

# Experts and how to make the most of them

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Speakers:



Thea Wilson

[wilson@12kbw.co.uk](mailto:wilson@12kbw.co.uk)



Daniel Sokol

[sokol@12kbw.co.uk](mailto:sokol@12kbw.co.uk)

# Introduction

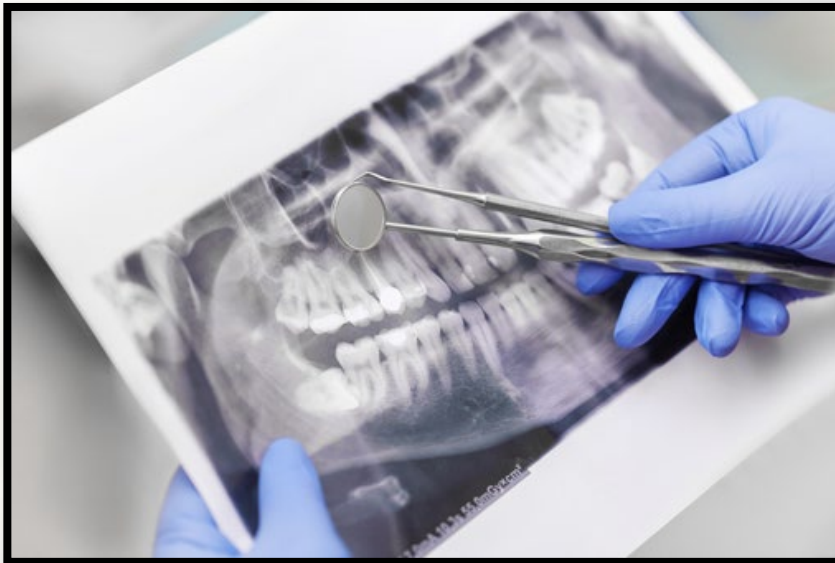
Expert evidence can win or lose your case – it is vital to give it the attention it deserves.

In this talk we will be discussing how to make the most of expert evidence covering:

- ▶ Choosing the right expert;
- ▶ Testing the expert and their report;
- ▶ Preparing for joint statements and trial; and
- ▶ What to do if it all goes wrong

# Choosing the expert

- ▶ First step: Decide on the discipline required
  - ▶ For breach reports, consider who the criticism is made of: e.g. is it midwifery or obstetric care, GP or surgeon, nurse or medic?
  - ▶ Is the expert on breach the right expert to consider causation?
  - ▶ In condition and prognosis reports main questions are: a psychiatrist/psychologist; neurosurgeon/neurologist/neuropsychiatrist/neuropsychologist?



*Robinson v Mercier*  
(1 October 2021)

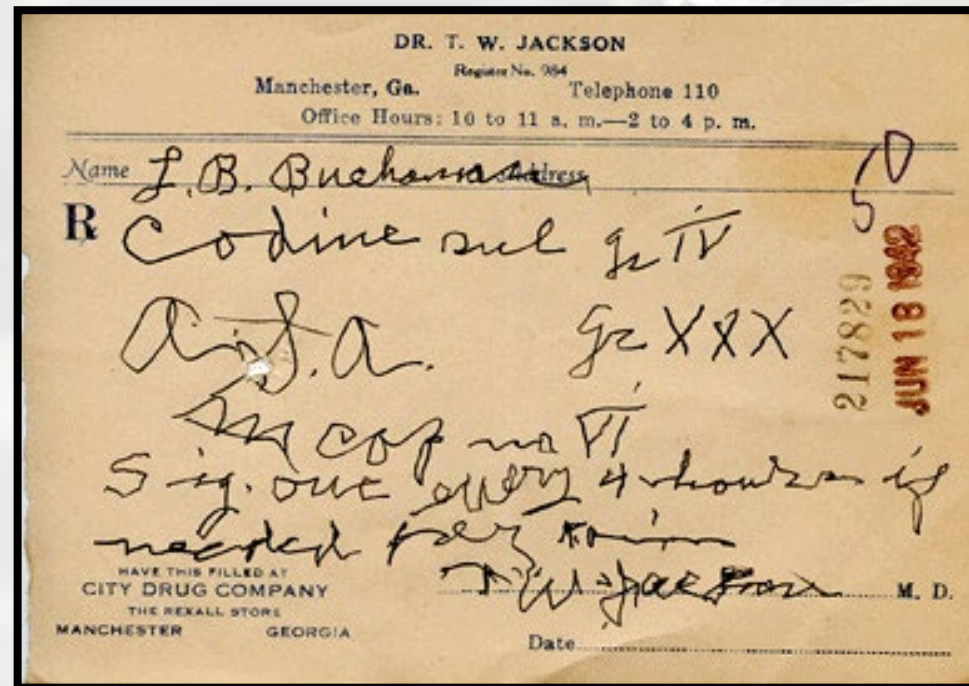
# Choosing the expert

- ▶ Second step: Which expert?
  - ▶ Use personal experience and recommendations
  - ▶ Ask:
    - ▶ Are they still practising?
    - ▶ NHS or Private?
    - ▶ Do they principally practise in the UK or do they have a practice in other countries?
  - ▶ Practical & recent experience of the issues/procedure in question – is it their speciality?
  - ▶ How much court experience do they have; are there any reported judgments?
  - ▶ Conflicts of interest? (*Thefaut v Johnston* [2017] EWHC 497 (QB))
  - ▶ Balance of C/D/joint work? Are they a gun for hire?

*"His opinion fluctuates to whatever he feels will win the case."*

# Testing the expert

- ▶ First Step: Review the medical records yourself
  - ▶ Are the notes legible?
  - ▶ Are any missing?
  - ▶ Are there internal inconsistencies in the notes (*Shaw v Stead* [2019 EWHC 520 (QB)])



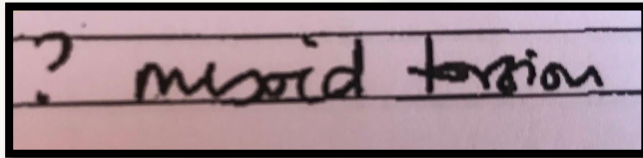
# Testing the expert

- ▶ Second step: Compare the records with what the client has said to you and to the expert(s) (if applicable)
  - ▶ Is there a difference between the client's account and the contemporaneous record?
  - ▶ On what is the expert's opinion resting?
  - ▶ Bear in mind that a court will be cautious before preferring a witness's recollection to the contemporaneous record (*Goodman v Faber Prest Steel* [2013] EWCA 153)



# Testing the expert

- ▶ Third step: Review the report – look for basic problems:
  - ▶ Does the report comply with Part 35 and PD 35?
  - ▶ Has the expert included everything relevant?
  - ▶ Has the expert transcribed any medical records relied upon accurately?



? Misioid torsion

"? Misioid torsion"

- ▶ Has the expert addressed everything raised in the instructions?
- ▶ How readable is the report – layout, structure, grammar, typos, factual errors
- ▶ Is the report excessively long?
- ▶ Has the expert considered guidance from professional bodies and the relevant literature?

# Testing the expert



- ▶ Third step: Review the report – Check for fundamental problems
  - ▶ Has the expert applied the correct standard/legal tests (*Harris v Johnston* ([2016] EWHC 3193 (QB))?)
  - ▶ Do the findings stand up to logical scrutiny?
  - ▶ Has the expert lost objectivity?
  - ▶ Has the expert properly disclosed conflicts of interest?
  - ▶ Has the expert explained how they came to that opinion?
  - ▶ Have they explained why they differ from the other side's opinion (if applicable)?

If possible, these fundamental questions should be tested in conference either by video or in person



# Testing the expert

- ▶ At conference (ideally before joint statements):
  - ▶ Clarify any issues with the report.
  - ▶ Firmly test the logic of the conclusions reached and the basis on which they were reached.
  - ▶ Identify any weaknesses in reasoning in both parties' reports.
  - ▶ Ask what the other party's expert will say and why.
  - ▶ Get them to explain, with reference to literature if possible, why the conclusions reached in the other side's report are wrong.
  - ▶ Confidence levels?
  - ▶ Check that the expert understands the legal tests to be applied.
  - ▶ Confirm that they have had access to all important documents (including the pleadings and any witness statements).
  - ▶ Prepare the expert for joint statements and for the trial.

# Preparing the expert

- ▶ Prepare the expert for joint statements:
  - ▶ Make sure the expert is aware of the key issues in the case.
  - ▶ Ensure the agenda encompasses any weaknesses in reasoning identified in the other party's report.
  - ▶ Encourage the expert to have a proper discussion, reflected in the statement, not simply a cut-and-paste of the key passages of each expert's report.
  - ▶ Make sure that the expert confirms they will read the joint statement before signing it (*Holdsworth v Luton & Dunstable University Hospital* [2016] EWHC 3347 (QB)).

# Preparing the expert

- ▶ Prepare the expert for trial:
  - ▶ The expert should attend to hear the other expert give evidence and if possible the witness evidence on the issue (consider this need when budgeting)
  - ▶ If something new comes out in oral evidence and the expert is not present, ensure that a full note is available to the expert as far as possible in advance of them giving their evidence.
  - ▶ Use your expert to assist with cross-examination of the opposing expert
  - ▶ If necessary, prepare the expert in advance for hot-tubbing (or the possibility of it).



# What if it all goes wrong?

- ▶ If the expert changes their mind pre-trial, first hold a conference or at least put questions to the expert:
  - ▶ Check that the expert has actually changed their mind (rather than signed something they have not read properly)
  - ▶ Explore the background to the change
  - ▶ Understand the reasons for the change
- ▶ Consider an application to switch experts.
- ▶ Note this will only be allowed if enquiries show the expert has stepped outside their expertise or shown themselves to be incompetent (*Stallwood v David* [2007] 1 All ER 206).



# What if it all goes wrong?

- ▶ Consider a claim against the expert:
  - ▶ Generally caselaw has involved defendant hospital trusts suing claimant experts who collapsed in the witness box.
  - ▶ If an expert destroys the case through a late change of heart or at trial, particularly if it becomes clear that their original advice was based on unsupportable reasoning, it may be worth considering a claim for any legal or court fees paid as a result of their advice.
  - ▶ The Court will consider:
    - ▶ Whether the correct position should have been obvious to the expert from the start (or early on) and at various stages.
    - ▶ Whether the expert was attempting to assist the court or showed flagrant disregard for the duties of an expert to the Court.
    - ▶ Was there a causal link between this and the loss?

# Questions?





**Thank You**