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# CONFERENCE 2024

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## Dealing with CPR Part 35 Questions

Presented by: David Dewar

Solicitor, Associate Director, Winn Solicitors Limited





**David Dewar, Associate Director & Head of Commercial and Contested Litigation at Winn Solicitors Limited**

**I joined Winn Solicitors in 2019 having previously specialised in Personal Injury matters since 1990; I am noted for my work with high value and complex personal injury actions.**

**Previous testimonials appearing in the Legal 500 and Chambers and Partners describe me as:**

**“A tough litigator with meticulous attention to detail who provides sensible, down-to-earth and realistic advice ... an outstanding lawyer ... shrewd tactician with excellent judgement ... a keen eye for detail and an ability to come up with innovative solutions.”**

**I am responsible for the Personal Injury department at Winns, comprising 55 lawyers together with the Dispute Resolution Team which handle Commercial and Contested non-PI Litigation.**

**When I am not at work, I am usually on the golf course or walking my border terrier.**

# CPR Part 35 Questions

## Introduction

- Why Part 35 Questions appear to be more popular – *TUI v Griffiths*
- Consideration of the Expert's role and the rules on pre-action conduct concerning the instruction of experts and whether it creates tension in the process
- Consideration of the rules and guidance applicable to Part 35 Questions
- Practical issues to consider when receiving Part 35 Questions
- Review of anonymised Part 35 Questions
- Dishonesty and Evidence in Personal Injury Claims

## CPR Part 35 Questions

### Part 35 Questions – why so popular in the last 12 months?

- 29 November 2023 - [TUI UK Ltd \(Respondent\) v Griffiths \(Appellant\)](#)
- Press Summary: [TUI UK Ltd v Griffiths](#)
- Supreme Court affirms the general rule in civil cases that a party must challenge by cross-examination the evidence of any witness [including experts] of the opposing party on a material point which is claimed should not be accepted by the trial judge.
- Provides 7 examples in which this requirement may be relaxed, one of which is where Part 35 questions are put to the expert witness and the expert witness fails to answer them satisfactorily.



## CPR Part 35 Questions

### Why they have increased in number

- Sadly, it's the lawyer's fault - Supreme Court did not modify CPR Part 35.6
- Key facts from TUI:
  - TUI obtained its own expert evidence and elected not to disclose it
  - Part 35 Questions had been asked and no suggestion the replies were inadequate
  - The Part 35 Questions asked did not focus on the matters which TUI later criticised
  - Supreme Court endorsed the use of '*focused CPR Pt 35.6 questions*'

## CPR Part 35 Questions

### Why they have increased in number

The real reason it is entirely the lawyer's fault

Current trend in frequency and format of Part 35 Questions appears to overlook a crucial part of the *TUI* judgment which appears on page 33, paragraph [81]:

*It is important and consistent with the ethos of the CPR that there be a **proportionate use of resources** in the pursuit and defence of such claims. A defendant can ask **focused** CPR Pt 35.6 questions*

Proportionate and focused questions remains at the core of the rules and guidance applicable to Part 35 Questions, and the Supreme Court in *TUI* did not alter that

## CPR Part 35 Questions

### *Expert Evidence Generally*

- To assist the Judge to make findings in the Judgment on facts or law
- *Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to the form and content by the ... of litigation* (Lord Wilberforce in [Whitehouse v Jordan \[1981\] 1 WLR 246](#), at paragraph 256)
- Expert witnesses should provide independent assistance to the court by way of an objective unbiased opinion in relation to matters within their expertise. They should never assume the role of the advocate; see also Garland J in [Polivitte Ltd v Commercial Union Assurance Co plc \[1987\] 1 Lloyd's Rep 379](#), at paragraph 386

## CPR Part 35 Questions Review of anonymised Part 35 Questions

# PRACTICE DIRECTION 35

## Expert Evidence – General Requirements

**2.1** Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

**2.2** Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.

**2.3** Experts should consider all material facts, including those which might detract from their opinions.

**2.4** Experts should make it clear –

(a) when a question or issue falls outside their expertise; and

(b) when they are not able to reach a definite opinion, for example because they have insufficient information.

**2.5** If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.



## CPR Part 35 Questions

### Rules on pre-action conduct

# Delegate Poll

Your Medico-legal reporting practice – are you instructed in:

- A.) Exclusively Road Traffic Accident matters
- B.) Mixed some Road Traffic Accident some non-RTA matters
- C.) Exclusively Clinical Negligence matters

## CPR Part 35 Questions

### Rules on pre-action conduct

# Delegate Poll

When did you begin preparing Medico-legal reports?

- A.) Before 2013
- B.) After 2013
- C.) After 2021

## CPR Part 35 Questions

### Rules on pre-action conduct

# Delegate Poll Answers

When did you begin preparing Medico-legal reports?

- A.) Before 2013 – Less restrictive Pre-action Protocols and litigation costs rules
- B.) After 2013 - *Jackson* Reforms Implemented MoJ RTA Portal extended
- C.) After 2021 – Official Injury Claim (OIC), for managing low-value road traffic accident (RTA) claims, which launched in May 2021 – Whiplash Tariff Introduced

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

On 26 April 1999 the Pre-Action Protocol for Personal Injury Claims along with the Civil Procedure Rules and it revolutionised Personal Injury claims procedure remains largely as originally drafted. The reforms over the last 25 years have simply removed certain cases that originally proceeded under this protocol to their own bespoke protocols:

- Road Accidents valued under £10,000 were first to go,
- then Road Accidents valued between £10,000 – £25,000.
- Occupational Disease and Illness Claims
- Employers' Liability and Public Liability Claims valued below £25,000
- Holiday Illness Claims such as *TUI*

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

The Pre-Action Protocol for Personal Injury Claims works well and usually the Claimant will nominate the proposed medico legal experts, for agreement with the Defendant's Representative.

- There is no restriction the number of experts or expertise that must be used or in which order
- The expert is invariably instructed with a complete set of medical records
- There is no template report to be used
- No set or fixed fees

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

- Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013 – Injury Element of Claim exceeds £5,000 – Para 7.5:

*In most claims with a value of no more than £10,000, it is **expected that the medical expert will not need to see any medical records***

- Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents (“The RTA Small Claims Protocol”) comes into force 31 May 2021 – Para 7.10(1):

*In a claim made under this Protocol, it is expected that the medical expert will not need to see any medical records. **Any review of medical records must be justified within the report.***

## CPR Part 35 Questions

### ‘Tariff’ Whiplash Injury Regulations 2021

<i>Duration of injury</i>	Amount – Regulation 2(1)(a)	Amount – Regulation 2(1)(b)
Not more than 3 months	£240	£260
More than 3 months, but not more than 6 months	£495	£520
More than 6 months, but not more than 9 months	£840	£895
More than 9 months, but not more than 12 months	£1,320	£1,390
More than 12 months, but not more than 15 months	£2,040	£2,125
More than 15 months, but not more than 18 months	£3,005	£3,100
More than 18 months, but not more than 24 months	£4,215	£4,345.

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

# Delegate Poll

- How many times have you requested sight of the Claimant's medical records to complete your opinion after a MedCo 1<sup>st</sup> report examination?
  - A.) Never
  - B.) Once
  - C.) More than once but less than five
  - D.) More than five times



## CPR Part 35 Questions

### CPR – Pre-Action Protocols

- The Aim of the Pre-Action Protocols is to deal with the cases justly and at proportionate cost.
- The prohibition against reviewing medical records is proportionality driven, if they are not required in most cases so avoid the associated costs. The £50 records fee no longer applies but Agency fees of circa £30 can still be recovered.
- Part 35 Questions are seldom raised in MoJ Portal or OIC Portal cases
- Majority of Part 35 Questions are largely based on inconsistencies between the history provided by the claimant revealed by the medical records

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

Does the absence of a medical records review create the tension in the process resulting in disproportionate Part 35 Questions?

- Generally, a small proportion of whiplash claims cases involve:
  - A.) an exacerbation or aggravation of pre-existing symptoms, or;
  - B.) an acceleration of pre-existing injuries /degenerative conditions
- The first category usually it's the claimant's failure to recall/provide an accurate history, that creates the 'tension' not the absence of records
- The second category usually have a 2<sup>nd</sup> report with a records review and usually it's the claimant's failure to provide an accurate history creating the 'tension'

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

# Delegate Poll

- Would a prior whiplash injury (lasting less than 6 months) from which the claimant has made a complete recovery, and is asymptomatic at the time of the index accident alter your opinion as to the cause and expected duration of the symptoms now complained of?
  - A.) Not likely to alter
  - B.) Highly likely to alter

## CPR Part 35 Questions

### CPR – Pre-Action Protocols – Not at Fault

- It is not an issue arising with MedCo process per se. However, a disproportionate response for the few where:
  - Claimant provides an inaccurate but not dishonest history
  - Claimant's lawyers working within the Protocol do not have the medical records, to potentially identify an inaccurate history
  - Claimant has no opportunity to offer a reasonable explanation before the report is disclosed
  - Genuinely dishonest claims are a tiny proportion of total claims
- The greatest tension thereafter is the assumption any discrepancy arises from a Claimant's dishonest intent to mislead

## CPR Part 35 Questions

### Specific rules and guidance

#### Civil Procedure Rules Part 35 - EXPERTS AND ASSESSORS

Rule 35.6—(1) A party may put written questions about an expert's report (which must be proportionate).

Rule 35.6—(2)(c) must be for the purpose only of clarification of the report, unless in any case—

- (i) the court gives permission; or
- (ii) the other party agrees.

## CPR Part 35 Questions

### Specific rules and guidance

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- (ii) the other party agrees.

## CPR Part 35 Questions

### Specific rules and guidance

Clarification – Defining the undefined

*Rule 35.6—(2)(c) must be for the purpose only of clarification of the report ...*

### Interpretation and definitions

#### 35.2

(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.

## CPR Part 35 Questions

### Specific rules and guidance

Clarification – is not defined by the CJC Guidance, Rules or Practice Directions

*The Notes in Paragraph 35.6.1 of the ‘White Book’:*

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#### PART 35 EXPERTS AND ASSESSORS

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This is a useful provision, perhaps particularly so in fast track cases (see r.35.5(2)). It enables a party to obtain clarification of a report prepared by an expert instructed by their opponent. In a given case, were it not possible to achieve such clarification of a report, the court, for that reason alone, may feel obliged to direct that the expert witness should testify at trial. The meaning of “clarification” is not explained in the rule or Practice Direction. However, it would seem that questions should not be used to require an expert to carry out new investigations or tests, to expand significantly on his/her report, or to conduct a form of cross-examination by post, including on the expert’s credibility unless the court gives express permission. In *Mutch v Allen* [2001] EWCA Civ 50 [2001] 1 W.L.R. 1555, CA, the Court of Appeal held that a judge’s order that an expert should provide a written clarification of his report did not require him to conduct a new investigation or to expand significantly on his report, or to conduct a form of cross-examination by post, including on the expert’s credibility unless the court gives express permission.



## CPR Part 35 Questions

### Specific rules and guidance

# Dictionary definition of “clarification”:

*“an explanation or more details that make something clear or easier to understand.”*

Logic would suggest that clarification cannot relate to matters that are not already part of the Expert’s report.

***TUI – Unfocused Questions*** are those that are not only for clarification

## CPR Part 35 Questions

### Specific rules and guidance

Civil Procedure Rules Part 35 - EXPERTS AND ASSESSORS

Rule '35.6—(2)(c) *must be for the purpose only of clarification of the report, unless in any case*

***(i) the court gives permission;***

If they go beyond seeking clarification of the report permission is required from the court to ask it.

## CPR Part 35 Questions

### Specific rules and guidance

#### Civil Procedure Rules Part 35 - EXPERTS AND ASSESSORS

Rule '35.6—(2)(c) *must be for the purpose only of clarification of the report, unless in any case*

***(ii) the other party agrees.'***

If the Solicitors commissioning the report simply send you the opposing party's questions – you can safely assume they agree.

## CPR Part 35 Questions

### Specific rules and guidance

*Mutch –v- Allen* – *questions allowed that went beyond clarification*

#### **Object to the Question - not the answer**

- Claimant did not object and asked Expert to Reply
- Claimant's solicitor omitted material facts from the instructions, which was the primary issue to be determined at trial
- Defendant was not given permission to obtain their own expert evidence
- The questions were reasonable and proportionate, and probably would have been unnecessary but for the defective instructions

## CPR Part 35 Questions

### Specific rules and guidance

#### ***Wilson -v- Al-Khader – expression of additional opinions***

*“These [questions] called for not clarification but the expression of additional opinions and they are not, in my judgment, clarification questions within the meaning of Part 35.6”*

The Judgment in *Wilson* goes on to further clarify that it is irrelevant that the question may be expressed “*for the purposes of clarification*” when in fact it exceeds the boundaries of actual “*clarification*” the rules “*constrain the Defendant to asking questions only for the purposes of clarification*”.

## CPR Part 35 Questions

### Specific rules and guidance

#### *Mustard -v- Flower – Agreement or Court’s Permission*

*“it is clear from the rule itself that such questions may, in a proper case, be put **by agreement** or with the Court’s permission”*

*“[The questions] were based on statements by the Claimant, the reliability of which was likely to be tested at Trial, so were premature”. At Paragraph 33 he continues “[the questions] quite impermissibly placed a burden on the Experts to decide what were and were not proper questions.”*

## CPR Part 35 Questions

### Specific rules and guidance

Civil Procedure Rules Part 35 - EXPERTS AND ASSESSORS

Rule '35.6 (1) *questions about an expert's report ... must be proportionate*'

What does *proportionate* mean? If it is an RTA on the Fast-Track *proportionate* is:

- Maximum cost permitted under Rule '45.19 (2A)(e) *answer to questions under Part 35: £80.*'

**Can they be done for £80?**

**(If it cannot be done for £80 probably not proportionate)**

## CPR Part 35 Questions

### Specific rules and guidance

Civil Procedure Rules Part 35 - EXPERTS AND ASSESSORS

Rule '35.6 (1) *questions about an expert's report ... must be proportionate*'

What does *proportionate* mean in all other cases?

**No rule or guidance for other cases (except small claims)**

*(Instructions to my team: a fee approaching 50% of the initial cost probably not proportionate, but it depends upon the case and expert's discipline)*



## CPR Part 35 Questions

### Specific rules and guidance

Civil Procedure Rules Part 35 - EXPERTS AND ASSESSORS

Rule '35.6 (1) *questions about an expert's report ... must be proportionate*'

What does *proportionate* mean in all small claims?

**CPR 27 PD 27A 7(3)(2) - Limited to a sum not exceeding £750 (excluding VAT) for each expert. Which includes earlier report(s) + Part 35 Reply fee**

## CPR Part 35 Questions

### Specific rules and guidance - Who pays?

#### **The Solicitor commissioning the report (not the party asking the questions)**

Civil Procedure Rules Part 35 Practice Direction 6.2 states: "The party or parties instructing the expert must pay any fees charged by that expert for answering questions put under rule 35.6 ..." .

#### Questions to Experts

**6.1** Where a party sends a written question or questions under rule 35.6 direct to an expert, a copy of the questions must, at the same time, be sent to the other party or parties.

**6.2** The party or parties instructing the expert must pay any fees charged by that expert for answering questions put under rule 35.6. This does not affect any decision of the court as to the party who is ultimately to bear the expert's fees.

## CPR Part 35 Questions

### Specific rules and guidance - Instructions

Requests for a copy of your instructions – **You should not disclose unless you are satisfied permission has been granted**

**CPR 35.10(4)** the Court will not order disclosure of the instructions, including any specific document which forms part of the instructions to the Expert unless it is satisfied that there are reasonable grounds to consider the statement of instructions given with the Expert's Report to be inaccurate or incomplete.

## CPR Part 35 Questions Practical Guidance

- Confirm and agree your fee as soon as you can (Especially via direct instruction)
- If you will face difficulty replying within the deadline:
  - Let the solicitors know as soon as you can
  - Confirm when you can reply
  - What you need to complete your reply
- Don't leave it until the deadline:
  - Solicitor / Claimant may be struck out
  - Applications for more time are more likely to succeed if made before deadline has expired

## CPR Part 35 Questions

### Practical Guidance – Overriding Duty to the Court

- You are instructed not to answer some questions, but consider you should:

**Your CPR 35.3 duty requires you to answer it**

Experts – overriding duty to the court

35.3

- (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.

## CPR Part 35 Questions Practical Guidance – Overriding Duty to the Court

- Suggested Response:

Having regard to my CPR 35.3  
overriding duty to the court  
[insert answer]

## CPR Part 35 Questions Practical Guidance

### Dealing with a request for copy of your instructions

**Question:** Please provide the letter of your instruction and any subsequent letters the Claimant or his solicitors sent you:

**I am aware the Defendant requires permission to receive a copy pursuant to CPR 35.10(4). I invite the solicitors for the claimant to provide this to the solicitors for the Defendant, in the event the relevant permission has been given by the Court.**

## PART 35 QUESTIONS TO [REDACTED]

### CPR Part 35 Questions Review of anonymised Part 35 Questions

You are requested to answer the following questions in accordance with your duty to the Court and in accordance with Part 35 of the Civil Procedure Rules:

Enclosures:

- Medico-legal report, dated 09/08 [REDACTED]
- Medico-legal report of Dr [REDACTED] dated 06/07 [REDACTED]

1. Please provide the letter of your instruction and any subsequent letters the Claimant or her solicitors sent you.

Would you provide a copy of your letter of instruction?



## CPR Part 35 Questions

### CPR – Pre-Action Protocols

# Delegate Poll

- Would you provide a copy of your letter of instruction?
  - A.) Yes
  - B.) No

# Delegate Poll Correct Answer

- Would you provide a copy of your letter of instruction?
  - B.) No

## **Suggested Reply:**

**I am aware the Defendant requires permission to receive a copy pursuant to CPR 35.10(4). I invite the solicitors for the claimant to provide this to the solicitors for the Defendant, in the event the relevant permission has been given by the Court.**

## CPR Part 35 Questions Review of anonymised Part 35 Questions

2. Please also refer to section 2.7 of your report; it is stated here that the Claimant sustained injuries to [REDACTED] neck and lower back; please also refer to section 5.13, which states that the Claimant also suffered with vertigo and blurred vision following the accident. Please also refer to section B.4 of [REDACTED]'s report. It is stated here that the Claimant suffered injuries to her neck and right shoulder as a result of the accident.

Do you agree that the account provided to you by the Claimant regarding [REDACTED] injuries sustained in the index accident conflicts with the section referenced above from the report of [REDACTED], suggesting that the information provided to you by the Claimant was not accurate? If you disagree please state why with reference to the literature you rely upon to support that the information provided to you was accurate.

Would / could you decline to answer?

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

# Delegate Poll

- Upon what basis would / could you decline to answer?
  - A.) Not proportionate
  - B.) Not for the purpose only of clarification of the report
  - C.) Both A. & B. above
  - D.) I would answer my CPR 35.3 overriding duty to the court applies

## CPR Part 35 Questions CPR – Pre-Action Protocols

# Delegate Poll Correct Answer

- Upon what basis could you decline to answer?
  - A.) Not proportionate
  - B.) Not for the purpose only of clarification of the report
  - C.) Both A. & B. above
  - D.) I would answer my CPR 35.3 overriding duty to the court applies

# Delegate Poll Correct Answer

- Upon what basis could you decline to answer?

***Not for the purpose only of clarification of the report***

***Mustard -v- Flower***

***“[The questions] were based on statements by the Claimant, the reliability of which was likely to be tested at Trial, so were premature”. At Paragraph 33 he continues “[the questions] quite impermissibly placed a burden on the Experts to decide what were and were not proper questions.”***

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

# Delegate Poll

## Also Correct Answer

- A.) Not proportionate
- B.) Not for the purpose only of clarification of the report
- C.) Both A. & B. above
- D.) I would answer my CPR 35.3 overriding duty to the court applies



## CPR Part 35 Questions Review of anonymised Part 35 Questions

### Expert's answer:

2. I acknowledge that the descriptions of the injuries sustained by the client which given to myself and to Dr [REDACTED] do differ. However, it is not possible to determine which of these is correct. This would be a matter for the Court to decide.





## CPR Part 35 Questions Review of anonymised Part 35 Questions

3. Considering your answers above, do you agree that your prognosis/report was based on inconsistent and inaccurate information provided to you by the Claimant? If you disagree please confirm why you disagree.

Would / could you decline to answer?

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

# Delegate Poll

- Upon what basis would / could you decline to answer?
  - A.) Not proportionate
  - B.) Not for the purpose only of clarification of the report
  - C.) Both A. & B. above
  - D.) I would answer my CPR 35.3 overriding duty to the court applies

## CPR Part 35 Questions CPR – Pre-Action Protocols

# Delegate Poll Correct Answer

- Upon what basis could you decline to answer?
  - A.) Not proportionate
  - B.) Not for the purpose only of clarification of the report
  - C.) Both A. & B. above
  - D.) I would answer my CPR 35.3 overriding duty to the court applies

# Delegate Poll Correct Answer

- Upon what basis could you decline to answer?

***Not for the purpose only of clarification of the report***

***Mustard -v- Flower***

***“[The questions] were based on statements by the Claimant, the reliability of which was likely to be tested at Trial, so were premature”. At Paragraph 33 he continues “[the questions] quite impermissibly placed a burden on the Experts to decide what were and were not proper questions.”***

## CPR Part 35 Questions Review of anonymised Part 35 Questions

### Expert's answer:

3. I do not agree that my prognosis/report was based on inconsistent and inaccurate information. My report is based on information obtained from the client, a review of the medical records and an examination of the client.

**This is an excellent response to a silly question!**

It is for the judge to decide whether the information inaccurate

It would be incompatible with the CPR 35.3 overriding duty to the court to knowingly provide expert opinion based upon inconsistent/inaccurate information, without a caveat noting any such concerns.

Alternatively stating that upon clarification of the inconsistent/inaccurate information you may wish to revise your view (*PD 35, Para 2.5*)

## CPR Part 35 Questions Review of anonymised Part 35 Questions

# PRACTICE DIRECTION 35

## Expert Evidence – General Requirements

**2.1** Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

**2.2** Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.

**2.3** Experts should consider all material facts, including those which might detract from their opinions.

**2.4** Experts should make it clear –

(a) when a question or issue falls outside their expertise; and

(b) when they are not able to reach a definite opinion, for example because they have insufficient information.

**2.5** If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

## CPR Part 35 Questions

### Next Example

### CPR Part 35 Questions Review of anonymised Part 35 Questions

- *There are 44 questions in total*
- *10 pages of A4*
- *Copies of the medical records (which includes those that have already been considered)*
- *Another Expert's Report*
- *Addendum Letter from presumably the other Expert's*



## CPR Part 35 Questions Review of anonymised Part 35 Questions

### Would / could you decline to answer?

In accordance with the court's directions order, as varied between the parties, you are required to answer the following questions, which are put to you pursuant to Civil Procedure Rule 35 by the Defendant. Your responses should be sent to the representatives of all parties by 4:00pm on \_\_\_\_\_.

Please explain each of your answers.



## CPR Part 35 Questions Review of anonymised Part 35 Questions

# Would / could you decline to answer?

### Documentation

Please have regard to the following documents when considering the questions raised:

- a. Your reports of 02/03/2022 and 29/11/2022;
- b. The report of [REDACTED];
- c. The Claimant's medical records – including those considered for the formation of your reports and the Claimant's physiotherapy records; and
- d. Letter of [REDACTED] dated 10/07/2023.

# Would / could you decline to answer?

## Questions

### CPR Part 35 Questions Review of anonymised Part 35 Questions

1. Kindly answer yes or no as to whether the following factors are significant in your assessment of whether the Claimant suffered physical injuries as a result of the index accident (of 02/06/2020) and, if so, the length of prognosis:
  - a. The Claimant's account as to the mechanics of how her alleged injury was incurred, specifically the mechanics of the index accident including any impact thereof on the movement of the Claimant's body;

## **CPR Part 35 Questions Review of anonymised Part 35 Questions**

### **Would / could you decline to answer?**

- b. The Claimant's account as to symptomology the Claimant alleges to have been suffering from at the time of examination by you;
- c. The Claimant's account as to the history of those symptoms and the treatment undertaken;
- d. The Claimant's responses to palpation etcetera during physical examination;
- e. The Claimant's divulgence of previous incidents/ accidents that possibly resulted in injury, whether or not it was thought to have resolved by the time of your examination;
- f. The Claimant's medical history, as seen from GP notes, hospital notes, and any other relevant medical records.



## Would / could you decline to answer?

### CPR Part 35 Questions Review of anonymised Part 35 Questions

2. Please confirm what papers you were provided with as part of the formulation of your report, whether as provided by the Claimant directly, the Claimant's legal representatives, or otherwise.
3. For the preparation of your report, was the Claimant expressly asked for details of any other accidents she had been involved in, any other claim(s) she had presented, and/or for details of any other past history that may be relevant?

## **CPR Part 35 Questions Review of anonymised Part 35 Questions**

### **Would / could you decline to answer?**

4. Do you accept that there is no way to objectively confirm the existence of the alleged injuries to the cervical spine, lumbar spine or shoulders (being those physical injuries listed at section 4.1 of your first report)?
5. Would it be possible for the Claimant to have presented an entirely fictitious symptom profile? If your response is no, please indicate how you would disprove such an account.
6. What mechanism, if any, did the Claimant report to you as to the alleged nature of her knee being injured as a result of the index accident? Please explain your answer.

## CPR Part 35 Questions Review of anonymised Part 35 Questions

### Would / could you decline to answer?

7. If the Claimant was actually not “symptom free” as reported (10.3 of your first report), would such have the effect of undermining the conclusions in your reports?
8. Is it correct that you did not have regard to the contents of \_\_\_\_\_ report for the formation of your own? If so, do you wish to revise your prognosis in light of its contents?
9. Is the point of an injury’s onset material for assessment as to whether such can be properly ascribed to the index accident?

## Would / could you decline to answer?

13. Please have regard to the shoulder pain referenced, for example, at

05/09/2019, 11:13 in the Claimant's medical records – such concluding with

“referral for suspected breast cancer”. As to this:

- a. Have you been made aware of the position as to this suspected breast cancer beyond its reference in the Claimant's medical records per entry of 21/10/2020, 15:45?
- b. Could this suspected breast cancer be responsible for the pain ascribed to the index accident?
- c. Is it correct that the Claimant failed to report this pain linked to suspected breast cancer to you?
- d. How would you revise your prognosis in light of the above?

### CPR Part 35 Questions Review of anonymised Part 35 Questions

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

# Delegate Poll

- Upon what basis would / could you decline to answer?
  - A.) Not proportionate
  - B.) Not for the purpose only of clarification of the report
  - C.) Both A. & B. above
  - D.) I would answer my CPR 35.3 overriding duty to the court applies



## CPR Part 35 Questions CPR – Pre-Action Protocols

# Delegate Poll Correct Answer

- Upon what basis could you decline to answer?
  - A.) Not proportionate
  - B.) Not for the purpose only of clarification of the report
  - C.) Both A. & B. above
  - D.) I would answer my CPR 35.3 overriding duty to the court applies

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

#### Delegate Poll Correct Answer

- Upon what basis could you decline to answer?

***Not proportionate & Not for the purpose only of clarification of the report***

***Notes at Paragraph 35.6.1 of the White Book***

*‘...questions should not be used to require an expert to carry out new investigations or tests, to expand significantly on his/her report, or to conduct a form of cross-examination by post...unless the court gives express permission.’*

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

#### Delegate Poll Correct Answer

- Upon what basis could you decline to answer?

***Not proportionate & Not for the purpose only of clarification of the report***

***Wilson -v- Al-Khader***

*“These [questions] called for not clarification but the expression of additional opinions and they are not, in my judgment, clarification questions within the meaning of Part 35.6”*

## CPR Part 35 Questions

### CPR – Pre-Action Protocols

#### Delegate Poll Correct Answer

- Upon what basis could you decline to answer?

***Not proportionate & Not for the purpose only of clarification of the report***

#### ***Mustard -v- Flower***

Master Davidson in his Judgment in *Mustard* refers to the fact that the original rule did not include the requirement for questions to be proportionate and that was added sometime later particularly due to Solicitors “*serving lengthy, complex sets of questions that were, in reality, a form of cross-examination*”.

## Proportionality in the example

### CPR Part 35 Questions Review of anonymised Part 35 Questions

- *There are 44 questions in total*
- *If Rule CPR 45.19 (2A)(e) applies £80 + VAT.*
- *Equivalent to £1.81 + VAT for each question*

## Proportionality in the example

20. Having regard to the current guideline rates for summary assessment the Claimant submits that £80.00 is the equivalent to 15 to 20 minutes of the Expert's time. The basis of the calculation is set out in the table below:

Fee Earners Grade Per Hour (National 1)	£80 as Percentage of Hourly Rate	Time in Minutes (approximately)
Grade A £278	28.7%	17 minutes
Grade B £233	34.3%	21 minutes
Grade C £190	42.1%	25 minutes

21. Master Davidson in his Judgment in *Mustard* which appears at Paragraph 32 [See *Authorities Bundle, page 18*] refers to the fact that the original rule did not include the requirement for questions to be proportionate and that was added sometime later particularly due to Solicitors "*serving lengthy, complex sets of questions that were, in reality, a form of cross-examination*".
22. Defendant's Solicitor's letter enclosing the Part 35 Questions at no stage informed the Expert of the proportionality requirement and that CPR 45.19(2A)(e) sets the maximum permitted Fee at £80.00 (excluding VAT). As per Master Davidson "*impermissibly placing a burden on the Expert*" to decide what is and what is not a proportionate approach.

## CPR Part 35 Questions Review of anonymised Part 35 Questions

## A Recent Success

### CPR Part 35 Questions Review of anonymised Part 35 Questions

DJ [REDACTED] responded that most questions appeared to be asking the experts to agree whether there was an inconsistency – which did not need to be asked. The judge felt that the Defendant's approach was disproportionate – there were too many questions for a fast-track matter, and the Defendant would probably be in a better position raising these questions in cross-examination at trial in a bid to discredit the Claimant. He added that he certainly would not be striking out the Claim.

DJ [REDACTED] objected that experts who earn £80 for responding to Part 35.6 questions really were not required to acknowledge inconsistencies. He indicated that if the Defendant had asked *"half a dozen pertinent questions of each expert"* then he may have given permission – but the Defendant's solicitors *"needed to get a grip"* – it was his experience that [REDACTED] were *"particularly excised at the moment"* – but there had to be some proportionality. The judge held that if the Defendant wanted to select some questions and highlight them as the ones they really wanted answered, then he may be tempted to agree.

DJ [REDACTED] agreed that the Defendant did appear *"to have jumped the gun"*, and whilst succinct Part 35 questions could have assisted the court, they instead put a plethora of questions that did not need to be put, then went straight to *"the nuclear option"* of seeking debarment when the Claimant's solicitors objected – this did seem disproportionate.

## Dishonesty and Evidence in Personal Injury Claims

- Very few are dishonest – AVIVA own Fraud Article proves this
- Most are poor historians or lack sufficient awareness of the adversarial process
- Honest mistakes are usually the explanation

*If you hear hooves – don't assume zebras*

- Forensic Expert Engineers in RTA's – Opinion verses Fact
- Despite the thrust of the questions such as the ones we have looked at it is usually a simple issue for the judge:
  - Do I believe the claimant was injured?



# Dishonesty and Evidence in Personal Injury Claims

- Witnesses are generally unreliable at being able to accurately recall speed and distance

Speed MPH	Travels in Feet per Second	Inches/Second	Centimetres/Second	Comments
1	1.46667	17.60004	44.7041016	
2	2.93333	35.19996	89.4078984	
3	4.4	52.8	134.112	(Average walking pace)
4	5.86667	70.40004	178.8161016	
5	7.33333	87.99996	223.5198984	
6	8.8	105.6	268.224	(Thatcham Bumper Crash Test Speed)
7	10.2667	123.2004	312.929016	
8	11.7333	140.7996	357.630984	
9	13.2	158.4	402.336	
10	14.6667	176.0004	447.041016	

# Dishonesty and Evidence in Personal Injury Claims

- Minimal Damage

[Fiat 500 Front Impact at 6 MPH](#)

[Ford S-Max - Rear impact](#)

Ford S-Max : Rear repair cost\* £309.32 - GOOD.

Thatcham, on behalf of the British insurers, has helped develop an insurance crash test that will encourage manufacturers to fit deeper, wider and more energy absorbing bumper beams to their vehicles in the future, both to the front and rear. This will lead to better control of repair costs, saving money for motorists.

The bumper ratings are generated from the repair cost (excluding VAT) associated with a 6 m.p.h. collision. These costs are then translated into ratings, Good, Acceptable, Marginal, or Poor. These ratings are available at [www.thatcham.org/bumpers](http://www.thatcham.org/bumpers)

- Repair cost given above includes VAT at 17.5%



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2.64K subscribers



**Thank you!**