to be done to the client's case, the lawyers' duty is to ensure that the report is in a form which the judge or arbitrator will find helpful and easy to follow. If it is not in such a form, time and costs may be wasted, and the client's case may be unfairly prejudiced. Experts inexperienced in litigation may not be aware of many matters which to a litigation lawyer would seem obvious. For example:

- the report should be dated and signed;
- there should be a table of contents at the beginning;
- the report should commence with an introduction of the author, and his CV should be contained either in the introduction or in an appendix;
- the report should be clearly laid out, preferably in short numbered paragraphs;
- the contents should be presented in a logical order, broken down into whatever separate sections are appropriate for the particular case, covering matters such as background facts, explanation of technical concepts, discussion of the material issues, and conclusions;
- supporting items such as calculation sheets, test results and the like should be contained in appendices;
- the report should be consecutively paginated throughout (including the appendices);
- any photographs contained in the report should be properly reproduced (black and white photocopies are generally useless).

The *Practice Direction* issued to supplement Part 35 of the Civil Procedure Rules also requires that the report be addressed to the court and not to the party from whom the expert has received his instructions. It must say at the end that the expert understands and has complied with his overriding duty to help the court on the matters within his expertise, and it must be verified by the statement: "I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct".

In relation also to the *content* of experts' reports, the lawyers have very important functions to perform. The lawyers should vet the report to ensure that it contains, and contains only, the material that it ought to contain:

- 1 *Does it clearly indicate the scope of the expert's remit?* The expert should state exactly what he has been asked to report on by indicating the nature of his terms of reference.
- 2 *Does it adequately identify the material on which it is based?* Differences of opinion between experts often stem from their having been given different facts or assumptions to work from. If the tribunal is to weigh conflicting opinions from different experts it is vital for it to know the factual basis of each opinion (cf. the remarks of Cresswell J in *National Justice Compania Naviera SA v. Prudential Assurance Company Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68). To comply with the CPR *Practice Direction*, the report must contain a statement setting out the substance of all material instructions (whether written or oral), including a summary of the facts material to the opinions expressed. It must also give details of any literature or other material which the expert has relied on in making the report.
- 3 *Is it properly researched?* If the data available to the expert are insufficient for him to be confident of his opinion, he should indicate the areas of uncertainty and state explicitly that his opinion is provisional (*In re J* [1990] TLR 568, *The Ikarian Reefer*, *supra*). Where there is a

range of opinion on the matters dealt with in the report, the CPR *Practice Direction* requires the expert to summarise the range of opinion and give reasons for his own view.

- 4 *Does the report properly acknowledge the limits of the writer's expertise?* Experts should make clear the extent to which questions considered by them fall within their special expertise. Reports which incorporated argument or comment on facts outside the expert's own field have provoked adverse reaction from the court (*Polivitte Ltd v. Commercial Union Assurance Co plc* [1987] 1 Lloyd's Rep 379, 387; *The Ikarian Reefer*, *supra*). But it is sometimes necessary for an expert to consider wider matters. The Court of Appeal in *The Ikarian Reefer* [1995] 1 Lloyd's Rep. 455, 496 pointed out that it is not always possible to confine an expert to his own area of expertise. For example, an experienced fire expert, when he is assessing the significance of certain evidence, must be entitled to weigh the probabilities and this may involve making use of the skills of other experts or drawing on his general mechanical or chemical knowledge.
- 5 *Is the report dependent on the research or opinions of others?* Where the report is that of a leader of a team of investigators or research assistants who have acted under his direction or control, it may be sufficient if that fact is merely stated. But in general, if a report contains evidence or expertise contributed by persons other than its apparent author, then those persons and their contributions should be identified so that at the very least they can be tendered for cross-examination (*University of Warwick v. Sir Robert McAlpine* (1988) 42 BLR 1, 23). For use in court, the report must say who carried out any test or experiment used for the report, stating their qualifications, and whether they acted under the expert's own supervision.
- 6 *Has there been any change of view by the expert which requires explanation?* Sometimes experts express one view in experts' meetings or in reports and subsequently change their minds and express a different opinion. Where this occurs, it should be dealt with in their latest report, giving any necessary explanations. Otherwise they may lay themselves open to damaging cross-examination upon their inconsistencies (*University of Warwick*, *supra*).
- 7 *Does the report go too far in usurping the role of the judge?* This is a difficult and delicate matter. The traditional wisdom was that in no case was it competent for the expert to express his opinion upon any of the issues, whether of law or fact, which the judge had to determine: see *per* Neville J in *Crosfield & Sons v. Techno-Chemical Laboratories Ltd* (1913) 29 TLR 379, which was still cited more than 80 years later in the *Supreme Court Practice 1997*. But times have changed, as has the law of evidence. Expert opinion on an issue in the proceedings was made admissible by section 3 of the Civil Evidence Act 1972. In a professional negligence case it is impossible for the expert to state his opinion without expressing a view on the very issue of negligence that the judge has to decide. Indeed, in *Whitehouse v. Jordan*, *supra*, counsel appear to have been criticised for *deleting* a passage in a report where the expert stated expressly that there had been no negligence (see the report of the proceedings in the Court of Appeal [1980] 1 All ER 650, 655f-g). Nevertheless, judicial sensitivities remain. It is still advisable for the expert to tread warily, and, if he can, to avoid giving the appearance of trespassing unduly into the province of the judge. Even in a professional negligence case, it may be wise for him, instead of saying (for example) "the defendant was negligent", to say "in my opinion the defendant adopted a course which no skilled practitioner acting carefully would have adopted".
- 8 *Do the words of the report truly reflect the expert's views?* This may seem at first sight an odd question, but engineers, scientists, doctors and other experts are not always accomplished craftsmen with words. It can happen that particular words or phrases which the expert has used in his draft report, when carefully examined, are ambiguous, or do not accurately reflect his real views, but carry unintended meanings or erroneous implications. To the expert the word "possible" may denote something that is more likely than not, or something that is possible but unlikely. When proof of a fact depends on the balance of probabilities, the difference between these shades of meaning becomes fundamental. Such words or phrases should be amended in debate between the lawyers and the expert until both are satisfied that the written words accurately convey the expert's true opinion.
- 9 *Does the report adequately cover the pleaded allegations?* This is particularly likely to be a problem in complex cases. It is unfair to leave it to the expert to guess which allegations

made in the pleadings he ought to comment on. The lawyers know which allegations are for this expert to deal with, which for another, and which will be matters solely for factual evidence or legal argument. It is important that solicitors or counsel check that every allegation that ought to be dealt with by the expert is clearly covered in the report.

- 10 *What omissions from the report are legitimate?* The former Rules of the Supreme Court (RSC Order 38, rule 37(1) and Order 25, rule 8(1)(b)) provided for the disclosure of “the substance” of the evidence of an expert whom a party proposes to call. In *Kenning v. Eve Construction Ltd* [1989] 1 WLR 1189 an engineer, asked by the defendants to report on an accident, wrote a report refuting the allegations of negligence pleaded in the Statement of Claim. In a separate letter he drew attention to two points, which were not covered in the Statement of Claim or in his report, on which he considered the defendants were at fault. By mistake the defendants’ solicitors sent off not merely the report but also the letter, which was greeted with some interest, not to say glee, by the plaintiff’s solicitors when they received it. The defendants sought to prevent the plaintiff relying on the letter. The deputy judge acknowledged that it was a widespread practice that anxieties, qualifications or adverse views expressed by expert witnesses were very often communicated to their instructing solicitors by way of a confidential covering letter. He also acknowledged that the letter was privileged. But he held that, if the defendants wished to call the expert, they must disclose not only his report but also his letter, since otherwise they would not be complying with their obligation to disclose “the substance” of his evidence.

This was a wrong decision. In effect, the deputy judge was misled by the simplicity of the case. He evidently felt that the report, which dealt only with the matters raised by the pleadings, concealed by omission the expert’s views on what he called “the overall issue of liability”: see [1989] 1 WLR 1189 at 1194. This was an understandable reaction in a simple case, but one only has to consider its application to a complex case for it at once to be exposed as fallacious. Suppose in a building case the plaintiff, based on advice from his own expert, pleads 47 criticisms of various parts of a defective structure. The defendants’ expert in the course of his investigation comes upon another 15 items where the defendants may be vulnerable to criticism. What should he say in his report? It is the duty of the defendants’ lawyers to tell him that his report should not go beyond the pleaded issues. This is the only logical and practical solution in an adversarial system of justice. The plaintiff may not be aware of the 15 further points, or he may have decided not to pursue them in order to avoid more complication or delay or expense or some adverse reflection on some of the 47 points already pleaded. The defendants’ expert should not raise in his report points against his own clients which have not been pleaded. Conversely, the plaintiff’s expert’s report should cover the allegations that are pleaded, and should not raise any additional criticisms, unless they are to be made the subject of an application to amend. Failure by the plaintiff’s lawyers to restrict the contents of the report to issues that are pleaded leads to needless expense and confusion as both the judge and the defendants try to determine which passages in the report are relied upon by the plaintiff in support of the pleaded case and which are to be disregarded as irrelevant. The court’s task under the adversarial system is to address the “overall issue of liability” not in the abstract but by considering the particular issues which the parties have chosen to raise on their pleadings.

The Court of Appeal had to consider a related situation in *Derby & Co Ltd v. Weldon (No 9)* [1990] TLR 712 (not to be confused with separate decisions in the same litigation, reported under the same name and number in WLR and All ER). In that case the defendants’ expert accountant had prepared a report, which had been disclosed, on the plaintiffs’ “initial conspiracy” claim. The report did not deal with an “alternative initial conspiracy” which had been introduced into the plaintiffs’ pleadings by amendment. The court took the view that the rules for disclosure of expert evidence did not override legal professional privilege. Any report that the accountant might have prepared on the “alternative initial conspiracy” was privileged, and, if the defendants did not wish to adduce evidence from him on that issue, they could not be ordered to disclose any report that he might have made upon it. The court confirmed that *Kenning, supra*, was wrongly decided. In the Rules of Court the “substance” of the evidence referred only to the evidence it was *intended* the expert should give at trial; it does not mean all the evidence he *could* give.

The new Civil Procedure Rules make no specific alteration in the law in this respect.