

The Little Book on

**Expert Witness Practice  
in the Civil Arena**

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# **Expert Witness Practice in the Civil Arena**

Chris Pamplin PhD FGS  
Editor  
UK Register of Expert Witnesses

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# Preface

Since 1999, the role of the expert witness working in the civil justice system in England and Wales has become increasingly complex.

In the system of case management that existed prior to 1999, lawyers held sway and the use of expert evidence as part of the case management strategy was all too common. So often this approach involved finding the most circuitous route to court; misuse of expert evidence was just one tactic adopted. So it was, perhaps, understandable that the 'hired gun' was seen from time to time.

Lord Woolf determined to stamp this out. Following the introduction of the Civil Procedure Rules in April 1999, we have seen:

- expert evidence placed under the complete control of the court
- the adoption of a cards-on-the-table approach to litigation
- absolutely clear guidance for expert witnesses on their overriding duty to the court.

But herein lies a problem for the diligent expert witness. Not only has he to be cognisant of the various rules and guidance with which he must comply, but he can no longer hide behind his instructions. His overriding duty to the court makes his position alongside the judge crystal clear; he is not an advocate for a party. Critical to the role of the expert witness is independence. And this overriding duty has made the role of expert witness an increasingly lonely one.

This book is designed as a practical guide to the complex array of rules and guidance for expert witnesses as they interact with the civil justice system in England and Wales. In recognition of the isolation borne of their independence, this book is written with the interest of the expert firmly to the fore. It encourages experts to fulfil their overriding duty to the court, and their professional duty to others, whilst making choices that protect their own interests.

*Chris Pamplin*

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# 1 Expert Evidence

An **expert** can be anyone with knowledge or experience of a particular field or discipline beyond that to be expected of a layman. An **expert witness** is an expert who makes this knowledge and experience available to a court<sup>1</sup> to help it understand the issues of a case and thereby reach a sound and just decision.

**An expert witness makes knowledge available to the court**

This distinction implies a further one, between advising clients and helping the court, which will be explored later (see the section on the Expert Advisor on page 29). In the meantime we will concentrate on the role and duties of an expert witness in giving or preparing evidence for the purpose of court proceedings.

## What is expert evidence?

The fundamental characteristic of expert evidence is that it is **opinion** evidence. Generally speaking, lay witnesses may give only one form of evidence, namely evidence of fact. They may not say, for example, that a vehicle was being driven recklessly, only that it ended up in the ditch.

**Giving expert evidence involves expressing an informed opinion**

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<sup>1</sup> Or other judicial and quasi-judicial bodies, e.g. tribunals, arbitrations, adjudications, select committees, official inquiries.

# 2 Instructions

The giving and taking of instructions lies at the heart of the solicitor–expert relationship. It is, then, surprising that:

- many lawyers appear to assume that all experts understand what is needed, and
- many experts assume that lawyers will automatically provide everything required for the instruction to proceed smoothly.

Alas, the world of the expert witness is not that ordered!

## **Advice or report?**

First, and most obviously, the solicitor must be clear about why expert help is required.

- Is it, perhaps, that an appraisal is needed of the technical issues presented by the case before the solicitor can decide whether or not to undertake it, possibly on a conditional fee basis?
- Is help needed in early attempts to negotiate settlement of a dispute?
- Is help required in framing the client's statement of case and to identify weaknesses in that of the opponent?

**Experts and lawyers need to communicate well if problems are to be avoided**

# 3

## The Report

In the context of litigation it is important to distinguish between two kinds of expert report:

- those commissioned solely for the **advice** of an instructing solicitor or lay client, and
- those required for the **purpose of court proceedings**.

While it is with the latter that this chapter is concerned, much of what follows will be relevant to both kinds of report. The legal requirements, though, apply only to those intended for use in court.

In general, expert witnesses are immune from suit in respect of reports they prepare for court purposes, but this is not the case with those they write to *advise* their clients. With such reports, they are as liable in negligence for the opinions they express as they would be for reports written for any other professional purpose.

### Significance of expert reports

The production of a report is central to the role of an expert witness. This is so whether or not the case goes to trial. Indeed, 95% of civil cases never reach court: they are either settled beforehand or abandoned altogether. Reports commissioned from experts can play just as crucial a role in securing

#### Careful!

Which sort of report are you being asked to write? Issues of immunity and liability arise.

Reports are regularly used to negotiate a settlement

# 4 Meetings of Experts

## Legal basis

Historically, the starting point in any discussion of the practice relating to expert meetings is a comment made by the judge trying the case of *Graigola Merthyr Co Ltd -v- Swansea Corporation*.<sup>1</sup> In the course of his judgment, Mr Justice Tomlin observed that:

**Tomlin's  
observation went  
unheeded for  
many years**

*'Long cases produce evils... In every case of this kind there are generally many irreducible and stubborn facts upon which agreement between experts should be possible, and in my judgement the expert advisers of the parties, whether legal or scientific, are under a special duty to the court in the preparation of such a case to limit in every possible way the contentious matters of fact to be dealt with at the hearing. That is a duty which exists notwithstanding that it may not always be easy to discharge.'*

Unhappily, this comment went largely unheeded, for in the Interim Report of his Inquiry into the civil justice system, published in 1995, Lord Woolf concluded that the system was still failing to

<sup>1</sup> *Graigola Merthyr Co Ltd -v- Swansea Corporation* [1928] 1 Ch 31.

# 5

## Answering Questions

The CPR require at Rule 35.1 that ‘expert evidence shall be restricted to that which is reasonably required to resolve the proceedings’. Rule 35.4 ensures that this objective is achieved by placing the calling of expert evidence under the complete control of the court, while Rule 35.5 provides that evidence shall be given in a written report ‘unless the court directs otherwise’.

Clearly, though, there are dangers in a court receiving a written report that has not been scrutinised for inconsistencies or ambiguities – especially when, as is often the case nowadays, there will be no opportunity to cross-examine the expert at a later stage in the proceedings. Hence, the countervailing provisions of Rule 35.6 that enable parties to seek clarification of an expert’s report by means of written questions, the answers to which will then form part of the report.

**Parties can seek clarification of expert reports by written questions**

### **CPR provisions**

The main purpose of the CPR *Written questions to experts* procedure (set out in CPR 35.6 and the supplementary provisions contained in the Practice Direction 35.5) is to help parties understand the reports disclosed to them by their opponents. If, however, questions are put that are oppressive in

# 6

## The Hearing

Experts who provide reports will not always have to appear in court. In a great many cases their reports will have been agreed and, consequently, they will not be called upon to attend a hearing. Indeed it is becoming more and more uncommon for experts to be examined and cross-examined on their evidence.

**Court appearance is rare, and getting rarer!**

It is entirely possible, then, that an expert might work for some time before experiencing the delights (or otherwise) of a personal court appearance. Those unfamiliar with the workings of the court should prepare for this by making themselves fully aware of court etiquette and the rules governing the giving of evidence.

**When your time comes, familiarise yourself well in advance**

### Rules of etiquette

Courtroom etiquette is the same for expert witnesses as for any other person using or appearing in the court. Broadly speaking these are merely rules of good behaviour and can be summarised as follows:

**Basics of courtroom etiquette**

- **Remove all headgear** before entering the court. (There are exceptions for religious observances.)
- **Enter and leave the courtroom at an appropriate time** so as to cause as little disturbance as possible.

# 7 Payment of Fees

This is, without doubt, the thorniest issue of all, and indeed a volume in this series is dedicated to examining chapter and verse on the topic – *The Little Book on Expert Fees*.<sup>1</sup> It's a subject on which each expert must make up his own mind, especially considering the commercial implications of any one approach. What follows here is merely an introduction to the subject, more details of which can be gained by reading the aforementioned title.

**For more detailed analysis order *The Little Book on Expert Fees***

## **A matter of contract**

The relationship between an expert witness and the instructing solicitor is a contractual one, whether or not it has been reduced to writing. It follows that if, for example, they have agreed the fee the expert is to be paid (or the basis on which it is to be calculated) and the timing of its payment, the solicitor is **personally responsible for paying that fee in full and within that time span**. This is so even if:

**Lawyer personally responsible for expert's fee**

- the solicitor has not at that stage been paid by the client (or whoever else is funding the litigation), or

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<sup>1</sup> See [www.jspubs.com/LittleBooks](http://www.jspubs.com/LittleBooks) for further details.

# 8 The Witness Summons

Oral testimony is one of the bastions of our adversarial system of justice. In civil litigation, it is true, the Woolf reforms have restricted its use to some extent. But even here it remains important that parties should be able to call witnesses to testify in court and, if necessary, compel them to do so. A **summons** is the means provided to ensure attendance of the witness.

**A summons compels court attendance**

In civil cases, a further use of the witness summons is to secure:

**It can also secure production of documents**

- the **production of documents** for the court, and
- the attendance at a preliminary hearing of **witnesses who can attest to the authenticity** of the documents.

This may be particularly necessary if the documents are held by a non-party and one of the litigants wishes to have sight of them before trial of the action.<sup>1</sup>

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<sup>1</sup> For example, at a so-called Khanna hearing (see *Khanna -v- Lovell White Durrant* [1995] 1 WLR 121).

# 9 Immunity

As a matter of public policy, all witnesses in legal proceedings, including expert witnesses, are immune from claims for damages resulting from anything said or done in court. Expert witnesses are no exception to this rule.

**Expert immunity a matter of public policy**

However, this does not mean that an expert is immune from any action arising out of his conduct as an expert witness. If he commits perjury he could face criminal proceedings. If he brings his profession into disrepute he may face professional disciplinary proceedings. And if his actions waste court time, he may even end up paying some of the costs in the case. So, how much immunity does an expert witness actually enjoy?

## **Immunity from civil suit**

It is a well-established rule of law that anyone involved directly in legal proceedings – whether as judge, member of the jury, advocate or witness – is absolutely immune from civil action for anything he may say or do in court. If witnesses were to lie while under oath, they would, of course, risk being prosecuted for perjury. But that is a criminal offence, not a civil one. What is quite clear is that **experts cannot be sued for libel, malicious falsehood, negligence**

**Experts cannot be sued for libel, malicious falsehood or negligence**

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