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Evidence – Witness and Expert: Updates and Practice on Parts 32 and 35

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Update on

CPR Part 35: Expert Evidence

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Part 35: Back to Basics

CPR r.35.1

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

r.35.3(1)

It is the duty of experts to help the court on matters within their expertise.

r.35.4(1)

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

Part 35: Back to Basics

r.35.4(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.

r.35.10(1)

An expert's report must comply with the requirements set out in PD 35.

Experts and those instructing them are expected to have regard to the guidance contained in the Guidance for the Instruction of Experts in Civil Claims 2014.

https://www.judiciary.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf

Part 35: Back to Basics

Practice Direction to Part 35

2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.

2.3 Experts should consider all material facts, including those which might detract from their opinions.

2.4 Experts should make it clear –

(a) when a question or issue falls outside their expertise; and

(b) when they are not able to reach a definite opinion, for example because they have insufficient information.

2.5 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.

Part 35: Back to Basics

PD35 at para 3.2: an expert’s report must –

(6) where there is a range of opinion on the matters dealt with in the report –

(a) summarise the range of opinions; and

(b) give reasons for the expert's own opinion;

Expert Evidence as "an exception"

In ***Wambuca & Ors v Barrick TZ Ltd & Anor* [2023] EWHC 2582** Master Stevens rejected the Claimant's application to rely on an expert. Although the application failed on the first stage of the first requirement, Master Stevens addressed all of the relevant criteria …

In accordance with Part 35, such expert evidence must be (1) admissible and (2) reasonably required to resolve the proceedings.

The Claimants relied upon guidance as to **admissibility** as laid out in ***Kennedy v Cordia (Services)* LLP [2016] 1 WLR 597:**

(i) Whether the proposed evidence **will assist the court** in its task;

(ii) Whether the **witness** has the **necessary knowledge and experience;**

(iii) Whether the witness is **impartial** in his or her presentation and assessment of evidence and;

(iv) Whether there is a **reliable body of knowledge** or experience to underpin the expert's evidence.

Expert Evidence as "an exception"

As to **reasonably required,** the 3 stage test as laid out in ***British Airways PLC v Spencer*** **[2015] EWHC 2477** was relied upon:

i) Is the expert evidence **necessary** to decide an issue rather than **merely helpful**? If yes, it should be allowed.

ii) If it is not necessary, **will it assist the judge in determining an issue**? If it would assist but is not necessary, then the court should consider,

iii) If expert evidence was **reasonably required** to determine the proceedings.

In answering the third question, attention should be paid to the value of the claim and proportionality.

Expert Evidence as "an exception"

Master Stevens first rejected that the expert evidence was **admissible**:

1. It **would not assist** the trial judge:
   - The issue could be determined on factual evidence.
   - The international standards are not so technical so as to need the assistance of an expert to interpret them.
     - *"they are generalised and written in plain non-technical language"*
2. The expert **did not have** necessary knowledge and experience:
   - The proposed expert had experience in "Africa" but this was a *"huge oversimplification"* – this was a "*remote and culturally distinct area where artisanal mining has been prevalent for many years".*
   - He noted the "compelling" argument of the Defendant that the expert would have had the opportunity to tailor his CV. But that this was the expert's first instruction was *not* sufficient to doubt expertise.

Expert Evidence as an “exception”

Although the expert was **not biased**.

- The expert was **not** informed by a reliable body of knowledge:
- As above, the body was too generalist in nature.
- The separate criticism that the expert did not belong to a membership of a professional body *was not* accepted.
- The Claimants therefore failed to convince the judge of 1,2 and 4 of the ***Kennedy*** test.

Expert Evidence as "an exception"

Master Stevens *also* rejected that the expert evidence was **reasonably required**:

1. The evidence was **not necessary**:
   - Emphasis was put on a lack of previous authorities where the judge had found such evidence necessary.

2. The evidence **would not be helpful**:
   - Whilst the concern that the Defendant would have more knowledge than the Claimants on the specific processes, expert evidence could not be relied upon *"to try to complete the evidential matrix upon which the trial judge will make their decisions, when the nature of that expert evidence would be subjective opinion*".

Pointedly, addressing expert evidence in general, he said: "It is useful to remind myself that **expert opinion evidence is an exception** to the general rule that only evidence of fact may be adduced to the court. It therefore follows quite naturally **that the court should not be shy about limiting the occasions when such evidence can be adduced."**

Expert Evidence as “an exception”

Key take-aways from ***Wambuca***:

- Ask yourself, can this just be determined on the facts, without an expert?
- Caution should be taken in assuming that a judge will in fact be assisted in any area of fact that appears to be outside of “normal” experience of a judge.
- Experts should readily tailor CVs and experience to demonstrate necessary knowledge. Specificity over generality.
- Previous authorities where experts were considered necessary are persuasive.
- Experts of subjective opinion may not fill factual voids.

Borrowing Expert Evidence from Previous Authorities

Mr Justice Mellor rejected the attempts by a party in ***Crypto Open Patent Alliance v Wright* [2023] EWHC 2408** to adduce expert evidence from other trials by way of hearsay evidence.

The Claimant sought to rely on such expert evidence for the truth of the matters stated by the experts, and their reasoning. The justification given was that:

1. The expert reports demonstrate that the documents in issue have previously been found to be manipulated. This was intended to be put to the Defendant in cross-examination.
2. The expert reports demonstrate that other skilled forensic document examiners have reached conclusions in line with those of Mr Madden (the Claimant expert). This was essentially to anticipate, and avoid arguments against Mr Madden criticising his methods and conclusions.

Borrowing Expert Evidence from Previous Authorities

The legal principles as laid out in ***Rogers v Hoyle*** **[2015] QB 265** were as follows:

1. A party is **entitled to serve** under a **hearsay notice** a report or other document providing expert or other opinion evidence, and the Court will give appropriate weight to it (applying s.4 of the Civil Evidence Act 1995).

2. The admissibility of pre-existing expert reports served in this way **is not governed by CPR Part 35,** since that Part only governs reports commissioned for the proceedings in question.

3. The Court has a **discretion** under CPR 32.1 **to exclude hearsay evidence**

Carr J in ***Illumina Inc v TD Genetics Ltd*** **[2019] FSR 35** was noted to say that whilst the starting point was that hearsay evidence is admissible, this does not mean that the court is therefore "powerless" to exclude and parties "should not assume that they have carte blanche to rely upon whatever evidence they wish under hearsay notices, which has been adduced in previous proceedings."

Borrowing Expert Evidence from Previous Authorities

Regarding exercising the power to exclude, Carr J in ***Illumina*** said:

- The court will have regard to the overriding objective, in particular, whether the hearsay notice gives rise to disproportionate cost.
- If the evidence is duplicative of evidence that is already being adduced by one of the parties, it may be appropriate to exclude.

Judgment

Mr Justice Mellor **accepted** the Defendant's **application to exclude**, for the following reasons:

1. The Claimant sought to rely on passages which dealt with documents which were the subject of their own expert evidence and was therefore **duplicative.**

2. 7 further expert reports would result in **disproportionate** cost.

3. Their introduction would result in **practical difficulties** which would require further evidence as a consequence.

4. The **trial was already heavy**, which the length of the Claimant expert already noted, with over 30 witnesses. The trial judge would not benefit from further duplicative material.

5. As to the two reasons, they do not hold, because extracts of the reports could be put to the Defendant in **cross-examination,** and evidence of correct methods can be resolved by **instructed experts.**

6. There would be **unfairness** to the Defendant.

7. "Overall, COPA's invitation to allow the hearsay notice to stand, leaving the weight to be given to the 7 additional expert's reports to trial, **ducks the issue.** In all the circumstances of this case, I consider the nettle ought to be grasped now and discarded."

Conclusions

- Hearsay evidence should not be used in order to duplicate or corroborate expert evidence already existing in the case.
- Notices to rely on hearsay should be made only after considering the expert evidence already in existence.
- Consideration should be paid to the impact if such hearsay evidence were adduced, as well as whether the purpose for which it is being sought to be adduced could be met by other methods, such as from the evidence of already instructed experts in the case.

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Experts should stick to what they know…

Mrs Justice Bacon in ***Sycurio Ltd v PCI-Pal PLC & Anor*** **[2023] EWHC 2161** observed that an expert must give evidence within the scope of their expertise – experts cannot teach themselves outside this scope for the purposes of litigation.

This involved the duty of experts under **35.10(1)** "to help the court on matters within their expertise";

As well as **PD35**, which lays out specifically:

2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

2.2 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 stick to what they know…

According to the judge, what does it mean to give evidence "within their expertise"?

1. An expert may do some further research to *enhance* existing knowledge in the field.
2. An expert may also wish to do background reading in relation to a related field *in which they do not process specific expertise* so as to understand the context of the questions which they are asked which *do* fall within their field.
3. An expert **may not** "give evidence on the basis that they have sought to read in and educate themselves in the relevant field for the purposes of the case in question."
4. An expert **does not** become an expert in a field where they have acquired the knowledge over the course of the case itself.

Experts should stick to what they know…

Mrs Justice Bacon said:

"*Nor should an expert give evidence on a subject which falls outside their expertise, but which they consider they understand "well enough" to express a view on the matter. An expert is not instructed for court proceedings on the basis that they believe that they have "sufficient" grasp of the matter to express a view, or are able to teach themselves what they need to know in the course of preparing their evidence. They are instructed on the basis that they are a* ***genuine expert*** *in* ***the relevant field,*** *whose opinions* ***may be relied upon and given weight by the court."***

She gave particular warning about questions to experts:

" *it must not lead to an outcome where the expert strays into giving evidence on matters falling outside their expertise, on the basis that they have been asked questions by their solicitors which they have endeavoured to answer"*

Experts should stick to what they know…

The Claimant's expert evidence crumbled:

1. She was accepted to be an expert in international card scheme rules and EU card payment standards.
2. Her evidence, however, stretched in technical documents, including the various patents and the Product and Process description.
3. She was therefore unable to understand or answer questions put to her on the technical documents.
4. In further cross-examination *after* re-examination she explained that she had not written the first draft of her expert report herself but sent copies by instructing solicitors, who then spent many months putting her report together.
5. She also admitted that she had to do a "huge amount of research" regarding the patents, and described understanding them as a "nightmare".

Subsequently, her evidence was abandoned on the technical points in submissions and the claim on those points ultimately failed for lack of evidential support.

Experts should stick to what they know…

- Key take-aways from ***Sycurio:***
  - As a patent case, there is the peculiarity of the area to consider.
  - Nonetheless, it emphasises the importance of adhering to an expert's *expertise* / the expert basis for their opinion.
  - The claim may therefore require the instruction of another expert where experts feel the need to comment beyond their field.
  - Experts should be dissuaded from "reading up" on fields outside their expertise *if they then intend to give an opinion on said field.*
  - Outside knowledge and reading up is acceptable if it is to understand the broader context, and inform their opinion on *their* expert field.

Joint Expert Site Meetings & Assumption of Mutual Instruction

In ***Jennings v Otis Ltd & Anor* [2021] EWHC 2039 (KB)** Mr Justice Cotter addressed the question of whether a Claimant should disclose his witness evidence prior to the experts reporting, which led to important generic observations, regarding:

1. Whether a claimant should attend the site with both claimant and defendant experts.

2. Whether expert instruction was appropriate at all.

Joint Expert Site Meetings & Assumption of Mutual Instruction

The judge held that it was correct for the Claimant not to attend the site with the experts. This was originally agreed so as to understand how his arm came to be inserted in the gap which then caused his injury.

The judge agreed for the following reasons:

1. Experts already had access to potential versions of events through pre-action correspondence, pleadings, and statements.
2. If the expert needed to know additional detail such as the Appellant's height and weight at the time of the accident. They could have asked for it.
3. The potential for satellite issues arising from when the Claimant was asked to explain / demonstrated what happened is obvious.
4. It was not appropriate for expects to have the ability to ask questions of a witness on a discrete factual issue of whether and how a person came to fall.

Joint Expert Site Meetings & Assumption of Mutual Instruction

Mr Justice Cotter did however have some warning about instructing expert evidence:

- "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"
- A Judge should not consider him/herself presented with a "fait accompli because each side has already incurred significant costs in obtaining expert evidence."
- In accordance with CPR 35.7 where both parties wish to instruct an expert, the judge may direct for that evidence to be given by way of single joint expert.
- Expert evidence *must* be reasonably required (CPR 35.1)

Joint Expert Site Meetings & Assumption of Mutual Instruction

- Key take-away points from ***Jennings***:
  - Just because the parties have agreed directions, or indeed instructed experts, this does not limit the court's power to monitor the use of expert evidence, including directing the use of a single joint expert.
  - Before instructing an expert, the whole of the case should be considered, including what exactly is in issue between the parties, and whether information can be obtained from other evidence.
  - It will often be inappropriate for a Claimant to attend a site meeting with both experts. Such information which the Claimant can provide can, and should be, obtained prior to the meeting.

“Must” to “More than Probable” *not* a simple matter of language

In ***Nash v Volkswagen Financial Services (UK) Ltd* [2023] EWHC 2336 (KB)** a change in expert opinion was considered by Mr Justice Freedman.

- The case turned on whether the fire which destroyed the Claimant’s vehicle was caused by a defect in the car itself.
- In his original report, the Claimant’s expert said that the fire “must” have been caused by the car being defective.
- On questioning by the Court, the expert said that it was “more than probable” that the fire was caused by a defect.
- The trial judge found that the Claimant had failed to establish his case, and found for the Defendant. The Claimant appealed, contending that the difference by the expert was just a matter of language.

“Must” to “More than Probable” *not* a simple matter of language

There were however considerable concerns with the Claimant’s expert notwithstanding his change in evidence:

- He was unable to identify any defect within the engine compartment of the car causative of the fire.
- He could not identify any defect in the electrical components or wiring.
- He agreed that he has not seen any evidence that there was a defect which caused a noise which the Claimant reported.
- He agreed that whatever caused the fire may have been destroyed or concealed by the effects of the fire.

Within this context, Mr Justice Freedman did not consider the change from “must” to “more than probable” to be “simply a use of language”, but rather “about a matter at the heart of expert evidence, namely the question of probability in respect of the putative cause of the fire as posited by the expert”.

"Must" to "More than Probable" *not* a simple matter of language

- It was held that the judge had rightly preferred the Defendant's expert over that of the Claimant, due to the concerns he had. The trial judge had dismissed the Claimant's arguments as to the Defendant expert's level of experience, and method of inspection.

- Indeed, Mr Justice Freedman said that *once the (Defendant's) expert had been admitted* it was too late to argue that, on the basis of experience, the trial judge should have accepted the Claimant's expert over the Defendant expert. He noted the lack of an appeal of a case management decision to permit the Defendant's expert.

"Must" to "More than Probable" *not* a simple matter of language

Key take-aways from ***Nash***, (perhaps a reiteration of age-old issues when it comes to expert evidence):

- Experts should be careful not to overstate their position to then retract into more guarded opinions, given this can be fairly characterised as a change in position, can impact the cogency of their report as a whole and motivate judges to find other criticisms.
- If concerns are had about opposing expert's expertise, those submissions are most aptly made at case management, rather than post facto at trial, when permission for that expert has already been granted.

New Limits on Expert Reports in the Intermediate Track

- New fixed costs rules introduced the intermediate track for claims issued after 1st October 2023, or in the case of PI where the cause of action accrued before 1st October 2023.
- The “intermediate track” applies to cases between the value of £25,000 to £100,000, subject to some important exceptions to FRC (such as mesothelioma, clinical negligence if breach and causation not admitted etc.).
- The overall aim of the reforms is to enhance the efficiency and cost-effectiveness of litigation, including the length of expert reports.

New Limits on Expert Reports in the Intermediate Track

The old CPR Part 28 is removed and a new rule introduced.

r.28.14(2) The following provisions apply in respect of directions in the intermediate track —

(a) oral expert evidence is limited to one witness per party, save where the oral evidence of a second expert for any party is reasonably required and is proportionate; and

(b) the trial time estimate must not exceed 3 days.

(3) The following provisions apply in respect of directions in the intermediate track,
unless the court orders otherwise—

…

(c) any expert report shall not exceed **20 pages**, excluding any necessary photographs,
plans and academic or technical articles attached to the report.

New Limits on Expert Reports in the Intermediate Track

Hence, under the new CPR 28.14(3)(c) *unless the court orders otherwise*:

Any expert report shall not exceed **20 pages**, excluding any necessary photographs, plans and academic or technical articles attached to the report.

Some things of note:

- It does appear that standard appendices, such as CVs may be within the page limit, and arguably review of medical records (albeit this can be presented as an appendix).
- Although there is a limit, there is a residual ability to apply to the court for a longer report if the circumstances of the case allow. There is limited guidance on this, as the new changes take shape. But things to consider may be:
  - Is this part of the opinion section or documentary background e.g. medical / treatment history
  - Overall proportionality.

New Limits on Expert Reports in the Intermediate Track

In terms of ensuring concision of expert reports:

- Consider the case-law as laid out earlier;
  - The expert must advise specifically on their area of expertise, and this may warrant arguing for additional, separate experts.
  - CVs and relevant expertise of the expert can be efficient and tailored to the case and circumstances in question.
  - Whether parts of the report go to issues of fact or opinion inappropriate for the expert to address.
- Re-formatting to smaller font or wider margins is unlikely to be looked upon favourably!

New Limits on Expert Reports in the Intermediate Track

Key take-aways:

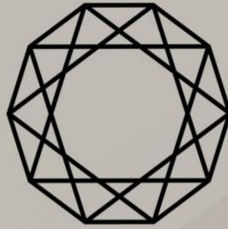
- The Intermediate Track's limitation on expert evidence will no doubt provide an incentive for Claimants to argue for additional expert evidence in order to escape it:
  - To argue the necessity of going beyond the limitations of an expert report limited to 20 pages.
  - To argue the necessity of additional expertise on more complex areas.
- If the claim may be allocated to the intermediate track, the restrictions on expert reports becomes of primary importance in arguing for multi-track allocation instead:
  - The trial time estimate must not exceed three days – therefore, arguments for permission for more complex expert evidence, and the need for oral expert evidence from multiple experts, will be obvious arguments deployed to escape the intermediate track.

New Limits on Expert Reports in the Intermediate Track

- Hence arguments on the reasonable requirement for additional expert evidence will become central to wider arguments for escaping the FRC regime.
- Increased satellite applications / “allocation” hearings can be expected in respect of expert evidence for the claims within the intermediate track valuations – or they will be addressed at the CMC.
- If the value seems to be within the intermediate track:
  - Consider what experts may be required and the level of detail required in reports (i.e. is 20 pages sufficient?).
  - Liaise appropriately with experts as to whether they can prepare a report within the limit without compromising the quality of reporting.
  - Consider whether expert can address issues within scope of their expertise or whether an additional expert is expressly recommended and required.
  - Consider impact on allocation.

Thank you for your attention.

Questions?



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Update on Witness Evidence and Part 32

Witness Evidence
CPR Part 32

32.2— Evidence of witnesses—general rule

(1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved–

(a) at trial, by their oral evidence given in public; and

(b) at any other hearing, by their evidence in writing.

(2) This is subject–

(a) to any provision to the contrary contained in these Rules or elsewhere; or

(b) to any order of the court.

(3) The court may give directions—

(a) identifying or limiting the issues to which factual evidence may be directed;

(b) identifying the witnesses who may be called or whose evidence may be read; or

(c) limiting the length or format of witness statements.

Witness Statements
CPR Part 32

CPR r.32.8 Form of witness statement

A witness statement must comply with the requirements set out in Practice Direction 32

Part 22 requires a witness statement must be verified by a statement of truth)

Practice Direction 32

17.2

At the top right hand corner of the first page there should be clearly written—

(1)the party on whose behalf it is made,

(2)the initials and surname of the witness,

(3)the number of the statement in relation to that witness,

(4)the identifying initials and number of each exhibit referred to,

(5)the date the statement was made; and

(6)the date of any translation.

Practice Direction 32

18.1- Body of Witness Statement

The witness statement must, if practicable, be in the intended witness's own words and must in any event be drafted in their own language, the statement should be expressed in the first person and should also state—

(1)the full name of the witness,

(2)his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer,

(3)his occupation, or if he has none, his description,

(4)the fact that he is a party to the proceedings or is the employee of such a party if it be the case; and

(5)the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter.

Practice Direction 32

18.2

A witness statement must indicate—

(1)which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and

(2)the source for any matters of information or belief.

Practice Direction 32- Format of Witness Statement

19.1 A witness statement should—

(1)be produced on durable quality A4 paper with a 3.5 cm margin,

(2)be fully legible and should normally be typed on one side of the paper only,

(3)where possible, be bound securely in a manner which would not hamper filing, or otherwise each page should be endorsed with the case number and should bear the initials of the witness,

(4)have the pages numbered consecutively as a separate statement (or as one of several statements contained in a file),

(5)be divided into numbered paragraphs,

(6)have all numbers, including dates, expressed in figures,

(7)give the reference to any document or documents mentioned either in the margin or in bold text in the body of the statement; and

(8)be drafted in the witness's own language.

Practice Direction 32- Format of Witness Statement

19.2

It is usually convenient for a witness statement to follow the chronological sequence of the events or matters dealt with, each paragraph of a witness statement should as far as possible be confined to a distinct portion of the subject.

Practice Direction 32- Non compliance. Does it matter?

CPR 32.8: **"A witness statement must comply with the requirements set out in Practice Direction 32".** Significantly PD 25.1. gives the court power to impose sanctions.

"25.1 Where:

(1) an affidavit,

(2) a witness statement, or

(3) an exhibit to either an affidavit or a witness statement,

does not comply with Part 32 or this practice direction in relation to its form, the court may refuse to admit it as evidence and may refuse to allow the costs arising from its preparation."

Practice Direction 32- Non compliance. Does it matter?

Shobeiry v. Patel **[2023] EWHC 2549 (KB)**

"This is a completely unacceptable way of preparing for an important hearing…..

…I would not expect a paying party to meet the cost of material that was not even put in front of me during the hearing. I would also not expect them to have to meet the cost of the inadequate preparation of material that has led to available judicial time being wasted on putting right those failures of preparation."

Practice Direction 32- Non compliance. Does it matter?

Correia v. Williams [2022] EWHC 2824 (KB)

-RTA. C was a Portuguese speaker

-Statement was written in English. He had provided his account to his solicitor who spoke Portuguese.

-Statement of Truth in English signed by C.

-Statement of Translation signed by the solicitor.

-1st instance- Judge ruled that the witness statement was not admissible. C had no evidence and case was dismissed.

Practice Direction 32- Non compliance. Does it matter?

Correia v. Williams [2022] EWHC 2824 (KB)

On appeal.

Held that the Court retained a discretion to permit a defective witness statement to be used. However here the defect was fundamental and the judge was correct to refuse to allow it to be admitted at trial.

Lawyers giving witness statements

***MF Tel Sarl v. Visa Europe Ltd* [2023] EWHC 1336 (Ch)**

Witness statements from solicitors. C's solicitor's statement failed to comply with CPR 32.8 and paragraph 18.2(2)PD 32.

"A witness statement that contains information provided by another person must provide the source of any matters of information and belief. The point is not without importance because the accuracy of this information may be challenged at the hearing of an application or at the trial. The source of the information needs to be clear. It is of particular importance on applications made under CPR rule 24.2 where the court may be required to exercise a judgment about the quality of the evidence, both in what it says and does not say, and whether it makes out a claim or a defence with a real prospect of success."

Lawyers giving witness statements

Punjab National Bank (International) Ltd v Techtrek India Ltd & Ors [2020] EWHC 539 (Ch)

“In my judgment, where the maker of a statement is relying on evidence provided by a witness who is an officer of, or employed by, an incorporated body, the requirements of paragraph 18 of Practice Direction 32 to provide the source of evidence is not complied with merely by saying that the source is the entity or officers of the entity. If the source of evidence is a person, as opposed the source being documents, the person or persons must be identified and named. A corporate entity cannot experience events and can only operate through the medium of real persons. It follows that the source of evidence must be a named person or persons. A failure to identify the source in a manner that complies with paragraph 18.2 will mean the court has to consider whether to place any weight on the evidence, especially where it touches on a central issue.”

Distinguishing witness's own knowledge from belief

Witness statements should be drafted so that it is clear which parts of the witness statement are based on the witness's general recollection and which are based on contemporaneous documents. That does not necessarily mean that each paragraph needs to provide an introduction making clear whether it is based on the witness's knowledge, on information available to them or their belief: see PD 32 paras 18.1 and 18.2; ***BlueManchester** Ltd v Bug-Alu Technic GmbH [2021] EWHC 3095 (TCC)*.

Striking out witness statements

Rahman v Rahman & Ors [2020] EWHC 2392 (Ch)

C brought an action for breach of contract in failing to allot him shares in a business.

5 day trial on liability. C was successful.

Assessment of damages hearing set down and directions made.

D put in witness evidence in relation to the assessment which, C argued, attempt to undermine the findings of the judge at the trial on liability.

C applied to strike out those parts of the witness evidence and parts of the counter-schedule. The application was successful.

Striking out witness statements

“The disputed evidence is lengthy and contentious. It has already been the subject of the lengthy ET proceedings and, in part, the liability trial. Some of it is entirely irrelevant on any basis ….

D1 submitted that the fact that the evidence is lengthy and contentious is not sufficient to justify striking it out. I agree, but these factors are capable of affecting the trial estimate (and in this case, the trial date).”

Further.. ”substantial parts of the evidence are inadmissible as being collateral challenges to the judge’s findings of fact, as to which D1 is issue estopped; they are therefore to be struck out as an abuse of process.”

Witness evidence in clinical negligence cases

- Freeman v Pennine Acute Hospitals NHS Trust [2021] EWHC 3378 (QB)

- Watson v Lancashire Teaching Hospitals NHS Foundation Trust [2022] EWHC 148 (QB).

Some practical guidance…

(1) The statement must be true.

(2) Comply with the procedural requirements…and the law of evidence.

(3) Think about structure and length. Make sure all relevant factual issues are dealt with.

Some practical guidance…

(4) Be careful with leading questions

(5) Think about language- **Alex Lawrie Factors Ltd -v- Morgan [1999] The Times 18 August.**

(6) Witness statements are not the place for submissions. Fact not opinion **E.D and F. Man Liquid Products Limited -v– Patel [2002] 1706 EWHC (QB)**

(7) Make sure that the witness has read (very carefully!) and agrees with the statement

Vulnerable witnesses- PD1A

Vulnerability

1. The overriding objective requires that, in order to deal with a case justly, the court should ensure, so far as practicable, that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence. The parties are required to help the court to further the overriding objective at all stages of civil proceedings.

2. Vulnerability of a party or witness may impede participation and also diminish the quality of evidence. The court should take all proportionate measures to address these issues in every case.

3. A person should be considered as vulnerable when a factor – which could be personal or situational, permanent or temporary – may adversely affect their participation in proceedings or the giving of evidence.

Vulnerable witnesses- PD1A

4. Factors which may cause vulnerability in a party or witness include (but are not limited to)—

(a) Age, immaturity or lack of understanding;

(b) Communication or language difficulties (including literacy);

(c) Physical disability or impairment, or health condition;

(d) Mental health condition or significant impairment of any aspect of their intelligence or social functioning (including learning difficulties);

(e) The impact on them of the subject matter of, or facts relevant to, the case (an example being having witnessed a traumatic event relating to the case);

(f) Their relationship with a party or witness (examples being sexual assault, domestic abuse or intimidation (actual or perceived));

(g) Social, domestic or cultural circumstances.

Vulnerable witnesses- PD1A

5. When considering whether a factor may adversely affect the ability of a party or witness to participate in proceedings and/or give evidence, the court should consider their ability to—

(a) understand the proceedings and their role in them;

(b) express themselves throughout the proceedings;

(c) put their evidence before the court;

(d) respond to or comply with any request of the court, or do so in a timely manner;

(e) instruct their representative/s (if any) before, during and after the hearing; and

(f) attend any hearing.

Vulnerable witnesses- PD1A

-Need for directions PD1A 6

-Appropriate measures PD1A7

-Ground rules PD1A8

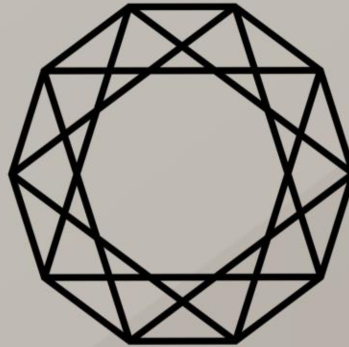
-Party/witnesses's views PD1A9

Vulnerable witnesses- PD1A

Guidance on the approach to take to an assessment of vulnerability was given in ***AXX v Zajac [2022] EWHC 2463 (KB)*** **at [23]–[35].**

Considering how a party can give their best evidence (PD 1A para.5(c)) includes the giving of expert evidence and hence encompasses vulnerable parties being put in the position to speak with experts and answer their questions effectively.

Provisions in the PD, while providing a “structured reasoning tool” are not exhaustive nor should they be read narrowly as a statute.



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