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# Expert Evidence

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# THE BASICS

When can it be used?

Specific examples

Instructing experts



# When can it be used?

It's an exception to the general rule against admissibility of opinion evidence

It's permitted by S3 of the Evidence Act 1972

Technical, scientific or matters of specialist practice or procedure on specific matters of dispute

NOT to provide the expert's view on the credibility or reliability of a witness.

That is inadmissible.



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# Life Expectancy





## Specific examples: PI and clin neg

Life expectancy – statistical evidence?

Admissible in principle but ordinarily starting point is clinical judgment of expert witnesses : *Royal Victoria v B a child* (Jay J)

Medical experts usually well able to interpret and apply '*quite complex statistical evidence which can be admitted as hearsay*'



## **Life expectancy - statistical evidence – Master Davison *Dodds v Arif***

- Where the injury itself has not impacted on life expectancy, permission will not be given unless the condition in para 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.
- Where the injury has impacted on life expectancy, or the condition in para 5 of the Explanatory notes is satisfied the ‘normal or primary route’ for life expectancy evidence is the clinical experts.



## **Life expectancy - statistical evidence – Master Davison *Dodds v Arif***

- The methodology which the experts adopt to assess the claimant's life expectancy is a matter for them.
- Permission for bespoke evidence from an expert in life expectancy 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.



# ***Chaplin v Pistol, Allianz Insurance Plc***

Court confirmed the position in *Dodds v Arif*:

Bespoke evidence on life expectancy should be confined to cases where the clinical experts cannot offer an opinion at all, or where they state that they require specific input from a life expectancy expert, or where they deploy/wish to deploy statistical material, but disagree on the correct approach to it.



# Pain evidence and ergonomics

The expert evidence must be reasonably necessary to determine the issues – tangential evidence not permitted

Pain evidence not permitted where issue was clinical negligence relating to treatment of C who had spinal injury having fallen off horse (she suggested it would be useful to explain the ‘reliability’ of her account of pain and causation)  
*Daly v Milton Keynes Hospital NHS Foundation Trust*

A judge did not need an expert to tell him whether instructions for fitting a car seat were intelligible. *Team Tex SAS v Wang*



# Instructing experts – GUIDANCE

You *and your experts* need to be familiar with the CIVIL JUSTICE COUNCIL'S GUIDANCE FOR THE INSTRUCTION OF EXPERTS IN CIVIL CLAIMS as well as CPR 35 and PD35

For you :

Is the evidence reasonably necessary?

Clear instructions must be given (cf para 20)

For them :

Duty to respond on acceptance of instructions, re conflict, lack clarity, or lack of material relevant to their opinion and terms for payment.



# DUTIES AND RESPONSIBILITIES OF EXPERTS

Practice Direction 35

Content of the report

Scope of expert opinion

Risk of cost sanctions

Substance of all material instructions



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# CPR 35 and PD 35

**CAUTION!**

MAKE SURE YOU  
READ THE RULES





# DUTIES AND RESPONSIBILITIES OF EXPERTS

## READ PD35!!!

- Experts of like discipline should have access to the same material
- It is not for an **independent** expert to indicate which version of the facts they prefer.
- Experts should **not take a partisan stance** in relation to interim applications. For the process of experts meeting and producing an agreement (where possible) is governed by the CPR including the overriding objective, and should be **constructive and cooperative**.



# DUTIES AND RESPONSIBILITIES OF EXPERTS

## READ PD35!!!

- The **parties and experts must save expense** and approach the case proportionately.
- Should material emerge close to trial such that an expert considers that **further analysis consideration or testing** is required, his or her opposite number should be **notified as soon as possible**.
- Only in **exceptional** circumstances rendering it unavoidable should an expert **produce a further report** during a trial that takes the other side by surprise.

# Content of the report

PD35 mandates the formalities

Content governed by instructions + obligations to court + directions

Maintain professional objectivity + impartiality

Addressed to the court – ensure expert familiar with rules

Model forms of reports : cf Academy of experts and Expert Witness Institute

Understand duty, have complied and will comply, aware of and have complied with PD35 + Statement of truth



# Scope of expert opinion

Whole of relevant subject matter BUT confined to matters material to the disputes and lie within their expertise [paras 12 - 13 Guidance].

Do not select only evidence which supports them *Royal & Sun Alliance*

Set out all material facts, literature or material on which they've relied

Inform 'without delay' of any material change.



# **Ikarian Reefer (1)**

Impartial

Independent assistance to the court

Experts must never assume the role of the advocate

State facts and assumptions

Make it clear if an issue falls outside their expertise

If insufficient data is available



## **Ikarian Reefer (2)**

Any qualifications about the completeness and truthfulness of the report

Must be no delay in communicating change of opinion

If the report refers to photographs, survey reports or similar documents, these must be provided to opposite party at the same time as the report



# Importance of independence

## *Williams v Jervis*

119. [...]Although Dr Gross has dealt with the claimant's case voluminously there are clear indications of a lack of thoroughness and a failure to spend adequate time in properly analysing the case. It may be that his heavy workload and high documentary output has prevented this. It is equally likely in my judgment that he approached the case with a set view of the claimant and looked at the claimant and her claimed symptomology through the prism of his own disbelief. From that unsatisfactory standpoint he unfortunately lost the focus of an expert witness and sought to argue a case. I am driven to the conclusion that I am unable to place reliance on Dr Gross's evidence in this case.



# Importance of independence

## *Ruffell v Lovatt*

Dr Jenner was a pain expert who was “*dismissive of those who did not agree with his rigidly held opinions*”.

His evidence was “*combative*” and he repeatedly acted as the claimant’s advocate.

Ultimately, the court rejected his evidence.



# Substance of all material instructions

55. The mandatory statement of the substance of all material instructions should not be incomplete or otherwise tend to mislead. The imperative is transparency. The term “instructions” includes all material that solicitors send to experts. These should be listed, with dates, in the report or an appendix. **The omission from the statement of ‘off-the-record’ oral instructions is not permitted.** Courts may allow cross-examination about the instructions if there are reasonable grounds to consider that the statement may be inaccurate or incomplete.

# Costs sanctions for experts





# Risk of cost sanctions

*Experts should be aware that any failure to comply with the rules or court order, or any excessive delay for which they are responsible, may result in the parties who instructed them being penalised in costs, or debarred from relying upon the expert evidence.’ (para 15, and 89-92 Guidance)*

## *Thimmaya v Lancashire NHS Trust & Mr Jamil*

Expert was subject to wasted costs order of £89,000 and C had to discontinue her case. Expert ‘*wholly unable to articulate the test applied in determining breach of duty in a clin neg claim.*’



# **Solicitor to check prior to service:**

61. Before filing and serving an expert's report solicitors must check that any witness statements and other experts' reports relied upon by the expert are the final served versions.

## **Amendments [after service and receipt of more material/other reports]**

65. Experts should not be asked to amend, expand or alter any parts of reports in a manner which distorts their true opinion, but may be invited to do so to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues. Although experts should generally follow the recommendations of solicitors with regard to the form of reports, they should form their own independent views on the opinions and contents of their reports and not include any suggestions that do not accord with their views.



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# JOINT REPORTS

Purpose

Agendas

BDW Trading Ltd v Integral Geotechnique Ltd [2018]

Expert change of opinion in joint reports



## Joint reports

PURPOSE : CPR 35.12 ‘where possible to reach an agreed opinion..’ and to identify what not agreed and any action to resolve any of the outstanding issues.

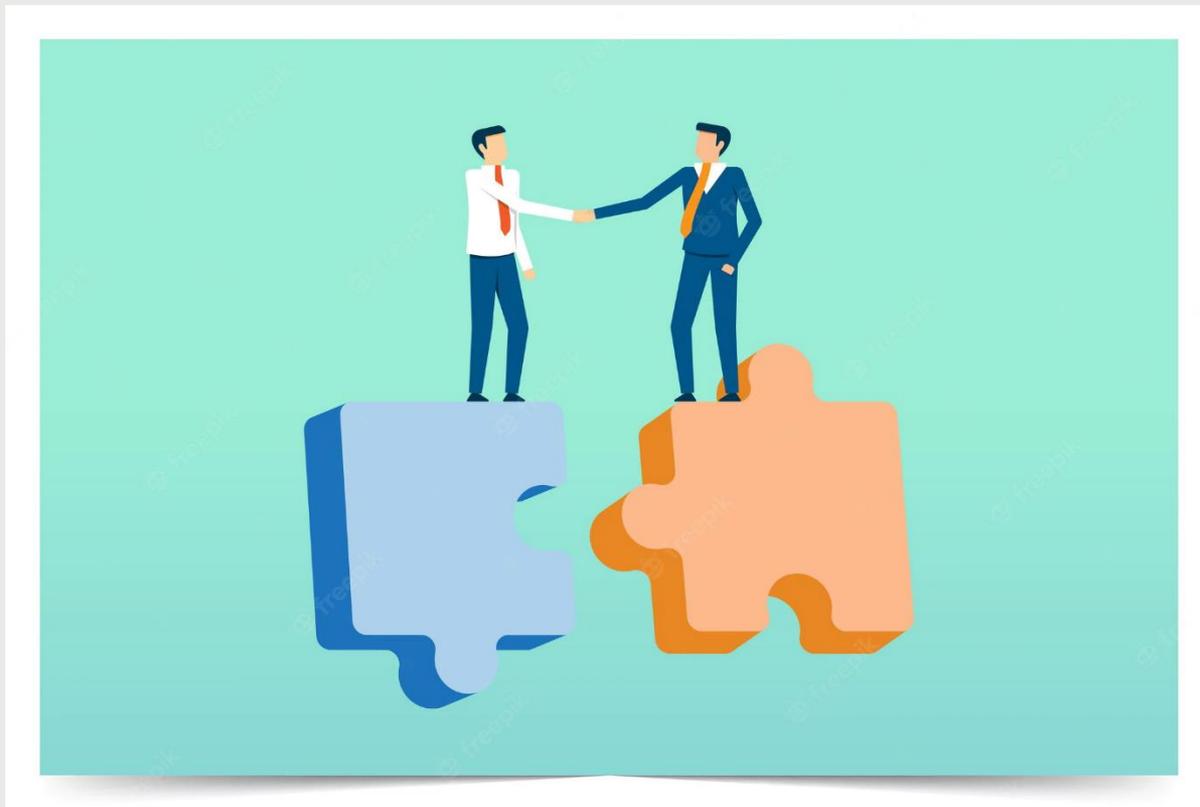
**HOWEVER : They are not to seek to settle the proceedings [Guidance para 71]**

Lawyers don't attend (possible theoretically to have an independent legal chair)



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# Cooperate on agenda drafting





# Agendas

To indicate what has been agreed and summarise concisely matters in dispute [para 76 Guidance]

Avoid separate agendas - may result in adverse costs

*The standard direction makes it clear that the solicitors are required to do their best to agree a single agenda. In the vast majority of cases, any disagreement ought to be capable of resolution through a bit of give and take. It may be appropriate to insert some additional questions into the draft at the defendant's request. It certainly should not become routine to provide two versions which, as here, travel over much of the same ground. [Yip J in Welsh v Walsall]*



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# No messing around!





# No messing around!

Those instructing experts **must not instruct experts to avoid reaching agreement** (or to defer doing so) on any matter within the experts' competence. Experts are not permitted to accept such instructions'. [para 77 Guidance]

Experts : to approach joint meetings in a **constructive manner**.

Only once joint statement completed that necessity of short supplemental statements can be explored.

**Sanction** could be withdrawal of permission *Mayr v CMS Cameron McKenna*

**Not for parties to tell experts what views allowed to hold**



# BDW Trading Ltd v Integral Geogtechnique Ltd [2018]

## TCC guide

*whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement.*

*Legal advisers should **only invite** 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.*



## PD 35.9

**The role of the legal representatives in expert discussions is limited to agreeing an agenda** where necessary and whilst they may attend discussions if ordered or agreed, **they must not intervene and may only answer questions or advise on the law.**

Experts do not require the authority of the parties to sign a statement, which should be done at the conclusion of the discussion, or as soon thereafter as practicable and in any event within 7 days.



# What went wrong?

In evidence Dr Tonks accepted that he had **sent the first draft of the joint statement to the Defendant's solicitors** for their comments and **having received feedback made some changes to the draft.**

**quite inappropriate** and **'a serious transgression'**

**Dr genuinely unaware that his conduct was inappropriate**

Important that experts and all legal advisers understand what is and is not permissible.



# The correct approach

- The expert may provide a copy of a draft statement to the solicitors (otherwise the concerns referred to below might not come to light).
- The expert should not ask the solicitors for their general comments or suggestions on the content of the draft statement;
- **The solicitors should not make any comments or suggestions save to both experts in circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of the joint statement** e.g. where the experts' views may have been infected by some material misunderstanding of law or fact. This will provide the experts with the opportunity to consider the point.



# The correct approach

This process needs to be done:

*“in the open so that everyone, including the trial judge if the case proceeds to trial can see what has happened and if appropriate firmly discourage any attempt by a party dissatisfied with the content of the joint statement to seek to re-open the discussion by these means.”*



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# Transparency is key





## **Expert change of opinion in joint report – what can I do? Principles applicable:**

*Cosgrove v Pattinson* [2000] 11 WLUK: (re shift in SJE report):

1. Nature of the issues
2. No. of issues between the parties
3. The reason the new expert is wanted
4. The amount /issues at stake and their importance
5. The effect of permission on conduct of trial
6. Delay if any in making application
7. Delay in occasioned by new expert coming to case
8. Any other special features of the case
9. Overall justice



# NO EXPERT SHOPPING!

*Beck v MOD* [2005] 1 WLR 2206

## EXPERT SUBSTITUTION

Fact of change of opinion insufficient to obtain alternative evidence

But per *Smallwood v David* [2007] 1 All ER 206

*‘Where there is good reason to suppose that the applicant’s first expert has agreed with the expert instructed by the other side or has modified his opinion for reasons which cannot properly or fairly support his revised opinion such as those mentioned in the White Book’... permission may be granted*



# SMALLWOOD V DAVID

Note from White Book:

But in practice it could be **very difficult** for a party dissatisfied with an agreement reached at a experts' discussion to persuade the Court that this agreement should in effect be set aside unless the party's expert **had clearly stepped outside his expertise or brief or otherwise had shown himself to be incompetent**



# Expert change of opinion in joint report: unsuccessful permission applications

*Guntrip v Cheney Coaches Ltd* [2012] EWCA

DJ's decision to deny 2<sup>nd</sup> orthopaedic expert on bus driving causing knee problem was within his discretion, it was an old claim, significant delay and costs would be incurred (case had been adjourned x 2 already), the original opinion had been tentative so this wasn't a huge shift of opinion. The CJ disagreed with the DJ partly because the shift was fatal to C's case C.A. said

*'It is part of justice that unfounded claims should fail just as much as meritorious claims should succeed.'*

So the fact it was fatal to C's case was not determinative.



# Expert change of opinion in joint report: unsuccessful permission applications

*Fernandez v Iceland Foods Limited [2021]*

*EWHC*

Appeal against CJ decision to deny permission for fresh expert in ophthalmology after 1<sup>st</sup> expert shifted his view from being on balance supportive of repetitive lifting resulting in a subretinal bleed in C who suffered diabetic retinopathy. After sight of further evidence including D's report he said it was 50/50 as to cause, spontaneous bleed also a v rare event. C's 2<sup>nd</sup> expert had not fully reported, and said the fact that C had lain down after work could have allowed the blood to spread but that if C had proliferative diabetic retinopathy the bleed would have happened anyway within a short period of time.



## ***Fernandez v Iceland Foods Limited [2021]***

Cotter J : *‘clearly sound foundations for his altered view. He had given very careful thought to his changed opinion.’* [and had received further evidence].

Note : attempt by C to rely on C.A. decision in *Edwards-Tubb v JD Wetherspoon* failed. That case concerned *the terms on which substitution could be granted* rather than whether substitution should be granted. Cf the dicta of Hughes LJ para 30 *‘.. There may be perfectly good reasons for a party to wish to instruct a second expert....reasons may not always be that the report.. Is disappointingly favourable to the other side.... It will often.. Perhaps normally, be proper to allow a party the option, at his own expense, of seeing a second opinion...not usually be right simply to deny him permission to rely on expert B and thus force him to rely on expert A in whom he has, for whatever reason, lost confidence.*



# CONCLUSIONS : EXPERT EVIDENCE

Read the Guidance from the Civil Justice Council (both lawyers and experts).

Ensure your experts have read and digested it.

The ideal opportunity for debate, toing and froing and distillation of expert opinion is pre-service.

Once you have served or intend to serve the report then the Guidance comes into play



# CONCLUSIONS : EXPERT EVIDENCE

Once you seek to rely on the report / proceedings are issued : beware the 'off the record' instructions.

Independence of the expert must be maintained and demonstrably so.

Your role is to identify the issues, including agreeing a sensible agenda, correct any misunderstandings of fact/law and to advise only on the form of the report (not the opinion) and to keep the expert updated as to the timetable and directions from the court.



## CONCLUSIONS : SUBSTITUTION

If you have reservations – flush them out before service if possible or at least before first CMC

If initial report was borderline it will be more challenging

You need to have **good reasons** : had he/she **clearly stepped outside their expertise or brief or otherwise had shown themselves to be incompetent**



## **CONCLUSIONS : SUBSTITUTION**

Evidence of undue influence by other side's expert?

Do other cases reveal a pattern with this expert?

Don't delay

Proportionality to value will be key, but

**Fact that shift is fatal to one side – not determinative**

**This is the application of discretion- difficult to appeal**



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***“Frank! Is it wise to change your horse mid-stream?”***

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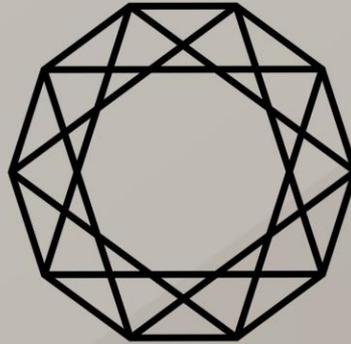


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**Thank you for your attention**

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**Questions?**



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