



**St John's
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Experts in personal injury & clinical negligence cases: what are they for and what should we do with them?

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What are Experts for? The Legal Context

What is an Expert?

My very helpful suggested definition of an expert: someone who is permitted by the court to give expert evidence...

- It is the evidence they are giving and not the person which is relevant
- An expert in one field will not necessarily be an expert in another field

What is Expert Evidence?

Historical Development

Expert evidence was traditionally seen as an exception to the longstanding substantive rule that, in general, witnesses may not give evidence of opinion but only fact (as far back as Lord Mansfield in *Carter v Boehm* (1766) 3 Burr. 1905). In the notes by Josiah William Smith QC on that case (written in 1876), he said:

On the one hand, it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it.

...

While on the other hand, it does not seem to be contended that the opinion of witnesses can be received when the enquiry is into a subject matter the nature of which it is not such as to require any peculiar habits or study in order to qualify a man to understand it.

Further, expert evidence, unlike evidence of fact, can be excluded when the court can properly form its own conclusions without the need for expert evidence.

Nowadays, however, the rules governing the admissibility of expert evidence are framed not as an exception to the general rules but as a category of their own within the general rules of evidence. This is probably due to expert evidence being much more common and much more relevant (sometimes indispensable) in recent times and also because it is not always simply opinion evidence as it often arises as specialist knowledge and understanding.

So expert evidence is best seen as a category of evidence in itself whose admissibility is largely dependent on its relevance and probative value in any given case.

Expert Evidence needs to be EXPERT Evidence...

Three recent cases serve to illustrate the potentially catastrophic pitfalls in accepting expert evidence at face value without pausing to consider its real strength.

CCC v Sheffield Teaching Hospitals NHS Foundation Trust [2023] EWHC 1770 (KB) was a cerebral palsy claim; liability was admitted but the main battleground was quantum, largely in relation to care needs. The Defendant relied on evidence from Mr Chakraborty, who provided an opinion on what he considered to be the appropriate level of care required by the Claimant. The trial judge, Ritchie J, was, to say the least, not impressed with Mr Chakraborty's evidence, saying at paragraph 90 of his judgment:

I consider Mr. Chakraborty's evidence in relation to care was flimsy and unimpressive, but more importantly, I consider that Mr. Chakraborty is not an expert in constructing, designing and managing care packages for children with cerebral palsy. He did not have case management qualifications or experience and I do not consider that he was acting within his CPR part 35 responsibilities professionally or properly in holding himself out to be an expert on maximum severity care packages or the costing thereof. In addition, I found his evidence in relation to assessing the hourly rates of past care to be insubstantial, relying on a single advertisement posted by somebody else and some phone calls as his foundation for the rates. Where Miss Sargent's expert evidence contradicts Mr Chakraborty's evidence on past and future care I reject Mr Chakraborty's evidence and prefer Miss Sargent's evidence.

In *Balachandra v The General Dental Council [2024] EWHC 18 (Admin)*, another case heard by Ritchie J, the Claimant had been struck off the regulatory register on the basis that she had made handwritten clinical notes about 11 patients long after the treatments were provided and then sought to persuade the PCC that the notes were contemporaneous. She denied this allegation of fraud and exercised her statutory right to appeal to the High Court; the appeal was granted after Ritchie J expressed very strong views on the purported expert evidence relied upon to prove the allegations of fraud. In relation to one expert, Julian Scott, Ritchie J said (at paragraphs 75 and 77):

I question whether he had the expertise or sufficient information to be able fairly to determine the facts of whether the originals were or were not sent to NHSE and on to Capita just by looking at the photocopy records. He had no idea what happened internally in NHSE or Capita by way of scanning. He did not know who did the scanning or under what protocol. He saw no index of the documents received. He did not visit the practice and see what other hand-written records the Appellant made on the relevant days.

...

None of the detail of the evidence to support those findings was laid out in the report... Thus, I struggle to understand how Mr Scott came to this firm conclusion on fraud on the basis of the 5 foundations he has set out based merely on photocopies.

In *M v F & Anor [2022] EWFC 186*, the Family Court had to consider various applications relating to the residence and travel of a 14-year-old girl. One of the issues was the risk of forced marriage and a psychological assessment was obtained from Dr X. Recorder Reed was very unimpressed with the choice of Dr X as an expert witness because (at paragraph 43):

Through careful scrutiny of Dr X's CV and report I was able to ascertain that Dr X's expertise was as an academic not a practitioner. As such, they are not registered with the HCPC. Registration is not a mandatory pre-requisite when the court appoints a psychological expert, and it is open to the court to appoint an unregistered psychologist, usually where that psychologist is an academic who holds Chartered Psychologist status as Dr X does. However, the task Dr X was set was broader than a simple exposition of the way in which cultural or religious issues work to give rise to risks around forced marriage or honour based abuse, and encompassed questions that would usually be answered by a practitioner psychologist, where registration is

mandatory. Dr X is not a clinical psychologist qualified to make a diagnosis. It is not clear to me that any of the professionals had considered or appreciated these matters until I queried them.

These cases provide stark lessons in not taking your own expert's evidence at face value and scrutinising it yourself before deciding to rely on it. Ask yourself if the expert really does have the knowledge and experience required to provide an expert opinion on the issues central to the case and whether they have considered all the available evidence properly.

The Procedural Rules

The procedural requirements and considerations around the use of expert evidence in civil cases can of course be found in CPR Parts 1 and 35. The Civil Justice Council *Guidance for the Instruction of Experts in Civil Claims 2014* is also a valuable resource and is often referred to within proceedings when these issues arise.

Some of the most important aspects will be well known to most of us:

- Rule 35.1: expert evidence is “restricted to that which is reasonably required to resolve the proceedings”
- Rule 35.3: an expert's overriding duty is to assist the court and not their instructing party
- Rule 35.10: an expert's report MUST comply with the requirements set out in PD35
- Rule 1.1: the overriding objective: dealing with cases justly and at proportionate cost, ensuring that the parties are on an equal footing

The Test applying the Rules: the Court Decides if Expert Evidence is Required

In *Kennedy v Cordia (Services) LLP (Scotland) [2016] UKSC 6*, the Supreme Court set out the fundamental test to be applied when deciding if expert evidence is to be allowed:

- i) Will the expert evidence assist the court in its task?
- ii) Does the expert witness have the necessary knowledge and experience?
- iii) Is the witness impartial in their presentation and assessment of the evidence?
- iv) Is there a reliable body of knowledge or experience to underpin the evidence?

The Limits of Expert Evidence: Usurping the Court's Role?

In Taylor & Anr v Raspin [2022] EWCA Civ 1613, the Court of Appeal considered a claim where a motorcycle was hit by a car emerging from a side road and the first instance judge in the High Court made a split liability decision of 55/45 in favour of the motorcycle rider. Evidence had been heard at trial from a number of eyewitnesses to the collision and expert evidence was also heard in relation to the accident circumstances. The Court of Appeal dismissed the Defendant's appeal on the liability finding and agreed that the expert evidence estimating vehicle speed from the marks left on the road related to a relevant and important matter. However, the Court also expressed some clear views on the extent to which some expert evidence should be relied upon.

First, the expert's view on the size of the gap that most motorists would think is reasonable to allow entry from a minor road onto a major road was not the territory of expert evidence and amounted to comment on the behaviour of motorists in general. In any event, it did not help with the question of whether the Defendant should have checked to their left for a second time before pulling out. As the Court put it (at paragraph 26 of the judgment): *"If his evidence was intended to say what did or did not amount to a breach of duty, it was inadmissible"*.

Second, although not central to the decision on the appeal, the Court did consider that, if the trial judge's approach could be open to any criticism, it was the emphasis placed on the expert evidence. There were three lay witnesses who saw the accident and their evidence was clear and consistent in relation to the manner of the Defendant's driving. As such, it seemed that the judge *"did fall into the trap of engaging in an exercise of mathematical precision"* as *"[t]he expert evidence was not central to the case"*.

It Is the Court's Decision When and What Expert Evidence to Allow

Jennings v Otis Limited & Anr [2023] EWHC 2039 (KB) was an appeal against a case management decision made by a Master in an employer liability personal injury claim involving a serious arm injury when working on an unguarded area of a lift shaft. The main issue was whether or not the Master should have directed at a CCMC that the Claimant (who was the only witness to his own accident) disclose all his witness evidence unilaterally before further case management directions could be made, especially in relation to expert evidence. Cotter J agreed that, where the Claimant had alluded in Part 18 replies to further facts which will be explored in his evidence as to how the accident happened, the Master was *"entitled to take the view that the Appellant was not making his case plain and clear"* (paragraph 23).

A secondary point was Identified by Cotter J, who observed that the question of expert evidence is not simply to be agreed between the parties but is a matter for the court; he said at paragraph 27:

In their respective draft directions for the CCMC, each of the parties invited the Master to give them permission for expert evidence. However, just because draft directions have been largely agreed does not mean that a Judge necessarily has to approve them and make an order in those terms. It is also not the case that a Judge should consider him/herself somehow presented with a fait accompli because each side has already incurred significant costs in obtaining expert evidence. CPR 35.1 remains the requirement to be addressed going forwards in the case and CPR 35.7 provides that where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert. The issue of what expert evidence was needed was parasitic on knowing the full extent of the Appellant's case, underlining the need for clarity. I accept that it may be that in the present case some engineering evidence (most likely through written reports alone) may assist and, as Mr Brown submitted, the time to reach a final conclusion on this issue is after the Appellant's case has been fully set out.

Experts Assist the Court and not the Parties; and They Can Change Their Minds

In *Muyepa v Ministry of Defence [2022] EWHC 2648 (KB)*, another case decided by Cotter J, he felt the need to highlight some fundamental principles about the role of expert witnesses and whom they are there to assist (paragraph 284):

Experts should constantly remind themselves through the litigation process that they are not part of the Claimant's or Defendant's "team" with their role being the securing and maximising, or avoiding or minimising, a claim for damages. Although experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code, as CPR 35.3 expressly states they have, at all times, an overriding duty to help the Court on matters within their expertise. That they have a particular expertise and the court and parties do not (save in some professional negligence claims) means that significant reliance may be placed on their analysis which must be objective and non-partisan if a just outcome is to be achieved in the litigation.

This comment perhaps highlights the tension between the way expert evidence *should* function and the way that it *does* function: has anyone ever asked if Mr Smith is a claimant-friendly expert...?

Unchallenged Expert Evidence is Likely to be Accepted: *TUI v Griffiths* [2023] UKSC 48

The *Griffiths* saga has now run its course and, many would probably say, has ended up where it should have been in the first place. At first instance, at the trial of a holiday illness claim, the Defendant put Part 35 questions to the Claimant's expert microbiologist but did not serve their own microbiology expert evidence in time such that the Claimant's was the only expert evidence on those issues at trial. The expert was not called to give evidence at trial but counsel for the Defendant made various criticisms of the report that led HHJ Truman to dismiss the claim, commenting that there were so many weaknesses in the expert's approach that causation could not be established on the balance of probabilities.

On appeal to the High Court, Spencer J found that it was not open to the trial judge to reject the expert's conclusions where his evidence was not challenged at trial and there was no contrary expert evidence adduced on behalf of the Defendant. The report was uncontroverted and was not, despite its "serious deficiencies", a "bare *ipse dixit*" which was so deficient that it should be rejected on its face.

The Court of Appeal then overturned the High Court's decision and the case was heard again in the Supreme Court, which disapproved of HHJ Truman's approach. Lord Hodge, giving the single judgment of the Court, listed a set of guiding principles (arising from the principles set out in *Browne v Dunn* (1893) 6 R 67) as to how evidence, including expert evidence, should normally be challenged by way of putting the case in cross-examination if the trial is to be fair. Paragraph 70 of Lord Hodge's judgment:

In conclusion, the status and application of the rule in Browne v Dunn and the other cases which I have discussed can be summarised in the following propositions:

- (i) The general rule in civil cases, as stated in Phipson, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.*
- (ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.*
- (iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.*

(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

*(vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of Phipson recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.*

(viii) There are also circumstances in which the rule may not apply: see paras 61-68 above for examples of such circumstances.

The exceptions referred to at (viii) generally involve scenarios where the issue is so obvious, or perhaps so insignificant, that fairness does not require the point to be put in cross-examination in order for the court to hear submissions on it.

The specific point was made at paragraph 68 that an argument that expert evidence should be rejected because of non-compliance with CPR PD35 needs to be dealt with carefully:

Seventhly, a failure to comply with the requirements of CPR PD 35 may be a further exception, but a party seeking to rely on such a failure would be wise to seek the directions of the trial judge before doing so, as much will depend upon the seriousness of the failure.

In short, just as in cases where dishonesty is being alleged, fundamental criticisms of an expert's evidence cannot just be made in submissions as the expert must have the opportunity to deal with the criticisms in order for the court to assess the evidence properly and thereby ensure a fair trial. This principle is not restricted solely to scenarios where the honesty or integrity of a witness is being called into question.

However, proportionality needs to be considered and there does not always have to be cross-examination at trial to achieve fairness. As Lord Hodge said at paragraph 81 of his judgment when dealing with TUI's concerns in this regard:

The conclusion I have reached does not mean that in most cases of modest value when a claimant presents an inadequately reasoned expert report, a defendant will inevitably have to obtain a detailed expert report and require a claimant's expert to attend for cross-examination. A defendant may be able to adopt more economic ways of testing the expert's evidence. It is important and consistent with the ethos of the CPR that there be a proportionate use of resources in the pursuit and defence of such claims. A defendant can ask focused CPR Pt 35.6 questions which articulate clearly the challenge or challenges on which the defendant wishes to make and give the expert the opportunity to explain his or her evidence in response to those challenges, thereby obviating the need to seek the expert's attendance for cross-examination. In this case TUI's questions did not give adequate notice of the challenges it ultimately made. Where the defendant has expert advice, a meeting of experts to discuss their positions can lead to a joint report restricting the issues in dispute. In any event, a focused cross-examination making the challenge and giving the expert the opportunity to explain his or her report and CPR Pt 35.6 answers need not be long.

What Should We Do with Experts? The Practical Context

In light of the principles touched on above, there will be questions to be asked in every case involving (or potentially involving) expert evidence. Sometimes the answers will be obvious but it is in the cases where the answers are not obvious (or even the questions are not obvious) where care needs to be taken.

Some general issues to consider:

Do you, as a claimant, actually need expert evidence? Does the defendant need their own?

Get the right expert:

- The right person and the right area of expertise
- Are they claimant / defendant friendly (unofficially of course...)?
- Are they willing to consider alternative angles and properly defend their own approach?
- Do they understand what they're being asked?

Make sure the expert is instructed properly (and remember the court can sometimes see the instructions)

Have a conference:

- Appropriate to have a conference and perhaps ask the expert to amend their report prior to service as long as it still represents their genuine position
- A chance to scrutinise the report and the expert's opinion
- A chance to see what the expert will say when challenged (either by way of Part 35 questions or at trial)
- When is the best time to have a conference? Maybe more than one?

Don't just leave a poor report to be challenged at trial in submissions

Don't just give up! If the other side's expert evidence looks solid:

- Ask Part 35 questions
- Consider what the factual evidence is that they may have relied on which isn't solid
- Ask your own expert how to challenge it

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