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The Legal Pathways

What solicitors and the legal system need, and how to avoid unnecessary work and criticism

Ian Curtis-Nye, Lyons Davidson

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Agenda

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The different legal pathways	• The pre-action protocols and their purpose • Issuing proceedings and which track • Stages of litigation
Part 35 and what is needed from you?	• The requirements of Part 35 • Case law on Part 35 • Why does it all matter?

Pre-action protocols and purpose



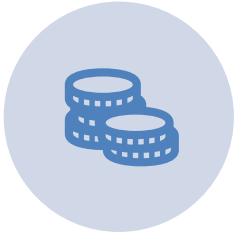
PRE-ACTION PROTOCOLS



ENCOURAGE EARLY COMMUNICATION



PROMOTE EARLY RESOLUTION



REDUCE COSTS

Proceedings – which track /process?

Why is this relevant to you?

Track / Process	Relevant factors	£ value
Small Claims Whiplash / OIC	Excludes protected parties and vulnerable road users	Injury up to £5k or total value over £10k
Small claims non-Whiplash		Up to £1,5k
MOJ claims portal	Applies to claims where liability admitted pursuant to relevant pre-action protocol	Up to £25k
Fast Track		Up to £25k
Intermediate Track	Applies to limited Clinical Negligence claims with early full admission	Up to £100k
Multi-Track	Applies to most Clinical Negligence claims regardless of value	Over £100k (PI only)

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Litigation stages

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Why is this relevant to you?

- Post Issuing – Pre-allocation
- Post Allocation – Pre-Listing
- Post Listing – Pre-Trial
- Trial

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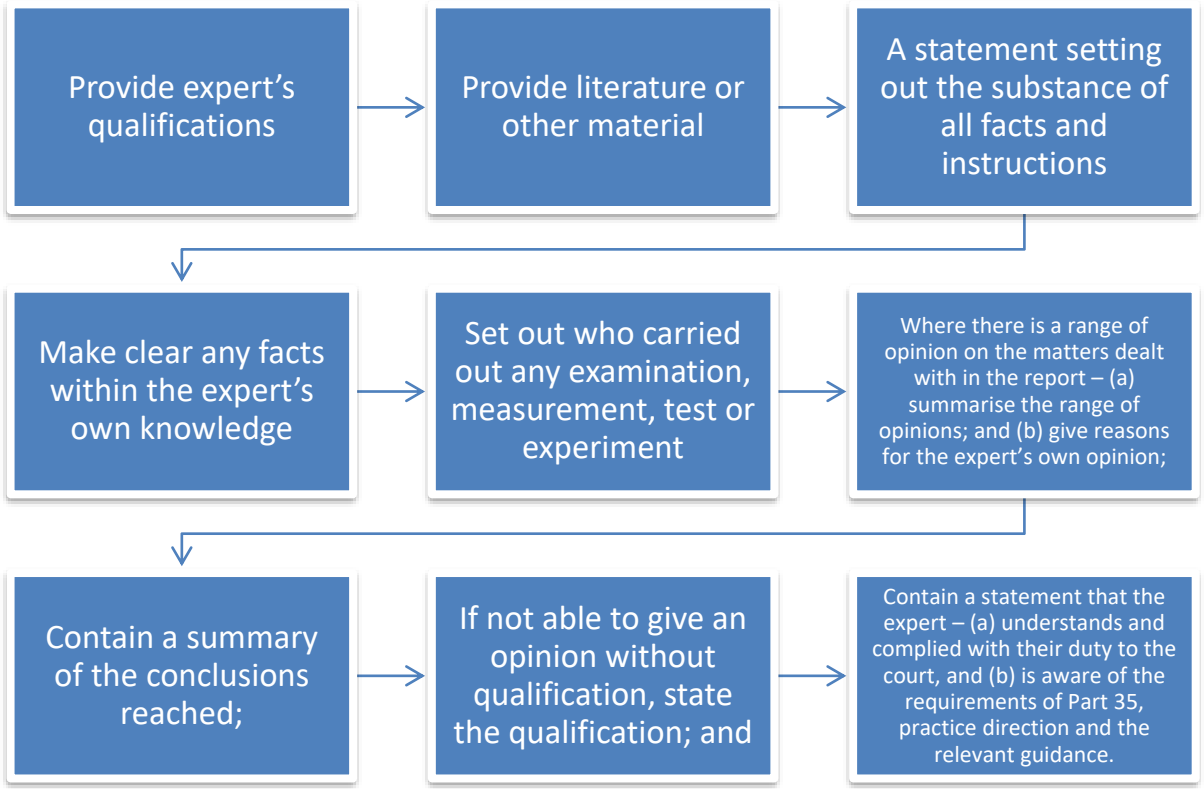
An expert report must…



The requirements of Part 35

- *Hamed -v- Ministry of Justice* (County Court in Cambridge – 7th June 2024)
  - The claimant brought an action for personal injury after falling from a top bunk when he was in prison
  - Liability was admitted, subject to medical causation.
  - The claimant's case was that his shoulder had been injured, relying on a single report based on an examination that took place more than 3 years after the accident.
  - The defendant alleged that the claim was fundamentally dishonest. This was upheld by the judge.

The requirements of Part 35 (cont'd)

- Judge's comments:
- "*Mr [Expert] had failed to comply with the requirements of Part 35 of the CPR and the accompanying practice direction, in that he had failed to provide a copy of his instructions (CPR 10(3)), had failed to provide details of the range of opinion (35PD.3.2(6)), and had failed to provide details of any literature relied upon (35PD.3.2(2)).* ***These are serious failings and it was clear from Mr [Expert's] evidence that he did not have an understanding of the requirements of part 35****, despite signing a declaration on 7 May 2021 that he was aware of the requirements of part 35 and practice direction 35.*"

- "*It is not sufficient for an expert giving an opinion upon which a court may rely, to simply state what his/her opinion is* ***without justification for that opinion beyond that it is the expert's opinion that*** *" … " on the balance of probabilities.*"

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Having sight of the relevant evidence

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- *Rebecca Hepworth v Dr Amanda Coates* [2025] EWHC 1907 (KB)
  - The claimant brought a clinical negligence claim against her GP, the defendant.
  - The claimant alleged that her GP failed to diagnose red flag symptoms of cauda equina symptoms.
  - The case failed on liability.
  - However, the judge went on to address concerns in relation to the expert evidence.

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Having sight of the relevant evidence (cont'd)

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- Judge's comments:
- *"It is sufficient for me to find that Dr [Expert's] evidence is that he prepared his report and met with Mr [other side's Expert] and signed the Joint Statement without having consulted Ms Hepworth's witness statement. His evidence is that he also did so without seeing the reports of the expert neurosurgeons or urologists, whose evidence would self-evidently be potentially relevant to the issues that he addressed and did not ask to see them.* ***It was not Dr [Expert's] fault if he was not provided with the witness statements and other reports, but that he did not ask to see them before finalising his report is, in my judgment, a serious omission."***

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Time matters

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- *In X and Y (Delay: Professional Conduct of Expert)* [2019] EWFC B9
  - Medical evidence was required in a Court of Protection case.
  - The parties to jointly instructed a consultant paediatrician.
  - There was significant delay with the report which included failure to open a password encrypted document in time and an inability to attend court
  - The judge made an order that a different expert be instructed.

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Time matters (cont'd)

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- Judge's comments:
- *"There will always be occasions when, despite an expert having genuinely believed that he or she could complete a report by the date set by the court, circumstances change and that is no longer possible.* ***Where that happens, the expert should let his or her instructing solicitor know promptly, giving reasons for the delay*** *and indicating the new date by which the report can be completed. An application should be made to the court for the timetable to be varied"*

- *"Dr [Expert's] fees in respect of any work she can prove she has undertaken since she was instructed. Without hearing argument on the point I am unable to resolve that issue. However, in light of the history set out above it is at this stage* ***difficult to see how any fee could be justified.****"*

Understanding the legal test

- *Tarrant v Monkhouse* [2025] EWHC 2576 (KB)
  - The claimant brought a clinical negligence claim in relation to bariatric surgery.
  - Prior to trial the pleadings were amended to reduce the number of allegations.
  - The claimant relied on expert evidence.
  - During cross-examination the claimant's expert was questioned on the "Bolam" test, which had been mentioned in the expert's report.

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Understanding the legal test (cont'd)

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- Judge's comments:
- *"[The expert] was asked by Ms Hughes to explain his understanding of the Bolam test, which he had mentioned by name in his report. The answer he gave* ***did not disclose an accurate understanding and/or an ability to explain the test*** *applicable in cases of alleged clinical negligence."*

- *"The inability of an expert witness to recite the Bolam test by heart is in no way determinative of the quality of their opinion. However, in this case it was simply* ***not clear to me that [the expert] had at least the basic understanding of the legal parameters*** *within which he was being asked to express his opinion."*

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View from the team

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Low Value Personal Injury	• "Exceptional circumstances" – if they exist – set out what they are and not just that you agree.
Complex Personal Injury	• Answer the specific instructions and questions. Even if there are other matters you want to address.
Clinical Negligence	• If you are going to have periods where you are uncontactable or your workload is too high, speak to us and we can factor this in.

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Why does it matter?

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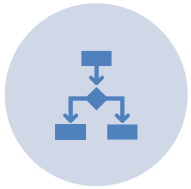
DUTY TO THE COURT



RESOLUTION



COST



DELAY



CREDIBILITY OF EVIDENCE

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Thank you!