



## Expert Evidence: All my own work?

by Ted Lowery

### Introduction: Time for an update

- 1 In June 1999 I presented a paper at one of Fenwick Elliott's seminars which looked at the impact of the Woolf reforms (in the shape of the newly minted Civil Procedure rules) on expert evidence in construction disputes. After 11 years it is clearly now time for an update!
- 2 In his Final Report on *Access to Justice* (published in July 1996) Lord Woolf highlighted what he considered to be the principal difficulties associated with expert evidence in civil litigation, as follows:
  - 2.1 Excessive cost. The Report described expert evidence as one of the major generators of unnecessary cost in civil litigation.
  - 2.2 A lack of impartiality. Expert evidence was likely to be biased in favour of the party instructing the expert.
  - 2.3 An unnecessary proliferation of expert evidence. The Report referred to the emergence of an "expert industry".
- 3 In order to address these evils (and other perceived defects within the civil justice system) the Civil Procedure Rules 1998 were introduced.
- 4 Part 35 of the new Civil Procedure Rules (and the accompanying Practice Direction 35) dealt with expert evidence. The principal elements of Part 35 were (and remain) as follows:
  - 4.1 Restrictions on the use of expert evidence. Rule 35.1 provides that expert evidence is to be restricted to that which is reasonably required to resolve the proceedings and by Rule 35.4, expert evidence can only be adduced with the permission of the court.
  - 4.2 The expert's duty. Rule 35.3 provides that the expert owes a duty to assist the court, which duty overrides any obligation to the person from whom the expert has received instructions or payment.
  - 4.3 The expert's report. Rule 35.5 provides that as a general rule, expert evidence is to be given in a written report (unless the court directs otherwise). Rule 35.10 requires the report to include a statement confirming the expert's understanding of his or her duty to the court and a summary of the instructions that he or she has received.
  - 4.4 Written questions. Rule 35.6 entitles the parties to put written questions to an expert, with the answers provided to be treated as part of the expert's report. (Rule 35.6 also entitles the court to disregard the expert's evidence and/or apply costs penalties if the answers to the written questions are not provided.)
  - 4.5 Single joint experts. Where appropriate, by Rule 35.7, the court can direct that the expert evidence is to be given by a single joint expert.



- 4.6 Experts' meeting. Under Rule 35.12 the court can, at any stage, direct a discussion between experts for the purpose of identifying and discussing issues in the proceedings and reaching agreement on same where possible.
- 4.7 Right to seek directions from the court. Rule 35.14 entitles experts to file written requests for directions from the court for the purpose of assisting them in carrying out their functions.
- 5 The general view is that the reforms initiated by Lord Woolf in the shape of Part 35 have gone some way to eradicating the triumvirate of expert evidence evils identified within paragraph 2 above. For example, the frequent use of single joint experts in medical negligence cases has led to reduced costs and, at the same time, eliminated the opportunity for both sides to employ experts whose principal characteristic is a willingness to advocate that party's case. It has been said that the *"hired guns have largely disappeared, (or at least reformed)"*<sup>1</sup>. Similarly, the prescriptive requirements of Rule 35.10 in terms of the contents of written reports have made it more difficult for experts to adopt a disingenuous approach when giving evidence.
- 6 From the point of view of the construction sector, it was acknowledged in 1999 that the evils identified above were primarily associated with expert evidence in fields other than construction disputes (in particular, medical negligence and road traffic cases). Looking back to my 1999 paper, my overall conclusion was that I did not think the new Civil Procedure Rules would make a great deal of difference to expert evidence within construction disputes. This was because many of the practices "introduced" by Part 35 had been a feature of expert evidence within construction disputes both in and outside the Technology and Construction Court ("TCC") for some years previously:

*"I think it will be clear that in most respects the new rules do not represent a sea-change in relation to experts in construction disputes. If anything, litigation as a whole has moved more into line with practices which construction lawyers and construction experts have been familiar with for some years now, thanks to the pioneering attitude of the TCC."*

- 7 Without wishing to lay claim to any prophetic skills, it seems to me that over the last 11 years, the Civil Procedure Rules have not had a dramatic impact upon expert evidence in the construction sector.

## Expert evidence in 2010

- 8 The Civil Procedure Rules came into effect on 26 April 1999. Since then, further formal guidance for experts has been produced that builds upon the provisions of Part 35 and Practice Direction 35.

## The Expert Protocol

- 9 In June 2005 the Civil Justice Council issued a Protocol for the Instruction of Experts to give Evidence in Civil Claims (the "Expert Protocol") which replaced the earlier Code of Guidance on Expert Evidence. Paragraph 2.1 of the Expert Protocol sets out its aims as follows:

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<sup>1</sup> Personal Injury Law update by David Marshall: *Law Society Gazette* 18 January 2007.



*“This Protocol offers guidance to experts and to those instructing them in the interpretation of and compliance with Part 35 of the Civil Procedure Rules (CPR 35) and its associated Practice Direction (PD 35) and to further the objectives of the Civil Procedure Rules in general. It is intended to assist in the interpretation of those provisions in the interests of good practice but it does not replace them. It sets out standards for the use of experts and the conduct of experts and those who instruct them. **The existence of this Protocol does not remove the need for experts and those who instruct them to be familiar with CPR35 and PD35.**” [My emphasis added]*

- 10 As might be expected, the Expert Protocol supplements and reinforces the provisions of Part 35. Paragraph 4, for example, covers the expert’s duty of independence and includes at paragraph 4.1:

*“Experts should provide opinions which are independent, regardless of the pressures of litigation. In this context, a useful test of ‘independence’ is that the expert would express the same opinion if given the same instructions by an opposing party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates.”*

- 11 The Expert Protocol includes much useful information and guidance for expert witnesses in relation to all aspects of Part 35 and therefore comprises essential reading for any expert giving evidence in civil disputes (and for those instructing them).

## The Technology and Construction Court Guide

- 12 Further assistance for experts giving evidence in the TCC can be found in Section 13 of the Technology and Construction Court Guide (currently in its second edition, issued in October 2005 and revised with effect from 1 October 2007). Again, the TCC Guide is based upon the provisions of Part 35 and provides practical guidance as to how the provisions of Part 35 operate, with particular reference to established procedures in the TCC.

## Updates to Part 35

- 13 No material changes have been made to Part 35 since 1999 but with effect from 1 October 2009, pursuant to the 50th update to the Civil Procedure Rules, the mandatory (and immutable) form of the statement of truth to be included within the expert’s report (as set out in paragraph 13.5 of the Expert Protocol) was changed from:

*“I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.”*

to

*“I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer”.*



- 14 At the same time, paragraph 13.5 of the Expert Protocol and Practice Direction 35.3.2(9) were revised to require the expert's report to include a statement that the expert is aware of the requirements of Part 35, Practice Direction 35, the Expert Protocol and the Practice Direction on Pre-action Conduct. This change directly and unequivocally draws attention to the need for the expert to familiarise him - or herself with the requirements of these important documents.
- 15 In 2010 there is therefore a considerable volume of official guidance on how expert evidence should be prepared and presented and the duties of the expert witness. (For reference purposes the current version of Part 35 of the Civil Procedure Rules and the accompanying Practice Direction 35 can be found in the Civil Procedure Rules page on the Ministry of Justice website at [www.justice.gov.uk/civil/procrules\\_fin/index.htm](http://www.justice.gov.uk/civil/procrules_fin/index.htm). The Expert Protocol appears as an Annex to Practice Direction 35. The Technology and Construction Court Guide can also be found on the Ministry of Justice website at [www.hmcourts-service.gov.uk/docs/tcc\\_guide.htm](http://www.hmcourts-service.gov.uk/docs/tcc_guide.htm)).

## Expert evidence in the construction sector

- 16 As noted above, I do not believe that the Civil Procedure Rules have had a dramatic effect upon expert evidence in the construction sector. Part 35, Practice Direction 35 and the Expert Protocol have largely formalised what previously amounted to recognised standard practice within the construction field. It might be said that within the construction sector it's been a case of, "As you were". In particular, some of the more innovative provisions of Part 35 have not been embraced enthusiastically by the construction sector where they had not been common in the sector prior to 1999. For example:
  - 16.1 The use of single joint experts is relatively infrequent. This is almost certainly because disputes within the TCC do not usually fit within the criteria for single joint experts established by the Civil Procedure Rules. Whilst paragraph 13.4.3 of the TCC Guide does provide some guidance as to circumstances in which the appointment of a single joint expert may be appropriate, paragraph 13.4.2 notes as follows:

*"Single joint experts are not usually appropriate for the principal liability disputes in a large case, or in a case where considerable sums have been spent on an expert in the pre-action stage. They are generally inappropriate where the issue involves questions of risk assessment or professional competence."*

(Further general guidance on whether the use of single joint experts is appropriate can be found in *Cosgrove v Pattison*<sup>2</sup>.)

- 16.2 Likewise, I am not aware that much use has been made of the expert's right to seek directions from the court. I like to think that this is because in the construction sector both experts and those instructing them are usually sufficiently experienced and knowledgeable to know what is required of them.
- 17 However, this is not to say that in our field both practitioners and experts can be complacent. Mistakes continue to be made (by both practitioners and experts) and the law has not stood still over the last 11 years. As described below, a number of decisions have been handed down since 1999 that provide further guidance as to the application and interpretation of Part 35.

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<sup>2</sup> [2001] CPLR 177, *The Times* 13 February 2001.



## Case round-up

18 The balance of this paper considers some of the more significant cases over the last 11 years and for this purpose I have grouped these cases under three headings:

18.1 Points of procedure.

18.2 Merits and credibility (or the lack of it).

18.3 Expert witness immunity.

### Points of procedure

#### *Restrictions on expert evidence*

19 The opening section of Part 35 deals with the court's power to restrict expert evidence. In construction disputes, the range of expert evidence required is normally uncontroversial although the TCC does emphasise the need to decide at an early stage how many experts will be required and in what disciplines. Paragraph 13.2.1 of the TCC Guide notes that:

*"The scope of any expert evidence must be limited to what is necessary for the requirements of the particular case."*

20 Thus it is for the parties to demonstrate to the court's satisfaction why a particular expert's evidence will assist the court in determining the issues in the proceedings.

21 The court has had occasion to intervene to exercise its powers to restrict expert evidence where one of the parties seeks to introduce evidence from a new expert. This usually occurs when the party thinks that it may obtain a more advantageous opinion from a new expert, and this process is frequently referred to as "expert shopping".

21.1 In *Calden v Nunn*<sup>3</sup> the defendant applied for permission to instruct a new expert some three months before the trial was listed to be heard. The application was refused on the grounds that to allow further evidence to be introduced would require the vacation of the trial date.

21.2 Conversely, in *Beck v Ministry of Defence*<sup>4</sup> the defendant sought permission to instruct a new expert on the day before the date upon which reports were due to be exchanged. In this case the defendant argued that he had suffered a genuine loss of confidence in the expert (largely super-induced by the expert's production of a draft report of very poor quality), and the defendant's application was granted on this basis.

21.3 In *Stallwood v David and Another*<sup>5</sup> the claimant applied for permission to rely on evidence from a new expert where the existing expert had agreed a joint statement that was prejudicial to her case. Although the court ultimately allowed the appeal, this was largely due to concerns over comments made by the judge at first instance.<sup>6</sup> The court decided that it would only be in rare cases, where an expert had, "modified his opinion for reasons which cannot properly or fairly support his revised opinion", that a party would be allowed to rely on new expert evidence.

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<sup>3</sup> [2003] EWCA Civ 200.

<sup>4</sup> [2003] EWCA Civ 1043.

<sup>5</sup> [2007] 1 All ER 206.

<sup>6</sup> This was a personal injury case. During the hearing of the application the judge had commented that he had suffered from backache for 40 years but could still sit and do his job.



22 In summary therefore, where there are genuine reasons for a loss of confidence in the expert, or genuine reasons for the expert's inability to continue, for example in the case of illness, the court will be sympathetic, but any such applications will be subject to close scrutiny and the courts will generally discourage "expert shopping". It is also important to bear in mind that the court will be less sympathetic, the closer the application to instruct a new expert is made to the trial date.

23 Note, however, that where the court grants permission to instruct a new expert, it will usually impose a condition that the (unpublished) report of the previous expert must be disclosed, as happened in *Beck v Ministry of Defence*. In that case, Lord Justice Ward observed:

*"Nevertheless, expert shopping is to be discouraged, and a check against possible abuse is to require disclosure of the abandoned report as a condition to try again."*

24 See also *Hajigeorgiou v Vasiliou*<sup>7</sup> in which the Court of Appeal held that it was appropriate for the court to exercise its discretion by imposing such a condition:

*"The principle established in Beck is important. It is an example of the way in which the court will control the conduct of litigation in general, and the giving of expert evidence in particular. Expert shopping is undesirable and, wherever possible, the court will use its powers to prevent it. It needs to be emphasised that, if a party needs the permission of the court to rely on expert witness A in place of expert witness B, the court has the power to give permission on condition that A's report is disclosed to the other party or parties, and that such a condition will usually be imposed. In imposing such a condition, the court is not abrogating or emasculating legal professional privilege; it is merely saying that, if a party seeks the court's permission to rely on a substitute expert, it will be required to waive privilege in the first expert's report as a condition of being permitted to do so."*

25 The Court of Appeal went on to confirm that the obligation to disclose previous expert reports would extend to cover both "final" and interim/draft reports if these contained the substance of the expert's opinion. It follows that if a party is seeking to instruct a new expert solely for the purposes of improving his case, his claims will still be subject to scrutiny in the light of the unpalatable opinions of the discarded expert.

#### *Timing and delays*

26 Delays and slippage to the pre-trial timetable are a common feature of construction disputes (and other large-scale litigation). Difficulties may arise when the production of the expert's reports is delayed.

27 In *Fitzpatrick Contractors Limited v Tyco Fire Integrated Solutions (UK) Limited*<sup>8</sup> the claimant applied to adjourn the trial on the grounds that the original timetable was too tight, following wholesale amendments made to the pleadings. The court allowed the adjournment where it was accepted that expert and factual witnesses would face genuine difficulties in meeting the timetable set for trial. The court concluded that it was not possible for the case to be ready for a proper and effective trial in accordance with the overriding objective (of enabling the court to deal with the case justly and in a proportionate manner, as per CPR Part 1) on the existing date set for the hearing.

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7 [2005] EWCA Civ 236. Also see *Andrew Carruthers v (1) MP Fireworks Limited and (2) Balfour Convenience Stores Limited* (Unreported).

8 [2008] EWHC 1927.



- 28 This is to be contrasted with the decision in *Fitzroy Robinson Limited v Mentmore Towers Limited and Others*<sup>9</sup> in which the court considered an application by the defendant seeking the adjournment of a quantum trial. The application was made three weeks before the date fixed for the trial and arose from a delay in the expert evidence in that reports had not been exchanged and the experts had not met. The court refused to grant an adjournment largely because the judge found that the defendant's expert's delays were deliberate and tactical:

*"As of this morning, the experts have not met (despite Mr Hudson's efforts), and the defendants' solicitors have not even formally confirmed that Mr Miers is available for the w/p meetings. I have concluded that the defendants' refusal to take the steps necessary to comply with my order of 20.11.09 is deliberate. It merely strengthens my view that the defendants are more interested in tactical manoeuvring than preparing for trial or complying with the orders of the court, and that it would be quite wrong to reward their stance by adjourning the trial."*

- 29 In this case the judge helpfully identified five factors that the court should take into account when considering late applications to adjourn in disputes where there has been a failure to comply with directions, including as to expert evidence, as follows:

- The parties' conduct and the reason for the delays;
- The extent to which the consequences of the delays can be overcome before the trial;
- The extent to which a fair trial may have been jeopardised by the delays;
- Specific matters affecting the trial, such as illness of a critical witness and the like;
- The consequences of an adjournment for the claimant, the defendant and the court.

- 30 In extreme cases, an expert's persistent non-compliance with the court's orders may result in the trial proceeding with one party effectively being prevented from relying on expert evidence, as happened in *Stevens v Gullis and Pile*<sup>10</sup>.

- 31 Reference should also be made to the decision in *Phillips v Symes (No. 2)*<sup>11</sup> in which the court decided that an expert psychiatrist who had caused proceedings to be brought/continued in consequence of a defective examination of the claimant could, in principle, be vulnerable to an order for costs under Part 35. The test to be applied in these circumstances is whether the expert has acted in flagrant and reckless disregard of his duties to the court, causing significant expense to be incurred.

#### *Other procedural points*

- 32 In *Upton McGougan Limited v Bellway Homes Limited and Others*<sup>12</sup> the defendant relied upon an expert's report covering matters it had not pleaded. The claimant applied to debar the defendant from relying on those parts of the expert's report that went beyond the scope of the pleaded case and, following a detailed analysis of the expert's report and the pleadings, the court granted the application, albeit

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<sup>9</sup> [2009] EWHC 3070.

<sup>10</sup> [1999] BLR 394.

<sup>11</sup> [2004] EWHC 2330 (Ch),  
[2005] 1 WLR 2043.

<sup>12</sup> [2009] EWHC 1449.



that some of the offending parts of the report were not struck out to allow the claimant the opportunity to amend its pleaded case.

- 33 In *Penny and Another v Digital Structures Limited*<sup>13</sup> the claimants alleged that they were not given a proper opportunity to deal with a point raised by the defendant's expert during cross-examination that had not featured in the expert's written report. This dispute concerned the structural integrity of a barn conversion (and is perhaps unique in that the defendant's expert employed a Toblerone packet to illustrate part of his evidence during cross-examination). Although the court acknowledged that the defendant's expert had first introduced the point on cross-examination, it was noted that no objection had been raised at the time and, further, that in the circumstances, the claimants had had sufficient opportunity to consider this point and/or recall their own expert to give further evidence in reply. Since the claimants did not avail themselves of this opportunity, the court concluded that no procedural irregularity had occurred.
- 34 Best practice requires that the expert's written report be comprehensive as to the evidence to be given, although it sometimes happens that new points will arise during the trial. In that event, the moral of *Penny v Digital* is that immediate action is required to preserve your right to address and deal with any such new points.

## Merits and credibility

- 35 Gore Vidal once remarked that, "It is not enough to succeed, others must fail", and that phrase nicely sums up the nature of expert evidence in adversarial proceedings. The court will be required to decide which expert's evidence it prefers and thus you are always going to have a winner and a loser.
- 36 Expert evidence is, by its nature, a matter of opinion and it follows that for the court, one of the key criteria is the persuasiveness or credibility of the opinion. In my view, credibility should be measured by reference to:
- 36.1 The expert's experience and qualifications. Put another way, does the expert's background mean that his or her opinion on the subject carries weight?
- 36.2 The expert's knowledge and grasp of all relevant facts.
- 36.3 Whether or not there are any grounds to indicate that the opinions of the expert may not be truly independent. In other words, has the expert shown partiality?
- 37 It is worth noting that there have been comparatively few instances of experts being found guilty of actual bias or partiality. More often than not, the expert's evidence will be disregarded because the court concludes that the expert's opinions lack substantive foundation.
- 38 It is in the nature of our adversarial court system that the opposition's normal reaction to any expert evidence is to consider ways in which that evidence might be attacked and undermined through cross-examination and submission. To this extent, the expert witness is always going to be something of an Aunt Sally, but where the mud sticks, it will usually be because the court agrees that the expert has in some way failed to do his or her job properly in compliance with the requirements of Part 35. The cases I have outlined below include direct judicial

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<sup>13</sup> [2009] EWCA Civ 144.





criticism of experts and, notwithstanding the sense of *schadenfreude*, we can all learn from our colleagues' mistakes.

- 39 There are 'dos' and 'don'ts' for every profession. For expert witnesses (and practitioners instructing expert witnesses), the 'dos' are largely set out in the official documents described above, i.e. Part 35, Practice Direction 35 and the Expert Protocol. Some of the more blatant 'don'ts' are illustrated in the decisions included below.

#### *All my own work?*

- 40 It often happens in construction disputes that the sheer volume of work required makes it necessary for the expert to rely upon assistance from others. For example, an expert quantity surveyor may require a colleague to review the minutiae of an extensive loss and expense claim. Generally speaking that is permissible as long as this arrangement is explained in the report and it is made clear (if appropriate) that the colleague's figures are adopted by the expert and represent his or her opinion. Problems may arise if too much of the work is handed over to assistants and the connection between this work and the opinion of the lead expert is overly stretched.
- 41 In *Skanska Construction UK Limited v Egger (Barony) Limited*<sup>14</sup> the court concluded that the evidence of the defendant's programming expert was unreliable where it appeared that his report was largely based upon factual matters digested for the expert by his assistants and by representatives of the defendant. The judge concluded that the expert did not appear to be entirely familiar with the details of his own report.

#### *Failure to scrutinise the facts*

- 42 The *Skanska* decision also highlights another aspect of expert evidence that may trouble the court. That is where the expert has relied on material presented to him or her without testing that information. In *Skanska*, the programming expert employed a sophisticated impact analysis, but the court noted the results of that analysis would only be as good as the input data. Where the analysis relied upon facts that were untested by the expert, in particular where these facts had been challenged by earlier factual witness evidence, the court concluded that it could not have confidence as to the completeness and quality of the input into what was described as a "*complex and rushed computer project*".
- 43 Similar judicial criticism was directed against a programming expert in *The Great Eastern Hotel Company Limited v John Laing Construction Limited and Laing Construction plc*<sup>15</sup> in which the court noted that the defendant's expert had been lacking in thoroughness in his research and was unreliable by reason of his "uncritical acceptance of the favourable accounts" of the causes for delay put forward by his instructing party. (This was in contrast to the claimant's expert whom the judge described as having approached his role in an independent way, and who, crucially, had been prepared to make concessions when his independent view of the evidence warranted it.) The court further noted that although the defendant's expert was charged with the duty of independently researching and analysing the events giving rise to alleged delays, he had ignored the contemporaneous documentation and photographic evidence and had instead based his analysis on the facts as presented by one of the defendant's witnesses.

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<sup>14</sup> [2004] EWHC 1748.

<sup>15</sup> [2005] EWHC 181.



- 44 This decision, in particular, reflects the need for the expert to act independently of the instructing party and subject the background facts to full and proper scrutiny. It is plainly unwise for an expert to rely solely upon the evidence presented by his side's witnesses of fact because some or all of that evidence may not survive cross-examination, with the result that the expert's own opinion is undermined. In other words, "Do not take your client's word for it".

#### *Outside interference*

- 45 Likewise, the credibility of the expert's evidence will suffer if it appears that it has been unduly influenced by the instructing party or that party's lawyers. (Note that this would be contrary to the mandatory declaration required in the expert's report.) Clear-cut examples of interference in the report will always be difficult to identify, although (as the cases cited above illustrate) it is a foolhardy expert who takes his side's evidence and arguments as gospel without further enquiry.

- 46 In *Robin Ellis Limited v Malwright Limited*<sup>16</sup> the court considered the situation in which an expert had been instructed not to sign any agreed statement without the authorisation of his instructing party's solicitor. The court concluded that it was not for the parties to dictate to the experts what opinions they were allowed to hold since this might breach the all-important requirement that the expert's independent duty was to assist the court, not the instructing party. (Although this case preceded the introduction of the Civil Procedure Rules it still amounts to good law.)

- 47 Note that paragraphs 18.7 and 18.8 of the Expert Protocol make the position clear in relation to experts' meetings and discussions:

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

*18.8 The parties' lawyers may only be present at discussions between experts if all the parties agree or the court so orders. If lawyers do attend, they should not normally intervene except to answer questions put to them by the experts or to advise about the law."*

- 48 The decisions noted above in *Stallwood* and below in *Jones v Kaney* demonstrate that experts' meetings and joint statements can sometimes produce unpleasant surprises for the parties. However, it must be accepted that the parties are not entitled to fetter what their experts say in experts' meetings, because if this were to occur, these meetings would be unlikely to provide the court with much assistance in terms of narrowing the issues for trial. Plainly, any significant changes of opinion by the expert at any stage in the proceedings will undermine the expert's credibility and will be raised during cross-examination.

- 49 The possibility of interference with the opinion of a single joint expert was raised in *Edwards v Bruce & Hyslop (Brucast) Limited*<sup>17</sup> in which the court considered an appeal against a case management decision granting leave for the claimant to rely on its own expert's report, notwithstanding that the original order had been for a joint single expert. Leave was granted on the basis that the defendant's solicitors had engaged in 'clandestine communications' with the expert in the time between his first and second report, of which the claimant was unaware.

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<sup>16</sup> [1999] BLR 81.

<sup>17</sup> [2009] EWHC 2970 (QB).



The court held that the secret communications had tainted the independence of the expert's second report and that the usual position of a single joint expert was no longer tenable. The decision demonstrates the importance of maintaining the independence of experts (whether or not single joint or party instructed) and avoiding any situations (however innocent) that may give rise to a risk of perceived bias or influence.

### *Other points on credibility and merits*

**50** I want to mention two more points which are not recorded in any official judgments but arise from my own experience of expert evidence in a recent ICC arbitration in which the sole arbitrator was a retired judge of the TCC and the parties agreed to apply Part 35 to the expert evidence in the proceedings:

**50.1** In the arbitration, expert evidence was presented in a number of disciplines including forensic accounting. Whilst it was not the fault of the individual in question, in preparing his reports the claimant's expert had been shown documents that had not been disclosed to his opposite number. The arbitrator concluded that he could not rely upon the expert's evidence in these circumstances. Hence it is very important to ensure that there is a level playing field between experts and that both have equal access to the same documentary evidence. An expert should not seek to rely upon documents that he or she knows have not been provided to the other side.

**50.2** This arbitration also illustrated the importance of selecting an appropriate expert for the relevant discipline. One issue for determination concerned the suitability of the design of a blast-resistant building on a chemical plant site situated in close proximity to several explosive and volatile installations. The respondent's expert had worked on over 200 such blast-resistant buildings, but his opposite number could only lay claim to having been involved in the design of one such building. It was no surprise that this revelation had a negative impact on the claimant's expert's credibility in relation to the blast-proof design issue.

### **Expert immunity**

**51** As the law currently stands, expert witnesses in civil proceedings enjoy immunity from suit in connection with their activities as experts. The leading case is the Court of Appeal's 1998 decision in *Stanton v Callaghan*<sup>18</sup>. Mr and Mrs Stanton brought a claim in negligence against a structural engineer who had acted as their expert in a subsidence claim against their insurers. Mr Callaghan provided a report but at the experts' meeting, he significantly revised his views from those set out in the report, to the detriment of the Stantons' claim. The Court of Appeal upheld Mr Callaghan's immunity from suit in respect of both the contents of his report and the joint statement of the experts.

**52** However, a case from earlier this year suggests that expert immunity may not last much longer. The background to *Paul Wynne Jones v Sue Kaney*<sup>19</sup> was that Mr Jones had sought damages for personal injury following a road traffic accident. Dr Kaney had been instructed to act as an expert witness advising on the psychological aspects of Mr Jones' claim for psychiatric injury, including his case that he had suffered post-traumatic stress disorder ("PTSD"). Dr Kaney's expert report suggested that Mr Jones did have PTSD. After exchange of reports, the experts participated in a telephone conference discussion following which Dr Kaney signed a joint

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<sup>18</sup> [1998] EWCA Civ 1176.

<sup>19</sup> [2010] EWHC 61 (QB).



statement agreeing that Mr Jones had not suffered from PTSD and, more strikingly, that she considered that Mr Jones had been “deceptive and deceitful” Dr Kaney’s explanation for this volte face was unsatisfactory – amongst other things she stated that she had signed the joint statement albeit that it did not reflect what she had agreed and that her view of Mr Jones (a little more generously) was that he had been evasive rather than deceptive.

- 53 Unsurprisingly, Mr Jones subsequently settled his claims for considerably less than he had expected and brought proceedings in negligence against Dr Kaney. Dr Kaney did not substantively defend the action but applied to strike out Mr Jones’ claim on a summary basis, relying upon the principle of expert witness immunity. At the trial, Mr Jones contended that:
- 53.1 The immunity of experts was analogous to that enjoyed by advocates, which had been abolished by the House of Lords (after *Stanton v Callaghan* had been decided) in *Arthur JS Hall v Simons*<sup>20</sup>.
- 53.2 The blanket immunity enjoyed by experts was incompatible with the Human Rights Act 1998 (in force from 2 October 2000).
- 53.3 Bearing in mind the restrictions on “expert shopping” if an expert acted so negligently as to permanently damage the claiming party’s position, the party would be left without a remedy.
- 54 In a judgment dated 21 January 2010 the court granted Dr Kaney’s application to strike out Mr Jones’ claim on the grounds that it (and the Court of Appeal) was bound by the decision in *Stanton v Callaghan*. However, the judge also expressed the view that the policy basis for expert witness immunity had been narrowed:

*“although I conclude that it [Stanton v Callaghan] remains good law, I have doubts as to whether it will continue to remain so for the reasons canvassed by the Claimant and the discussion summarised above. I conclude that there is a substantial likelihood that on re-examination by a superior court, with the power to do so, it will emerge that the public policy justification for the rule [of expert immunity] cannot support it.*

*In my judgment a policy of blanket immunity for all witnesses, indiscriminately protecting witnesses as to fact and witnesses on the opposing side from expert witnesses retained by a party to advise them before and during the proceedings as to a pertinent issue in those proceedings, may well prove to be too broad to be sustainable and therefore disproportionate. The public benefit of truthful, accurate, reliable and frank evidence to the court is unlikely to need such a broad immunity. It can be enforced by the court of its own motion, or by professional bodies supervising the professional activities of the expert in question, including the activity of giving evidence to the court.”*

- 55 The judge therefore granted Mr Jones a leapfrog certificate, enabling him to apply for permission to appeal this issue directly to the Supreme Court. That appeal has yet to be heard but the general view is that the writing is on the wall for expert immunity. It follows that if the blanket immunity for expert witnesses is abolished by the Supreme Court, that will leave expert witnesses open to claims for negligence from disgruntled parties.

<sup>20</sup> [2000] UKHL 38.



## Conclusion

- 56 I should say that this paper has primarily focused upon expert evidence in court proceedings. However, in arbitrations, the parties will frequently agree that the provisions of Part 35 are to apply to expert evidence presented to the Tribunal. Whatever the forum, it should be understood that the duty of an expert is to provide an independent and impartial view of matters upon which he or she is called upon to express a view.
- 57 Therefore, when either preparing a report and/or giving evidence, as a matter of best practice all experts should abide by the provisions of Part 35 and the Expert Protocol, whether the forum is court, arbitration, adjudication, or some other procedure.

Ted Lowery  
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