EXPERTS – PERILS AND PITFALLS

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This talk/paper is designed to give practical guidance and some useful pointers when it comes to choosing, obtaining permission for, and then managing your expert evidence. We will be using some recent cases to illustrate where things can go wrong and how to avoid that happening in your case.

We will be covering:

- Choosing the right expert and instructing them
- Getting permission to rely on expert evidence
- Changing experts
- Conduct (not just of experts)

1. Choosing the right expert and instructing them

1.1. It goes without saying that picking the right expert for your case is of paramount importance. If you fail to choose wisely this may come back to haunt you later on in the case. Some of this may seem obvious but we see too many cases where even the apparently obvious has been overlooked.

- Check your expert's CV
    - Are they in clinical practice? In what type of setting? If they are retired – how long since they saw a patient in clinic?
    - How many times have they appeared in Court?
    - If they profess to have a sub-specialism – have they given conferences, written papers on that sub-specialism and how long ago?
    - Are they up to date?
- Which specialism?
    - Analyse your case – do you need a specialist opinion or will general orthopaedic suffice?
    - Know the difference between psychiatry and psychology and think about which will be more beneficial to your case.
    - If in doubt, ask the experts.
- Ask your expert whether they are comfortable dealing with an issue before you send formal instructions
- Think about the order in which you will instruct your experts
    - Will the psychiatrist need to see the orthopaedic opinion before finalising his/her evidence?
    - If you suspect a TBI – do you get the neurology report first?
- Imagine drafting a witness statement in support of a contested application for permission – does the choice of expert and order in which you have obtained them appear justified and reasonable?
- How long until trial? Bar the unforeseeable, is the expert still going to be available to assist (retirement etc.)?

- Don't just go for the 'usual suspects'
    - In a difficult or nuanced case consider going for an expert who is generally considered more favourable to the 'other side'
    - A fresh perspective could make all the difference as to the other sides' evaluation of their case.

1.2. If an illustration is needed of the importance of making sure your expert is competent not just in the chosen field of expertise but in the test that the Court will apply in your particular type of litigation, look no further than the cases of ***ZZZ v Yeovil District Hospital NHS Foundation Trust*** [2019] EWHC 1642 (QB) and ***Thimmaya v Lancashire NHS Foundation Trust*** [2020] 1 WLUK 4373. Mr Jamil, a surgeon instructed by C in a clinical negligence matter was found at trial in ZZZ to have made fundamental errors in his reports on crucial issues and to have failed to grasp the necessary legal test to be applied. He was pursued (successfully) for wasted costs by the NHS trust in Thimmaya as a result of the Claimant having to abandon her case at trial due to his performance under cross examination (including his failure to be able to articulate correctly the Bolam test). He was found to have been unfit to give evidence due to mental health difficulties. He had continued to accept medico-legal work despite being signed off from his clinical practice.

1.3. If you are uncertain about which medical experts to engage or in what order then seek early advice from Counsel. We can provide a realistic and appraisal of the prospects of permission being given and/or about the proposed expert. We will have seen many of the experts at trial, in conference or giving lectures and will be able to give you an honest appraisal.

1.4. Finally on this heading, a word about instructing experts. It is worth reminding yourself of the basics from time to time.

- The expert is expected to set out the substance of his/her instructions in the report – CPR35.10(3)
- The other side can apply to see the instructions if there are grounds to believe the statement of instruction is inaccurate or incomplete CPR35.10(4)
- All experts of like discipline need to have access to the same material CPR35.9 and also see the case of ***Dana UK Axle Ltd v Freudenberg FST GmbH*** [2021] EWHC 1413 (TCC)

2. <u>Getting Permission to rely on expert evidence</u>

2.1. It is often wrongly assumed by parties that the granting of permission to rely on expert evidence is a foregone conclusion where that report has already been obtained, or where there is no opposition from the other side. Yes, some Court's will often 'rubber stamp' the parties' directions regarding medical evidence and it may be that the test under CPR 35.1 is easier to satisfy once the report is before the Court, but never assume that to be the case.

2.2. Consider supporting your application for a particular discipline with evidence. If you know a particular area of expertise is likely to meet with significant resistance from the other side, consider submitting a witness statement in support. This is particularly im-

portant if e.g. the Claimant has reported matters to you that it is considered merit further investigation but are not contained within e.g. an existing medical report.

2.3. Address the test. The CPR refers to a 'duty to restrict expert evidence,' and parties should approach expert evidence through that lens.

"Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings."

Ask yourself the following:

- What do you want the expert to address?
- Why is that important?
- What impact will it have on the Court's determination of that issue?
- How will it assist the trial judge or promote settlement?
- If the evidence will make a financial difference in the case – is that proportionate to what it will cost to obtain the evidence?

- Don't forget CPR 35.4:

"(1) No party may call an expert or put in evidence an expert's report without the court's permission.

(2) When parties apply for permission they must provide an estimate of the costs of the proposed expert evidence and identify –

(a) the field in which expert evidence is required and the issues which the expert evidence will address; and

(b) where practicable, the name of the proposed expert.

(3) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2). The order granting permission may specify the issues which the expert evidence should address."

2.4. Some particular issues that commonly arise with obtaining expert evidence:

- Liability evidence
- Life expectancy evidence
- Employment expert evidence

<u>Liability Evidence</u>

This broadly encompasses a number of different types of experts and issues but most commonly: accident reconstruction evidence, evidence of e.g. vibration or dust exposure, compliance with regulations/accepted practice in a particular area, engineering evidence as to whether and how particular damage occurred.

Think carefully about what exactly the evidence will go to. The Court will be reluctant to sanction any expert evidence that appears to be trying to usurp the Court's function in determining breach of duty. Sometimes the arena in which the accident occurred is so obscure that a court would stand little change of understanding the technicalities of the particular field without the assistance of an expert and any judge will accept gladly

the assistance of someone to explain it to them. If it's just a question of determining whether a system of work was reasonably safe or whether a driver ought to have seen a pedestrian in time to stop then you may face an uphill battle to get the Court to agree that expert evidence is reasonably required.

Life expectancy evidence

This is most commonly sought by defendants but the Courts can be reluctant to admit such evidence and it is worth looking carefully at the guidance given by Master Davison in ***Dodds v Arif & Aviva Insurance Ltd.*** [2019] EWHC 1512 (QB). In a judgment cited with approval since, Master Davison said:

To summarise, the authorities on this topic seem to me to support the following propositions:

i) Where the claimant's injury has not itself impacted upon life expectancy, permission for this category of evidence will not be given unless the condition in paragraph 5 of the Explanatory Notes (to the Ogden tables) is satisfied, namely that there is "clear evidence … to support the view that the individual is atypical and will enjoy longer or shorter expectation of life".

ii) Where the injury has impacted on life expectancy, or where the condition in paragraph 5 of the Explanatory Notes is satisfied, the "normal or primary route" for life expectancy evidence is the clinical experts.

iii) The methodology which the experts adopt to assess the claimant's life expectancy is a matter for them.

iv) Permission for "bespoke" life expectancy evidence from an expert in that field will not ordinarily be given unless the clinical experts cannot offer an opinion at all, or for reason state that they require specific input from a life expectancy expert, or where they deploy, or wish to deploy statistical material, but disagree on the correct approach to it.

Employment evidence

Crucial here is what the expert can bring to the table. Is it simply a trawl though some job adverts and some generalised statistics? Does the Claimant have an unusual or complicated potential career path that the court will need assistance with? Is the Claimant injured in such a way that complete retraining in an entirely different field is required and the Court would be assisted by information on the typical progression in that career?

Think carefully about your case and what the expert will assist with. Would you be better off with a witness statement from a career comparator in the same organisation? Will the ASHE tables suffice?

2.5. Timing of applications can be crucial. The effect on the timetable and the possibility of a trial being vacated will be weighed against the likely utility of the evidence. In ***Taleb v Imperial College Healthcare NHS Trust [2020] EWHC 1147 (QB)*** Mr Justice Stewart refused an application for permission for a genetics expert where there was no more than a possibility that the evidence might be relevant and permission would lead

to almost inevitable vacation of the trial.

It is also worth noting the practical matters highlighted by Stewart J:

"if an application which may well cause the vacation of a trial date is made then it should go to QB judges listing and it should be made clear just how urgent the matter is, and if, after an initial email and/or telephone call, there is not some response, then it should be asked to be referred to myself as judge in charge of the list."

2.6. ***Swansea v City AFC*** [2021] EWHC 1359 (QB) and ***TVZ v Manchester City Football Club Ltd*** [2021] EWHC 1179 (QB) are worth a look at in the sports arena, as the issues in those cases included what was appropriate 'expert' evidence in the context of sports agents and future loss of earnings for footballers.

3. **Changing Experts/Expert Shopping**

3.1. There may be very good reason why you need to change an expert, your first expert may have been taken ill or retired and in these cases whilst the other side may grumble and there may be issues of costs if you ought to have known the expert was about to retire, ultimately you will likely get permission to rely on an alternative expert if evidence in that discipline is crucial to the determination of the case and you don't upset a trial date.

3.2. If you simply don't like your expert then in order to get permission to change expert you will need to disclose the reports you hold. Tipples J set out the relevant principles in ***Burke v Imperial College Healthcare NHS Trust*** [2019] EWHC 3719 (QB) which are essentially these:

- Per *Coyne v Morgan* (2016) HHJ David Grant, the court has a wide and general power to exercise its discretion whether to impose terms when granting a party permission to adduce expert opinion;
- Per *Edwards-Tubb v JD Weatherspoon PLC* [2011] EWCA Civ 136 that a power to impose a condition of disclosure of an earlier report is available where the change of expert occurs pre-issue as it is when it occurs post-issue. It is a matter of discretion which should usually be exercised where the first expert reported after the parties engaged with each other in the process of the claim;
- Per *Vilca v Xstrata Ltd* [2017] EWHC 1582 (QB), the object of imposing a condition that reports of previous experts should be disclosed is to prevent expert shopping and to ensure that full information is available. If there is a hint of undesirable expert shopping, or that significant relevant material is being withheld, the imposition of the condition will be the usual order.

3.3. Tipples J then went on to give the following guidance:

- In line with *Coyne*, the court's discretion as to whether to impose a term when giving permission to a party to adduce expert opinion evidence arises irrespective of the occurrence of expert shopping;
- When the court chooses not to impose a condition giving permission to adduce expert evidence, the court must understand why it has departed from the general rule and the factual basis for that. Without a full expla-

nation from the applicant making clear there is no expert shopping, there will always be a suggestion of expert shopping which is itself sufficient to give rise to the imposition of a condition requiring disclosure of the previous expert's report;

- Any application to change experts should be notified to the other party in advance, so that party has the requisite opportunity to consider the proposed application and respond appropriately;
- Where a party does not put the other side on notice and seeks to make an application for the first time at a CMC, that party is under a duty of full and frank disclosure. For the purposes of this appeal, that duty extended to all matters necessary to show the court that there was no hint of expert shopping, nor withholding of relevant information.

3.4. Cotter J in ***Fernandez v Iceland Foods Limited*** [2021] EWHC 3723 (QB) late last year upheld a decision by HHJ Hellman to refuse the Claimant permission to change his expert following a complete volte face by the expert crucial to his case on causation. HHJ Hellman had concluded that the change in opinion was properly reasoned and justified. The result was the Claimant's case would inevitably fail but HHJ Hellman had properly analysed all the factors relevant to his exercise of discretion. CPR 35 PD paras 2.5 and 9.8 should be borne in mind, the expert's primary duty is to the Court (CPR 35.3) and the rules envisage that any expert can change their opinion; there is no provision for the instructing party to instruct a new expert should that occur.

3.5. Essentially if you want to change an expert and you are genuinely not trying to expert shop then be up front, make early applications and be prepared to draft a well reasoned witness statement identifying the issue with the expert, the importance of expert evidence on that point to the issues in the case, and how you can still have a sensible time table and then be prepared to suck up any costs consequences.

4. <u>Conduct – and not just of the expert</u>

4.1. The path to trial is littered with discredited or incredible experts. Equally, in the attempt to keep a client's case on track there can be a temptation to try to 'shape' the expert evidence as much as possible. A number of experts and their instructing solicitor have come unstuck in recent cases and the Courts do not appear to shy away from expressing stark criticism of those who overstep the mark.

4.2. Again, going back to basics:

> It is the duty of experts to help the court on matters within their expertise. This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid (CPR 35.3)
>
> The Practice Direction adds:
>
> - Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
> - Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.

- Experts should consider all material facts, including those which might detract from their opinions.
- Experts should make it clear –
    - when a question or issue falls outside their expertise; and
    - when they are not able to reach a definite opinion, for example because they have insufficient information.
- If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

4.3. When it comes to joint statements of the experts the following guidance from the TCC Guide needs to be born in mind:

Whilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement. Legal advisors should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all experts involved in the joint statement.

Together with CPR 35PD9.7:

Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement.

4.4. Andrews & Ors v Kronospan Ltd [2022] EWHC 479 (QB) provides a salutary lesson for those who overstep the mark in trying to shape an expert's view in the joint statement. Master Fontaine revoked the Claimant's permission to rely on an expert in dust modelling and analysis in this piece of group litigation. The Claimant's solicitors had to accept that:

- it was inappropriate for the Claimants' solicitors to have provided comment solely to their expert and that he should not have responded to those comments;
- it is wrong for an expert to solicit input from their instructing solicitors during the process of drawing up a joint statement, just as it is wrong for those solicitors to provide that input;
- there was a serious transgression of the rules by the Claimants, by reference to the terminology in the case of BDW Trading Ltd v Integral Geotechnique (Wales) Ltd [2018] EWHC 1915(TCC);
- the court has power to revoke permission to rely on an expert

The Claimant's solicitors were left with the argument that it would be wholly disproportionate to revoke permission for an expert relied upon by hundreds of Claimants and who had been involved in the case for 3 years. To replace him would cause huge expense and delay. On the evidence in this case it was clear to the Master that the expert regarded himself as an advocate for the Claimants. The comments exchanged made it clear that he was looking for ways he could support the Claimants' case. He concluded

that the serious transgressions by the Claimants' solicitors and the expert were such that the court had no confidence in Dr Gibson's ability to act in accordance with his obligations as an expert witness.

4.5. A case referred to in Andrews above was ***Dana UK Axle Ltd v Freudenberg FST GmbH*** [2021] EWHC 1413 (TCC), in that case the Claimant and the Court discovered for the first time at trial that the Defendants experts had engaged in site visits that they did not inform their opposite numbers about and that there were more site visits than were identified in their reports. This was against the backdrop of unless orders relating to disclosure in relation to the site visits that were known about and in relation to which relief was sought. The experts had therefore not had access to the same material. Further the defendant appeared to have directly influenced the expert reports such that there was justification for the suggestion that *'the defendant had interposed itself in the Experts' reports to such a degree that they cannot confidently be said to be the result of the Experts' independent analysis.'* Mrs Justice Joanna Smith found that the experts' breaches of Part 35, 35PD and the CJC Guidance were so serious that they would be sufficient in themselves, without the breach of the conditions imposed by the previous order, to justify the refusal of the court to allow the defendant to rely on its technical experts.

4.6. On a slightly different but equally disastrous note, the Courts do not look favourably on experts that step outside of their expertise or come across as advancing a particular party's case. In ***Beattie Passive Norse Ltd v Canham Consulting Ltd*** [2021] EWHC 1116 (TCC) Fraser J found the Claimant's structural engineer to have constantly embellished his criticisms of the defendant, to have used extreme (described as 'descending into hysteria' by D's Counsel), to have constantly introduced new concepts or ideas and to have relied on material in cross examination that was wholly irrelevant to the issue in this case, changed agreement with and reliance upon evidence annexed to his report, gave evidence on matters outside his expertise and 'constantly sought to advance the claimants' case at the expense of expert objectivity.' That was not the end of the matter though as at the costs hearing (EWHC 1414) the defendant sought indemnity costs, relying in part on the fact that case was advanced on the basis of the expert evidence and that the criticism of the expert in the judgment was reason enough to award indemnity costs. Whilst that was ultimately not a successful argument in the circumstances of that case, Fraser J did sound this word of warning:

Parties to litigation who rely upon expert evidence that fails to comply with the rules should not be encouraged by my finding that in this case the approach of the claimants' expert was not sufficient, alone and of itself, to justify an award of indemnity costs.

4.7. On slightly more familiar subject matter to personal injury practitioners Dr Miller and Dr Torrens did not come off well in the case of ***Palmer v Mantas & Liverpool Victoria Insurance*** [2022] EWHC 90 (QB). The Claimant in this case served a schedule of loss totalling £2.2million for the consequences of a TBI and chronic pain suffered in an RTA. The counter schedule was for just over £5,000. Unsurprisingly the allegation was one of fundamental dishonesty with a back up challenge to causation. Anthony

Metzer QC sitting as Deputy High Court Judge awarded the Claimant £1.6million. For those not familiar Dr Torrens is a Neuropsychologist and Dr Miller a Consultant in Pain Management.

4.8. The Judge praised six of the experts giving live evidence, describing their assistance as of 'a very high standard' and stating that where appropriate 'concessions were made by those experts…in accordance with their duties.' He went to level criticism at the remaining two. Dr Torrens came off slightly better. He described her as 'a helpful witness who gave genuine and honest answers and who…felt sympathetic to the claimant.' Her report however was 'littered with judgmental and scathing comments' these appear to have included 'self-pitying' and 'histrionic' and also raising the possibility of social services assessment for the safeguarding of the claimant's unborn child. The Judge found that her language went beyond that appropriate for an expert to employ and was suggestive of unconscious bias. Dr Torrens was over-reliant on a small detail as being indicative of dishonesty.

4.9. Dr Miller did not get off so lightly, so much so that Counsel for D accepted at the conclusion of the trial that he could place no weight on his evidence and observed that adverse criticism of him could have 'career-damaging' effect. Essentially, Dr Miller accepted that he did not believe the Claimant from the outset and that he had been over-zealous in his use of language. He had made errors and had unfairly criticised another expert. The totality of the judgment is worth reading but the ultimate conclusion was that the Judge was 'troubled by the extend of departure by Dr Miller from his Part 35 duty.'

4.10. The take away point from this case is to make sure that your expert evidence is not extreme or unbalanced and does not appear to be hostile or indeed overly sympathetic. There is a temptation on both sides to go for the hard line expert, particularly in cases where there may be exaggeration or downright dishonesty. There is however a lot to be gained by having experts who present a balanced view of a Claimant which can then be shaken/reinforced by later revelations in the evidence rather than an expert who is hostile or overly sympathetic from the outset. This is not least because the Courts appear to be moving towards a more robust approach to experts who do not put their Part 35 duties are the forefront of their evidence. The Courts have long been resistant to trial by experts and a dim view is taken of those who appear to be merely the advocates of the party who instruct them.

4.11. One expert who faced the very significant consequences of not adhering to even the most basic of obligations to the Court was Dr Zafar. In ***LVI v Zafar*** [2019] EWCA Civ 392 the insurer applied to have the Claimant's expert committed for contempt of court. Mr Zafar was found to have changed his report when there was no basis for doing so at the behest of his instructing solicitor and then found to have lied about it. The only reason the change was known about was because a hapless paralegal included the original in a court bundle. Mr Zafar then signed a witness statement to say that the report had been changed without his knowledge. He later changed that evidence in a subsequent statement to say that the amended report was in fact the correct one and his previous statement was made in error. He was found to have been in obvious contempt of Court and sentenced to six months imprisonment suspended for two years. This was

deemed unduly lenient by the Court of Appeal however as the Court gave guidance that was not available to the sentencing judge the court declined to alter the sentence. It is to be noted that the claimant's solicitor in this case did not exactly cover himself in glory in the way he dealt with the matter, he was found to have lied by the judge in relation to a letter he purported to have sent to the expert. The correspondence disclosed also showed that the solicitor had attempted to provide the expert with what he thought the expert's evidence should be.

4.12. Finally, there may be consequences where the litigant fails to attend appointments with another parties' experts (see unless order with a strike out sanction in ***Bott v Barnick*** *[2019] EWHC 3704 (QB)*). The Court will weigh up the issues in the case and CPR part 1 falls to be considered. In ***Kasabaqi v Westway Community Transport Ltd*** [2021] EWHC 3614 (QB)**,** the claimant missed an appointment with one expert and got into an argument with the other expert who had left and declined to act as an expert. A further rehabilitation expert refused instructions once he was informed that the claimant had been hostile towards some of the experts. The Court declined to sanction the claimant: he was a young man who had lost his leg and it was not for the Court to determine blame for the argument between the expert and the claimant. The Claimant's conduct was not an abuse of process and the Court was not persuaded that the defendant was unable to have a fair trial. CPR 1.3 prevailed and applied to both parties. The Defendant had admitted liability and there were steps that the Defendant could have been taken to overcome difficulties with obtaining the expert evidence such as chaperones etc.

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