The Little Book on

Expert Witness Practice in the Civil Arena

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2nd Edition

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What others say about the Little Books

'*Dr Chris Pamplin's style is clear and as far as possible jargon free. Compared to the cost of a standard medico legal report [the Little Books] are reasonably priced indeed.*'
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'*These [Little Books] are nicely laid out and easy to follow [and] offer a solid overview to the beginner.*'
Maria Ward
The Psychologist

'*I followed through on the advice in the Fees book with a letter before action and got my fee within days.*'
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'*… it can be confusing, frightening and (if ill prepared) uncomfortable in court! As a remedy, [this Little Book] is a wonderful book…*'
Dr Kim Survarna
Consultant Histopathologist
www.rcpath.org

Preface to Second Edition

The need to publish a second edition of this *Little Book* is a bitter-sweet pill. It is, of course, very satisfying to be the author of a book that is sufficiently popular to justify the cost, in time and money, of preparing a second edition. But it is the changes in expert witness practice that have been wrought during the past 4 years that make it a troubling exercise.

Let's consider just two of them. We have seen:

- the **loss of expert witness immunity**, following the judgment in *Jones -v- Kaney* [2011], and
- the **removal of a solicitor's personal obligation to pay expert witnesses** by the loss of Rule 20.01 of the Law Society of England and Wales's *Guide to the Professional Code of Conduct of Solicitors*.

What have these two changes in common? I think they speak to the seemingly inexorable pressure towards the professionalisation of the expert witness. Gone are the days when lawyers behaved like gentlemen whose word was their bond – and whose professional code of conduct reflected this approach. And farewell to the times when expert witnesses enjoyed the protection of the court in recognition of the difficult and, for some, alien role they were asked to play.

Today, lawyers are expected to gamble their businesses on the outcome of the cases they run, there is precious little money available for them to pay for expert reports, and expert witnesses are required to understand and comply with a veritable welter of rules and guidance.

It is now incumbent on all expert witnesses to understand the contractual nature of the work they do, and to be aware of and understand the import of the rules and guidance (from the court and professional regulators) that govern the work. This book provides excellent coverage of the key matters in civil work. But it can only be a part of what must be an ongoing process of refining one's skills as an expert witness – and not least because it could now cost you dear should it all go horribly wrong!

Chris Pamplin

Preface to First Edition

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

Contents in Detail

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Expert Evidence

An expert witness makes knowledge available to the court

An **expert** is 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/experience available to a court[1] to help it understand the issues of a case and thereby reach a sound and just decision.

This distinction implies a further one, between advising clients and helping the court, which will be explored later (see *Expert as advisor* on page 30). In the meantime, let's concentrate on the role and duties of an expert witness in preparing or giving evidence for the purpose of court proceedings.

1.1 What is expert evidence?

Giving expert evidence involves expressing an informed opinion

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.

- It is the function of the **court** (whether judge or jury) to decide the cause of the accident based on the evidence placed before it.

An expert assists the court in reaching a just decision

- It is the task of the **expert witness** (in our example, an accident investigator) to assist the court in reaching its decision with technical analysis and opinion inferred from factual evidence of, for example, skid marks.

Judge needs to have confidence in expert opinion

To be truly of assistance to a court, though, expert evidence must also provide as much detail as is necessary to allow the judge (or jury[2]) to determine

1 Or other judicial or quasi-judicial bodies, e.g. tribunals, arbitrations, adjudications, select committees, official inquiries.

2 There is a general presumption for civil trials to be heard without a jury unless the court, on application, orders otherwise. The common exceptions to this are cases involving fraud, libel, slander, malicious prosecution or false imprisonment.

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Instructions

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

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 appear to assume that all lawyers will automatically provide everything required** for the instruction to proceed smoothly.

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

2.1 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 solicitor's client's statement of case** and to **identify weaknesses** in that of the opponent?

Expert advisor owes duty to instructing party

When you are acting in an **advisory role** such as these you are beholden to your instructing party and no one else. That party alone decides whether and for what purpose your expert services are likely to prove useful.

Expert witness duties stipulated by CPR

It is a different matter if the solicitor envisages needing you to **prepare evidence for use in court**. In that event the CPR come into play, and they stipulate (among other things) that:

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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.

Prior to the decision in *Jones -v- Kaney*[1], expert witnesses were immune from suit in respect of reports they prepared for court purposes but not for those they wrote to advise a client. This distinction no longer remains. Now, expert witnesses are as liable in negligence for the opinions they express in either type of report as they would be for reports written for any other professional purpose.

3.1 Significance of expert reports

Reports are regularly used to negotiate a settlement

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, the vast majority 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 such outcomes as they can in cases that reach court.

Equally high standards apply to preparing reports as to giving oral evidence in court

The majority of civil cases will not result in a court appearance. But if you accept instructions as an expert witness, particularly in connection with higher value or more complex claims, there is always the possibility of being called to the witness box. In such circumstances your examination-in-chief, cross-examination and re-examination would be based

1 See *Jones -v- Kaney* on page 173.

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Meetings of Experts

4.1 Legal basis

Tomlin's observation went unheeded for many years

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*.[1] In the course of his judgment, Mr Justice Tomlin observed that:

> '*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.*'

Woolf proposed greater use of expert meetings

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 encourage that need for narrowing of the issues foreseen by Tomlin J almost 70 years previously. The solution recommended by Lord Woolf was that courts should insist on greater use being made of expert meetings.

Expert meetings usually ordered by the court

Expert meetings can take place at any time by arrangement between the parties to a dispute. It is more often the case, though, that they are **ordered by the court**, i.e. after proceedings have been issued. At the time of Lord Woolf's Inquiry, expert meetings frequently took place in technical and commercial cases in the High Court, but less often in the county courts.

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

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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*'. CPR 35.4 ensures that this objective is achieved by placing the calling of expert evidence under the complete control of the court, while CPR 35.5 provides that evidence shall be given in a written report '*unless the court directs otherwise*'.

Parties can seek clarification of expert reports by written questions

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 CPR 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**.

5.1 CPR provisions

The main purpose of the CPR *Written questions to experts* procedure (set out in CPR 35.6 on page 190) and the supplementary provisions contained in PD 35.6 on page 195) is to help parties understand the reports disclosed to them by their opponents. If, however, questions are put that are **oppressive in number or content**, or if – without the permission of the court or the agreement of the other side – questions are asked for any **purpose other than clarification** of an expert report, the guidance warns that '… *the court will not hesitate to* ***disallow the questions*** *and to make an appropriate order for costs against the party putting them*'.

Court warns lawyers against abusing the Rule – costs orders threatened

5.2 Rule in practice

For such a simple and straightforward procedure it is surprising how often experts and lawyers experience

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The Hearing

Court appearance is rare, and getting rarer!

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.

Based on the series of biannual surveys conducted by the *UK Register of Expert Witnesses*[1], it is now altogether exceptional for experts to have to appear in court in 'fast-track' cases, and it is becoming less and less likely in those on the 'multi-track'. In 1997 the survey recorded that the average frequency of court appearances was 5 times a year; some 4 years later this had dropped to 3.8; it now stands at 3.2. Of course, these surveys do not separate civil cases from criminal and family cases (in which most will reach court), and so the number of civil cases reaching court will be much lower even than 3.2.

When your time comes, familiarise yourself well in advance

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

6.1 Rules of etiquette

Basics of courtroom etiquette explained

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:

- **Remove all headgear** before entering the court. (There are exceptions for religious observances.)

1 See *www.jspubs.com/Surveys/feesurveys.cfm.*

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Payment of Fees

For more detailed analysis, order the *Little Book* on *Expert Witness 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 Witness Fees*.[1] 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.

7.1 A matter of contract

Lawyer contractually responsible for expert's fee

The relationship between you as expert witness and your instructing solicitor is a contractual one, whether or not it has been reduced to writing.

In every case, you should **set out the terms** under which the work will be undertaken. Not only is this a requirement under the CPR, but it is also to be regarded as good practice in all cases. Only in this way can you stipulate whether, for example, you are (unusually) prepared to accept what is allowed either on assessment of the costs or on assessment of your fees by the LSC. The contract should also set out **when payment is due**.

It follows that if, for example, you and your instructing solicitor have agreed the fee to be paid (or the basis on which it is to be calculated) and the timing of its payment, your solicitor is **contractually responsible for paying that fee in full and within that time span**. This is so even if:

- your instructing solicitor has not at that stage been paid by his client (or whoever else is funding the litigation), or
- your instructing solicitor should eventually receive less than the full amount from one or other of them.

1 See *www.jspubs.com/LittleBooks* for further details.

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The Witness Summons

A summons compels court attendance

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 can also secure production of documents

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

- 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.[1]

8.1 Civil procedure

Consequence of non-compliance dire

In the High Court, the witness summons used to be known – indeed, for more than five centuries was known – as a *subpoena* (from the Latin: *sub*, under; *poena*, penalty), which neatly indicated the likely consequence of non-compliance. Alas, that evocative Latinism was one of many swept away by the Woolf reforms. What we have in its place is the purely descriptive term that has been employed all along by the county courts. The change does serve to emphasise, though, that for all civil courts in England and Wales the rules governing the procedure are now the same – as, indeed, are the forms used when applying for and issuing a summons.

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

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Immunity

Expert witnesses have lost immunity to damage claims

As a matter of public policy, witnesses in legal proceedings are immune from claims for damages resulting from anything said or done in court. Until March 2011, expert witnesses were no exception to this rule. However, the Supreme Court decision in the case of *Jones -v- Kaney*[1] wiped away that protection.

9.1 Recent history of expert immunity

Expert witness immunity wasn't something put in place specially to protect expert witnesses. Rather, it was believed to be part of a wider immunity given to all witnesses in legal proceedings.

Witness immunity protects against claims for damages arising out of anything that the witness says or does in court. It is a protection put in place not through statute but as a matter of **public policy**.

Immunity existed to protect the public, not the expert witness

The policy justification for this immunity is not to protect witnesses, but rather to **protect the public** by encouraging witnesses to express themselves freely in court without fear of litigation.

This was given classic expression by Lord Justice Salmon[2] in a case heard way back in 1963:

> '*This immunity exists for the benefit of the public, since the administration of justice would be greatly impeded if witnesses were to be in fear that any disgruntled and possibly impecunious persons against whom they gave evidence might subsequently involve them in costly litigation*.'

Back in 1963 lawyers wouldn't lift a pen without their client making a payment on account of costs. Think how much more Salmon's words apply in 2011 when we have lawyers who have a financial stake in their client's case and litigation is run on the never-never.

1 *Paul Wynne Jones -v- Sue Kaney* [2011] *UKSC* 13.
2 *Marrinan -v- Vibart* [1963] 3 *AER* 380.

Appendices

Appendix 1: CPR Part 35

The following is taken from the 57th update of the CPR dated October 2011.
Source: www.justice.gov.uk

35.1 Duty to restrict expert evidence

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

35.2 Interpretation and definitions

(1) A reference to an 'expert' in this Part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings.
(2) 'Single joint expert' means an expert instructed to prepare a report for the court on behalf of two or more of the parties (including the claimant) to the proceedings.

35.3 Experts – overriding duty to the court

(1) It is the duty of experts to help the court on matters within their expertise.
(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

35.4 Court's power to restrict expert evidence

(1) No party may call an expert or put in evidence an expert's report without the court's permission.
(2) When parties apply for permission they must identify –
  (a) the field in which expert evidence is required; and
  (b) where practicable, the name of the proposed expert.
(3) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2).
(3A) Where a claim has been allocated to the small claims track or the fast track, if permission is given for expert evidence, it will normally be given for evidence from only one expert on a particular issue.
(Paragraph 7 of Practice Direction 35 sets out some of the circumstances the court will consider when deciding whether expert evidence should be given by a single joint expert.)
(4) The court may limit the amount of a party's expert's fees and expenses that may be recovered from any other party.

35.5 General requirement for expert evidence to be given in a written report

(1) Expert evidence is to be given in a written report unless the court directs otherwise.
(2) If a claim is on the small claims track or the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

35.6 Written questions to experts

(1) A party may put written questions about an expert's report (which must be proportionate) to –
  (a) an expert instructed by another party; or
  (b) a single joint expert appointed under rule 35.7.
(2) Written questions under paragraph (1) –
  (a) may be put once only;

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