Getting the most from your Experts

From Selection to Cross-Examination

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Resources at
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SERJEANTS' INN

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Simon is a medically qualified specialist clinical negligence and PI silk with 25 years' experience. He is also an Assistant Coroner and Certified Mediator.

Simon specialises in cases with difficult and complicated medical issues where his medical qualification enables him to better understand the full breadth of the potential issues, get the most from the experts, present the client's case at its best and cross examine effectively.

He is generally instructed in cases exceeding £1m in value and recently concluded a cerebral palsy claim in a lump sum equivalent value of £25m – believed to be one of the highest ever clinical negligence awards made in the UK.

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Jamie has a rapidly growing clinical negligence practice. He is instructed by claimant firms on CFAs and on behalf of defendants, corporate and individual, and public and private. He has advised on claims being brought against NHS Trusts, GPs, surgeons, nurses, dentists, opticians and care homes. His cases arise out of every type of injury or medical discipline, including delays in diagnosis, misdiagnosis, medication errors, fertility treatment, alleged negligence in psychiatric care, and neonatal injury. He frequently advises on fatal accident claims, and has experience of cases involving nervous shock and disputes over limitation.

SERJEANTS' INN

We will cover -

- The need to improve expert evidence
- Permission, joint experts, changing experts
- Instruction, report, conference, part 35 questions
- Joint meetings
- Examples of experts at Trial

Does expert evidence need to improve?

Examples

- Unqualified to give an opinion
- No reasons given in joint statement
- Abandoning their opinion – JS and Court
- Informal chats
- Falling asleep in Court
- Swearing in Court

Getting the Court's Permission

CPR 35.1 – Court's Duty to Restrict Expert Evidence -

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

CPR 35.4 – Court's Power to Restrict Expert Evidence -

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

- Straight forward areas of expertise
- Less straight forward – evidence to support need
- Should get the permission you need
- Be ready to appeal a bad decision …

Ryan v Resende, Goose J, 21.6.18 – Lawtel

- RTA claim, liability admitted
- Multiple injuries to head, vertebrae, ribs, shoulders
- Not able to return to work, significant care
- Master refuses care expert on basis medical experts can deal with
- Successful appeal – C adduces letters from medics saying cannot deal with
- D criticises C for not adducing before Master

Changing an Expert – conditional

Beck –v- Ministry of Defence [2003] EWCA Civ 1043.

Court of Appeal decision holding that the Defendant did not need permission of the Court to call a certain expert because they already had an Order allowing an expert of that discipline and it was not limited to a named person. They did need permission of the Court to have the Claimant examined a second time.

Hajigeorgiou –v- Vasiliou [2005] EWCA Civ 236.

A party seeking to replace an earlier unfavourable expert may be permitted to do so but on condition that the earlier expert report is disclosed. This is may be a reason for seeking to avoid permission being given for a specific expert's evidence being permitted an early stage.

Edwards Tubb v JD Wetherspoon 2011 EWCA Civ 136

- Court draws distinction between “advising privately” and a “report for the purpose of proceedings”
- Draft reports therefore often head “advisory” to avoid later disclosure

Refusal

Calden –v- Nunn [2003] WL 270906 – Court of Appeal refused Defendant permission to rely on a further expert report when application was made very late in the proceedings after joint meetings and joint statements and with a trial window, already twice postponed, imminent.

Burke v Imperial College 2019

- D applies to change breach expert at CMC
- A low threshold to impose the usual condition on allowing a second expert of requiring disclosure of the first
- Disclosure was usual condition if there was even a hint of expert shopping

You gotta have faith …

Hort v Charles Trent Ltd [2012) EWHC 3966 QB

On appeal Court allowed Claimant to change neurologist as lost confidence in earlier expert. Distinction made between changing expert and seeking further/additional expert evidence.

Reliance placed on Hughes LJ in Edwards-Tubb v JD Wetherspoon

- “...I certainly accept that there may be perfectly good reasons for a party to wish to instruct a second expert. Those reasons may not always be that the report of the first expert is disappointingly favourable to the other side, and even when that is the reason the first expert is not necessarily right. That means that it will often, perhaps normally, be proper to allow a party the option, at his own expense, of seeking a second opinion. It would 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.”

Murray v Devenish [2017] EWCA Civ 1016

- CA gives guidance on factors to consider in application change expert -

- State of litigation
- Reason for change
- Interests of Justice
- Candour with which application made

Single Joint Experts

This is a discretionary power exercised by the Court.

No presumption in favour of a single joint expert, except in fast track cases.

Specifically suitable to an issue which falls “within a substantially established area of knowledge and where it is not necessary for the Court to sample a range of opinion” (White Book Note 35.7.1)

Practice Direction Section 7 gives a list of factors which the Court will consider in respect of whether it is appropriate to order a single joint expert, including –

- proportionality to value, importance, complexity;
- will resolve issue speedily and cheaply;
- unlikely to be in dispute;
- requirement for conference.

Can you call a joint expert at trial? Yes.

- **Layland –v- Fairview New Homes and Lewisham Borough Council [2002] EWHC 1350** – In that case the single joint expert concluded that the Claimant had suffered no loss (diminution in value of the property). The Claimant obtained subsequent expert evidence to assert that there was a loss. The Defendants sought to dismiss the claim on the basis of the single joint expert's conclusion. The Court considered that it was appropriate to permit the Claimant to continue on the basis that it was satisfied that there was material that the Claimants might fruitfully exploit in cross-examination with a view to persuading either the joint expert or the Court that there had been a diminution in value.

- **Sage –v- Feiven [2002] CLY 430** – Appeal Court overruled a District Judge's Order for a single joint expert report to be prepared by an expert used by the Claimant (but not disclosed) earlier in the proceedings, on the basis that it was inevitable that privileged information would be disclosed to the Defendant. "If the evidence is to be used at trial it may be submitted as a written report without the expert being called. If a single joint expert is called to give oral evidence at trial, it is submitted, although the Rule and Practice Directions do not make this clear, that both parties will have the opportunity to cross-examine him/her, but with a degree of restraint, given that the expert has been instructed by the parties "

HJ v Burton Hospitals [2018] EWHC 1227 (QB)

- Court is not bound to accept the evidence of a joint expert
- The opinion of a single joint expert who is not called does not automatically trump the evidence of others called

Can you change a Joint Expert? Maybe.

Replacing a joint expert with separate experts:

Daniels –v- Walker [2001] WLR 1382

Cosgrove –v- Pattison [2001] CP Rep 68

Popek –v- National Westminster Bank Plc [2002] EWCA Civ 42

Peet –v- Mid Cant Health Care Trust [2001] EWCA Civ 1703

These cases have established the following factors as important:-

Substantial sum involved.

Written questions need to be put first.

Prospects of success.

Good reasons as opposed to fanciful reasons.

Proximity to trial.

Finalising Reports
Conference/Consultation
Pt 35 Questions to Experts

My 10 point checklist for finalising reports after

- **Arksey v Cambridge University Hospitals 2019 EWHC 1276 QB**

1. Has the expert put the current date on the report ?

- Sounds obvious, forgive me, but it’s amazing how often experts fail to re-date their finalised report from the draft they did the year before. Embarrassing and tells the other side how long ago their draft report was prepared.

2. Has the expert set out the nature of their instructions ?

- This can be as brief as "*I have been instructed to provide a report on liability.*"- but it has to be there. If not, the expert is in breach of CPR 35.10 and the Court can order disclosure of the letter of instruction. Not a good start to cross examination of your expert in the witness box.

3. Has the expert set out their qualification specifically on the issues in this case ?

- I have lost a case because our expert explained (completely to our surprise and in the witness box for the first time) that although a spinal surgeon, he did not operate at the level which was the subject of the claim.

- Experts need to confirm in their report whey they are qualified to give an opinion on the specific issue in the present case.

4. Has the expert set out the legal tests which they have been asked to address ?

- I have had an expert asked in cross examination what test he was applying to breach of duty. A lot of lawyers might struggle to run off the full Bolam/Bolitho test without hesitation or deviation; experts certainly can’t do it, and nor should we expect them to. It was an easy point against our expert and one which cannot be scored if they have set it out at the start of their report.

5. Have they set out all the documents with which they have been provided ?

- Best to refer to other experts' reports simply as draft reports, rather than the date of every draft. Is the list complete ?

6. Specifically – have they included the pleadings and witness statements in the list of documents ?

- This was what handicapped Mr Sandeman in Arksey. The pleadings and, more importantly, the witness statements are likely to be crucial to the expert's final opinion.

7. Have they identified issues of fact ?

- A common error is for experts to make assumptions in their report about the facts upon which they base their opinion, when those facts are actually one of the issues in the claim. Experts need to be alert to such factual issues, be alerted to them by their lawyers and identify them in their report.

8. Have they deferred to the Judge on issues of fact ?

- Experts give their view on issues of expert opinion, not on issues of fact. However this does not mean that they cannot comment on issues of fact. They can and indeed should comment on issues of fact where their expertise enables them to assist the Court with that determination – for example by interpreting medical records and explaining medical issues. As long as they qualify their view by stating that they appreciate that issues of fact are ultimately a matter for the Court.

9. Have they given reasons, reasons, reasons ?

- Experts and lawyers forget that the report and joint statement will stand as evidence in chief at trial. If a point is not contained within the reports, the likelihood is you will not be able to adduce it in evidence in trial. A point can be as powerful as you like, but if it’s not in the report it’s useless.

10. Finally - is the report balanced ?

- An expert’s duty is to provide independent unbiased objective expert assistance to the Judge trying the case. The report should be drafted in a manner which demonstrates that.

Once you have got a draft report, can the other side get hold of it?

- Generally speaking – no.

35.10 and 11 – Privilege

Instructions - 35.10.4 –

The instructions referred to in paragraph 3 shall not be privileged against disclosure but the Court will not, in relation to those instructions (a) order disclosure of any specific document or (b) permit any questioning in Court other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph 3 to be inaccurate or incomplete.

Privilege is only withdrawn under Rule 35 in respect of the instructions received by the expert to prepare their report.

If the Court is satisfied that the expert's report does not state the substance of all the material instructions, then the Court may order disclosure of those instructions and related documents. This was confirmed in the case of **Lucas –v- Barking, Havering and Redbridge Hospitals NHS Trust [2003] EWCA Civ 1102**. This case also confirmed that the mere mention of privileged documents in an expert report does not necessarily waive privilege in the document.

The Report –

Drafts of an expert's report may be privileged and a Court has no power to order their disclosure failing any breach of Rule 35.10.4 – **Jackson –v- Marley Davenport Ltd. [2004] EWCA Civ 1225.**

TMO Renewables v Reeves 2020 EWHC 789 Ch

- A good case on what a witness has to do to waive privilege
- The short answer is – a lot
- I have never seen a judge order disclosure of a draft expert report referred to in another's

Conference/Consultation

- Limit the experts you involve in a conference to the absolute minimum – core experts only;
- In a child brain injury quantum conference, of 10 experts only about 3 will determine the main value of the claim;
- Give everyone the same paginated conference bundle;
- Tell the experts they need to a) have it with them and b) have read it;
- You are paying them an hourly rate to be involved in the conference - not to look at their phone, tap noisily on their keyboard or to make the tea;

What can and can’t you ask an expert to change?

- Guidance for Instruction of Experts 2014 – para 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 their opinions and contents of their reports and not include any suggestions that do not accord with their views”.

After the Conference

- Changes to reports;
- Generic changes (redate, instructions, updated enclosures, delete dates of draft reports, issues and legal tests, quotes from other reports);
- Specific to each expert – key issues.

Written Questions to Experts

CPR 35.6 –

A party may put to an expert instructed by another party or a single joint expert ….written questions about his report……once only …..must be put within 28 days of service of the report …..unless the Court gives permission or the other party agrees.

Moylett v Geldof [2018] EWHC 893 (Ch) – can the Court edit an expert's report?

- A Judge ignores what is inadmissible
- Also see Hoyle v Rogers 2014 CA – preferable to be left to a the trial Judge rather than the subject of an application

Expert Joint Meetings – the rules and cases

Mrs Justice Yip on Agendas

- **Welsh v Walsall Healthcare NHS Trust 2018 EWHC 1917 QB.**

- **Saunders v Central Manchester University Hospitals NHS Foundation Trust 2018 EWHC 343 QB**

Agendas

- Short
- Neutral
- Not leading
- Cooperate
- D’s questions are best added, not mixed in
- No dogs dinner
- Don’t delay

- Cara v Ignotus, 7.10.15, Master Yoxall - Lawtel
  - A reminder that the practice direction states that questions should not be leading;
  - Application objecting to form of questions upheld with costs.

35.12.4 –

The content of the discussion between the experts shall not be referred to at trial unless the parties agree.

35.12.5 –

Agreement shall not bind the parties.

Experts cocking up joint statements

- Signs a joint statement which does not reflect their true opinion

- Cf changing their mind for good (or bad) reasons

- *“In practice, however, it could be very difficult for a party to satisfy that an agreement reached at an experts’ discussion, to persuade the Court that this agreement should, in effect, be set aside unless the parties’ expert who clearly stepped outside his expertise or brief, or had otherwise shown himself to be incompetent (White Book Note 35.12.2).”*

- At best thoughtless, at worst an unprincipled attempt to tailor evidence to fit with client's case – **Fifield v Denton Hall 2006 EWCA Civ 169;**
- Has happened to me on 3 occasions;
- Get expert to write addendum – what incorrect and why signed;
- If all else fails, there is always ….. **Jones v Kaney [2011] UKSC 13** (removal of immunity from suit).
- Psychiatric expert – is now the Defendant in a subsequent claim by Claimant;

Joint Meetings of Experts – My Ten Top Tips for Lawyers

- Have a standard proforma agenda ready to go. The preamble (telling the experts how to go about the meeting) is standard for pretty much all cases. Mine (email me if you would like a copy) tells them essentially what legal test to apply, the standard of proof and reminds them of the differences between issues of fact and opinion.

- Keep it simple. In even the most complicated or high value case the number of key issues in case can usually be counted on the fingers of one hand. Ask yourself “what are the key issues for the judge to decide in this case at trial?”

- Less is more. I have seen agendas with fifty questions on them. Hopeless. The purpose of a joint statement is to clarify the issues not complicate them.

- However – remember Yip J's comments in the later case of Welsh v Walsall 2018 EWHC 1917 QB – "in the vast majority of cases, any disagreement ought to be capable of resolution through a bit of give and take…
- … it certainly should not become routine to provide two versions which, as here, travel over much of the same ground"

- Diarise a telecon with your expert before the joint meeting. Make sure they have all the papers they need. Go through the agenda and their opinion on each of the issues. This also ensures they have read the papers before they meet their counterpart. I appreciate this should be assumed, but I never fail to be amazed at how poorly some experts prepare for joint meetings – not reading the relevant papers or not even having them to hand to refer to during the meeting.

- Don’t speak to the experts during the “meeting”. Most meetings in fact are a series of telephone calls and emails between the experts. Experts may ask for your view on a draft joint statement – tell them no. Until the joint statement has been signed off, you should not speak to or email the expert about the issues covered by the agenda.

- When the joint statement is available check that your expert has done a decent job, included the key points in the joint statement and also given their reasons where they disagree.

- *If* your expert has failed to address the questions in the agenda properly, failed to give their reasons or if they appear to have executed an unexplained U turn from their previous opinion, speak to them on the phone ASAP and get them to produce an addendum you can disclose to explain themselves if necessary.

Consequences for Errant Experts

- In this circumstance you may also need to consider advising your client as to whether they have a potential **Jones v Kaney 2011 UKSC 13** claim against the expert for failing to take proper care in the production of the joint statement - never a happy place to be and hopefully avoided with proper preparation.

Thimmaya v Lancashire NHSFT + Jamil 30.1.20

- Third party costs order made for £88,000 in Defendant's favour against Claimant's expert
- He didn't know the Bolam test in XE due to "mental health problems"
- Should not have continued medicolegal work
- Improper, unreasonable or negligent conduct

Also see - “Ten top tips for *experts* attending joint meetings”

- https://www.simonfoxqc.com/blog/

Experts at trial

- Examples …

Your hard work may go unappreciated…

R N v Dr.D

Claimant claimed negligent failure by GP to refer him to hospital with meningococcal septicaemia. Mother in evidence described Claimant as so poorly that, whilst helping case on breach, undermined case on causation.

Defence called treating doctors to support their interpretation of the admission records.

High Court Judge's approach to expert evidence - considered oral evidence, not reports or joint statements.

Your case is only as good as your expert ….. - SL v RW NHST

- Cardiologist missed entry;
- Main pleaded case discontinued;
- Warned +++ to read trial bundle;
- Clear at con on morning of trial had not;
- Vascular surgeon came up with new allegations mid litigation;
- No explanation for lateness;
- Amendment required;
- Came up with 2 different Bolam tests in witness box;
- And fell asleep in Court.

Careless talk at breakfast …..

L –v- Dr. B:

The Claimant was an independent financial adviser who, unknown to himself or his GP, developed hypothyroidism over a period of years. It was his case that he presented to his General Practitioner on a number of occasions complaining of symptoms relating to this and that there was a negligent failure to diagnose it, leading to the loss of a lucrative business and career. However, a critical entry in the General Practitioner records referred to *"Wt ↓"*. It was the G.P.'s defence that this meant that the Claimant had given a history that he had lost weight at the time of his attendance, this being accepted as extremely unlikely if he was indeed suffering from symptoms of hypothyroidism at the time.

The Claimant adduced evidence from himself and from his wife giving detailed accounts of his symptoms including weight gain during the relevant period. These included photographs of holidays and his appearance during the period.

Defence case was that the entry was correct and that the GP would have noticed if the Claimant was hypothyroid clinically.

However defence endocrine expert told claimant GP expert over breakfast that he had missed the diagnosis of hypothyroidism in his own wife!

I put this to the expert in cross examination.

Defence Silk threatened to report me to the Bar Council.

The claim was dismissed on the basis that the Court preferred the General Practitioner's interpretation of the entry. This was despite the fact that the General Practitioner conceded in cross-examination that he had been negligent in other (non-causative) aspect of the consultation in question.

Ours was bad, their’s was worse …

O'S –v- East Cheshire NHS Trust:

This case concerned the Claimant's management when she suffered complications from having undergone a laparoscopic cholecystectomy at the Defendant's hospital. It was the Claimant's case that she developed a bile leak (non-negligent complication) requiring her re-admission to hospital shortly after the procedure. It was her case that (a) there was a negligent delay in performing an ERCP procedure to assess and treat the leak and (b) she was treated negligently over a week-end by being dehydrated through inadequate fluid provision when she was nil by mouth awaiting the ERCP procedure for the Monday.

The Claimant's expert conceded in cross-examination (by the Judge) that the decision to postpone the ERCP did accord with the reasonable and responsible body of opinion. The Claimant was therefore left only with the second allegation in respect of negligent management resulting in dehydration.

Defence expert maintained that 300ml of fluid over a 48 hour period was not negligent and no different to what patients receive in many hospitals around the country!

Treating doctor admitted that it was a failure.

Defendant would still not concede breach.

The Claimant's injury was that she developed severe pancreatitis, multi-organ failure including a coronary infarction. The Claimant's case in respect of allegation (b) was only that the negligence made a material contribution to that injury, but this had hardly been dealt with by the experts in their reports and joint statement. Oral evidence was given.

The Court accepted that the Claimant's claim on both negligence and the material contribution point.

The Claimant's expert was preferred to the Defendant's expert. The Claimant was awarded 95 per cent of her costs.

Thank you

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