Editor's Note

The Position of a Party Whose Expert Has Conceded the Opponent's Case—the Unresolved Tension Between Experts' Role to Further the Party's Cause and Their Obligation to Assist the Court

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LT Calling additional evidence; Case management; Expert evidence; Experts' duties

The relatively recent transformation of the role of experts, from party champions to effectively court assistants, keeps throwing up new problems. The latest of which arose in *Stallwood v David* [2006] EWHC 2600 where the parties' experts were directed to meet and produce a joint statement. Unfortunately for the claimant, the exercise resulted in her expert agreeing with the defendant's expert and effectively undermining her case. The question was whether the claimant should be allowed to call another expert.

Such a situation could not have arisen before the Civil Procedure Rules (CPR) came into effect, when experts were effectively part of a party's legal team and could not be made to meet and co-operate with the opponent's expert. Moreover, like the party's legal representatives, experts felt obliged to advance the party's cause. At the same time, however, experts were (and still are) considered to be witnesses and were therefore bound to be truthful. Inevitably, there was a tension between the expert's role as a member of the party's litigation team and the expert's duty to the court. From the early 1990s the court began to lay greater emphasis on the duty to the court. Notice of this change was given in *Compagnia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep. 68 at 81 where Cresswell J. stated:

> "1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation . . .
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to

> matters within his expertise . . . An expert witness in the High Court should never assume the role of an advocate.''

Although these principles were elaborated in the CPR, the tension at the heart of the expert's role in litigation has not been fully resolved. The difficulty arises from the fact that experts used in litigation occupy a peculiar place in court proceedings. They are considered to be witnesses. However, apart from the fact that they testify on oath and are liable to sanctions for perjury, they have little, if anything, in common with non-expert witnesses.

Indeed, their role differs to such an extent as to render their description as witnesses meaningless, if not downright misleading. Unlike witnesses, experts mainly present an interpretation of facts rather than the crude facts themselves. Unlike the involvement of witnesses in legal proceedings, the involvement of experts is not accidental. Witnesses are called to testify because they happened to have been present when some fact in issue took place. In contrast, experts are not called to testify because they have some connection with the facts but because they possess certain skills, the exercise of which could help a party to convince the court of the correctness of the party's case. Far from being accidental, therefore, expert retention is the culmination of, first, painstaking research and deliberate choice by the party and, secondly, of negotiation between the party and the expert concerning the terms on which the expert will agree to act.

Unlike a party's relationship to a mere witness, the relationship with the expert is fundamentally contractual. This factor has far-reaching implications. First and foremost, like lawyers, experts normally act for a fee, at times a very high fee. Like lawyers, they have an interest in the success of their client's case, for while their fee may not normally be contingent on the client's success, the expert's reputation and future professional income may well be affected by whether the expert has succeed in helping the client convince the court of the correctness of his or her allegations. Unlike a witness, who may be compelled on pain of contempt to attend court and testify, the expert has no obligation to accept a retainer and carry out an investigation. Having carried out an investigation and compiled a report, the expert has no obligation to produce it to court unless the instructing party has first paid the agreed fee.

Given these features it is only natural that clients and their lawyers should continue to regard retained experts as part of their litigation team and expect them to help their cause. However, this natural understanding of the expert role comes hard against the CPR philosophy that treats experts as assistants to the court, which is reflected in three measures adopted by the rule maker. First, the use of experts in litigation is placed under the complete control of the court. No party may rely on expert evidence without the court's permission (CPR r.35.4(1)). Hence, parties are no longer free to call as many experts as they wish. Secondly, the expert's allegiance to the court is given priority. CPR r.35.3 states:

> ''(1) It is the duty of an expert to help the court on the matters within his expertise.

> (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.''

Thirdly, the rules seek to promote party co-operation in the employment of experts and to encourage the use of joint experts wherever possible (CPR r.35.7). Similarly, the court may require opposing experts to co-operate with each other. Thus, CPR r.35.12 states:

> ''(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to—
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> (a) identify and discuss the expert issues in the proceedings; and
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> (b) where possible, reach agreed opinion on those issues.
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> . . .
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> (3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing—
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> (a) those issues on which they agree; and
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> (b) those issues on which they disagree and a summary of their reasons for disagreeing.
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> . . .
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> (5) Where experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.''

There is much to be said for this process. An earnest face-to-face meeting between experts professing skills and knowledge in a particular field will tend to narrow down their difference. Indeed, the experts themselves are likely to benefit from the exercise since they would be presented with different interpretations of the data and may be required to take on board additional considerations or even additional data. Even if the meeting does not achieve consensus, an exchange of views between opposing experts will often be conducive to better and deeper understanding of the issues. Quite apart from this cognitive aspect, a meeting between the experts will tend to soften any adversarial posturing, since the need to articulate reasons before well-informed professional colleagues is bound to moderate any mercenary loyalty felt by an expert towards the party paying the expert's fees.

While the rule contemplates the possibility of agreement between the experts, it makes it clear that where:

> ''experts reach agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement'' (CPR r.35.12(5)).

This provision states the obvious, since an expert is not the party's representative and has no authority to bind the party in any shape of form. Yet, the reality is quite different, because by agreeing with the opponent's expert a party's expert could deal a fatal blow to his or her own party's case, as happened in *Stallwood v David* [2006] EWHC 2600. The claimant brought an action in respect of whiplash injuries suffered in a motor accident. Her expert produced a report

stating that the claimant's injuries had long-term effects from which she would not recover. The defendants' expert, on the other hand, was of the view that the injuries could have caused only temporary symptoms and that therefore the claimant's present condition could not be attributed to the accident. The court ordered a meeting between the experts, following which the claimant's expert changed his opinion and agreed with the defendant's expert that the claimant's present inability to work was unrelated to the accident. This left the claimant with no evidence to support the bulk of her claim. She therefore applied for permission to call another expert.

Clearly, to permit a party in such situations to call another witness as a matter of course would defeat the purpose of CPR r.35.12 to promote expert agreement, as Teare J. recognised when he held:

> "17. . . . the express purpose of a discussion between experts is to reach, if possible, an agreed opinion on the expert issues; see CPR 35.12(1)(b). It necessarily follows that the rule contemplates that as a result of the discussion an expert may modify or change the opinion he had previously expressed in his report. In the context of trial management that is a most desirable purpose because it will tend to reduce the duration and expense of the trial and encourage a settlement of the case. Thus the mere fact that an expert has changed or modified his opinion following an experts' meeting cannot by itself be a reason for permitting for a party who is disappointed with the change or modification of opinion to adduce evidence from another expert. It would not be possible in such circumstances to suggest that further expert evidence was 'reasonably required to resolve the proceedings'; see CPR Part 35.1."

However, as Teare J. noted, there will be situations where a party may be allowed to call another expert, for example:

> "where there is good reason to suppose that the applicant's first expert has agreed with the expert instructed by the other side or has modified his opinion for reasons which cannot properly or fairly support his revised opinion . . ." ([21]).

The kind of situation that the judge had in mind was where the expert clearly stepped outside his or her expertise or brief, or otherwise had shown himself or herself to be incompetent. A further situation that may justify the court in ignoring the agreement is where the expert changed his or her view for an improper motive, such as a wish to curry favour with the opposing party, or to secure some favour from the opposing expert. What is common to these situations is that the expert's change of opinion will have been found to be flawed.

In such cases, Teare J. explained, the court would have to consider whether, having regard to all the circumstances and the overriding objective to deal with cases justly, it can properly be said that further expert evidence is "reasonably required to resolve the proceedings" (CPR r.35.1). In practice, however, a party wishing to impugn his or her own expert's change of view is going to face considerable difficulty. Professional incompetence is of course always

a risk, but the party choosing an expert will have normally done his or her homework and is unlikely to choose an incompetent expert. Besides, a party wishing to disqualify his or her expert's agreement with an opposing expert would have to show why his or her expert acted competently when providing a favourable report, but was incompetent when he or she changed his or her mind on the very same issue.

Teare J. held that the facts that the claimant was surprised by her expert's agreement with the opposing expert, and that the agreement undermined her claim, did not provide sufficient reasons for permitting the claimant to call another expert. A party applying for permission to call another expert must first establish by evidence that the expert acted incompetently or improperly. To this end the party would need to have some evidence about the reasons for the expert's change of view. To obtain such evidence, the judge held, the party must first ask the expert to provide his or her reasons for changing his or her position.

In the case under consideration the claimant did not approach her expert to find out the reasons for changing his opinion and was therefore in no position to impugn the expert's change of heart. Consequently, one would have expected the court to refuse the claimant's application. Yet, despite the fact that no fault could be found with the agreement between the claimant's expert and his opposite number the judge permitted the claimant to call a fresh expert. The route to this outcome is not easy to follow.

Teare J. found that the hearing of the claimant's application in the lower court was flawed due to excessive interruptions by the county court judge, and to the impression that the judge allowed his own personal experience, rather than the evidence, to influence his approach. It was therefore inevitable that these procedural defects should lead the appeal court to disregard the lower court's ruling and proceed to decide the application afresh. In doing so, the appeal court was required to exercise its discretion in accordance with the principles described above.

Yet, notwithstanding that no fault had been found with the change of opinion by the claimant's expert, Teare J. gave the claimant permission to call another expert. The reason he gave was that in view of the lower court's handling of the application:

> "if the claimant is not permitted to rely upon the evidence of Mr Horan [the additional expert] and the court subsequently accepts the opinion of Mr Boston [the defendant's expert with whom her own expert agreed] I consider that she would have an understandable sense of grievance judged objectively. I do not consider that that sense of grievance is likely to have been dispelled by the fact that matter has now been considered by the High Court" ([36]).

In taking this position, Teare J. was purporting to follow the approach developed by Neuberger J. in *Cosgrove v Pattison* [2001] C.P. Rep. 68. However, that case was concerned with a single joint expert, the validity of whose opinion was subject to some doubt. Given that in that case the only expert evidence available to the court was questionable, failure to allow a party

to remedy defective evidence would, of course, have created a legitimate sense of grievance, to say the least. But in the case before Teare J., no fault had been found with the expert evidence; if anything the agreement of two competent experts lent their joint conclusion on the issue greater weight.

The approach adopted by the judge was contrary to the principles governing the appeal jurisdiction. As a matter of principle, where an appeal court has found fault with the hearing held in the lower court, there are two courses of action open to it: the appeal court may apply its own judgment to the issue and decide accordingly; alternatively, it may allow the appeal and remit the case for a fresh hearing in the lower court. What an appeal court may not do is to give the appellant what he is asking for even when the merits of his case do not support his request. If the reasoning followed by the judge in this were followed, appeal courts may find themselves granting groundless applications fairly regularly.

Quite apart from its inconsistency with principle, Teare J.'s decision creates scope for difficult practical problems when the case goes back. If fault had been found with the claimant's first expert (such as incompetence or impropriety), the case would have proceeded on the basis that the agreement given by the claimant's expert was invalid and that his views should therefore be ignored. However, as no defect had been identified, let alone established, with regard to the agreement given by the claimant's expert as to the cause of injury, the claimant would not be in a position to insist that the court should exclude her first expert or ignore his views. This could give rise to a number of case management problems. The lower court would have to consider whether to direct a fresh meeting between opposing experts. In view of the circumstances of this particular case, the court may well conclude that it is important to direct a meeting in order to identify in advance of the trial the precise reasons for which the claimant's second expert differs from the other experts. This will inevitably give rise to the question of whether the claimant's first expert should be included in the meeting. Although a meeting attended by both the claimant's first and second experts may prove embarrassing, the alternative of excluding the first expert would be even more unattractive since it would give the impression (and not just the impression) that the expert was excluded because he fulfilled his duty to assist the court.

In any event, the defendants would be free to rely on the concessions made by the claimant's first expert as adding weight to their own expert opinion. Indeed, there would be nothing to prevent them from calling the claimant's first expert to explain why he agreed with their own expert. If this happened, the claimant would have to challenge at the trial not only the opinion of the defendants' expert, but also of her own first expert. Such a spectacle is unlikely to strengthen the principle that experts' duty is to the court rather than to the party paying their fees.

Given the tenuous justification for allowing the claimant to call another expert, one can only assume that the court was reluctant to effectively condemn her action to failure as a result of an agreement reached between the experts at a meeting at which presumably neither she nor her lawyers were present. Of course, it is always possible that a party's expert may concede under

cross-examination that his opinion is mistaken, but this would take place in the presence of the court and the instructing party. It is different, however, when a vital concession is given in private. One may therefore speculate that the judge was uncomfortable at the thought that the claimant's case would in effect be decided by the experts amongst themselves rather than by the court.

Such thinking suggests that the tension between the role of experts as members of the parties' litigation teams and their role as assistants to the court has not been fully resolved. If the expert's role is to assist the party paying his fees, a party in the position of the present claimant should be entitled to dispense with the services of an expert who, free of the compulsion of cross-examination, sides with the opponent. However, if, as the CPR provide, the expert's role is to assist the court, and not only at the trial but also during the pre-trial, then a party in the position of the present claimant should not be allowed to challenge a concession made by her expert, when it has been free of incompetence or vice. There simply is no half-way house and therefore the ruling in this case can only cast a shadow over the viability of the CPR r.35.12 process, which is clearly aimed at encouraging experts to reach the kind of agreement that was reached in this case.