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Guide to Dealing with Part 35 Questions and Replies

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Should you have any questions or concerns when dealing with CPR Part 35 Questions, David is happy to advise further, provided Winn Solicitors Limited does not represent any of the parties.

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Civil Procedure Rules

CPR 35.3 [Appendix 1 - White Book Rule 35.3]:

It is the duty of experts to help the court on matters within their expertise, which overrides any obligation to the person from whom experts have received instructions or by whom they are paid. Whilst the instructions may request the Expert not to answer some or all of the questions, the Expert may elect to answer them if they consider doing so falls within their overriding duty to help the court.

CPR 35.6(1)-(2) [Appendix 2 - White Book Rule 35.6] Questions must be:

- Proportionate
- May be put once only
- For the sole purpose of clarification of the report

UNLESS:

1. the Instructing Party agrees, or
2. the court gives permission.

CPR 35.10(4) [Appendix 3 - White Book Rule 35.10]:

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 35.14 [Appendix 4 - White Book Rule 35.14]:

The Expert may request directions from the court to assist them in carrying out their functions. CPR 35.14(2) and Paragraphs 28 – 29 of the CJC Guidance for the instruction of experts in civil claims [**Appendix 5**] detail the procedure to be followed.

What is Proportionate?

Whiplash injury

the maximum fee is £80.00 (excluding VAT) - CPR 45.19(2A)(e) [**Appendix 6**].

Small-Claims Track

Limited to a sum not exceeding £750 (excluding VAT) for each expert. Which includes earlier report(s) + Part 35 Reply fee - CPR 27 PD 27A 7(3)(2) [**Appendix 7**] & CJC Guidance for the instruction of experts in civil claims, para 17K [**Appendix 8**]

Other Cases – no guidance within the rules. In practice *Proportionality* is not your concern. It is recommended best practice that you seek to agree the fee with the Solicitor commissioning the report (not the party asking the questions).

Who pays for the Part 35 Replies?

The Solicitor commissioning the report (not the party asking the questions) – CPR 35 PD 35 6.2 [**Appendix 7.1**] if the amount will exceed the prescribed fee, it is recommended that you agree your fee.

What is "Clarification"?

The interpretation and definitions section for Part 35 are set out in CPR35.2(1). Unhelpfully, it only defines an 'Expert' and a Single Joint Expert' and 'Clarification' is not defined by the CJC Guidance, Rules or Practice Direction.

The Notes in Paragraph 35.6.1 of the 'White Book', page 1131 [**Appendix 2**] provide some guidance:

> *'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.'*

The Cambridge English 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.

Case Law on Clarification:

- It is irrelevant that the question may be expressed "*for the purposes of clarification*" when in fact it exceeds the boundaries of actual "*clarification*" [**Wilson -v- Al-Khader – Appendix 9**]
- "*[Questions calling] for … clarification but the expression of additional opinions*" are not "*clarification questions within the meaning of Part 35.6*" [**Wilson -v- Al-Khader – Appendix 9**]

Case Law on Proportionality:

- CPR Part 35.6 was amended to add proportionality because Solicitors were "*serving lengthy, complex sets of questions that were, in reality, a form of cross-examination*" [**Mustard -v- Flower at Paragraph 35 – Appendix 10**]

Questions Received Directly from Opposing Solicitors

This is now a feature of the 'Damages Claims Pilot' - MoJ's online court platform issues a standard order that requires the opposing party to send Part 35 Questions Directly to the Expert and a copy to the Solicitors commissioning the report. It is, or will not be, unusual or irregular to receive Part 35 Questions from lawyers other than the Solicitors commissioning the report.

It is, however, advisable that you seek instructions to agree your fee before you respond with the Solicitor commissioning the report (not the party asking the questions) – CPR 35 PD 35 6.2 [**Appendix 7.1**] if the amount will exceed the prescribed fee.

Part 35 Reply Checklist

1. Have you been provided with a copy of the Court Order? Do you need it (or anything else) to respond?
    a. Is it a Fixed Fee Matter (Whiplash injury or Non-Whiplash allocated to the Small-Claims Track)?
    b. Can you complete the Reply for the Fixed Fee?
    c. If you are unsure check with the Agency/Solicitors commissioning the report

2. Agree your fee for providing the Reply / Explain why you cannot complete the Reply for the Fixed Fee, and the amount sought.

3. Can you complete the Reply within the deadline provided within the instructions or Order? If not – inform the instructing solicitor immediately with details of the time required and why.

4. Do you have instructions from the Solicitors commissioning the report – do they object or expressly instruct you to answer the Questions?

5. Is the Question "for the purposes of clarification" or does it exceed the boundaries of actual "clarification"?
    a. Does the Court Order give permission to ask/answer a question that exceeds the boundaries of actual "clarification"?
    b. Do the Solicitors commissioning the report, object?

6. If you have no specific instructions from the Solicitors commissioning the report – answer the questions as you deem appropriate. ***[See point below if the Question(s) include a request for a copy of your instructions]***

7. If you are unable to answer – consider seeking instructions from the Solicitors commissioning the report. In the alternative, consider if you should make a request to the court for directions?

    *For procedural steps to follow when seeking Directions from the Court see CPR 35.14(2) [**Appendix 4**] and Paragraphs 28 – 29 of the CJC Guidance for the instruction of experts in civil claims [**Appendix 5**].*

8. Does the Question request a copy of instructions and if it does, is there a Court Order giving permission to disclose a copy of the instructions?

    In the event of ambiguity consider a Reply suggesting the Solicitors commissioning the report provide a copy of the instructions, if the court has provided the appropriate permission to disclose a copy of the instructions.

APPENDICES

Appendix 1 – White Book Rule 35.3 with Notes

(v) evidence of foreign law; see more particularly [93.5].

He concluded at [94]:

> there is not an automatic cut off of what is expert evidence when that expert evidence becomes or can be analysed as evidence of fact. Even in a case where an expert's evidence is, on a close analysis or otherwise, evidence of fact, that does not necessarily prevent it from being evidence which is capable of being given by an expert as such, or from CPR 35 applying to it. It is desirable for the efficient and proportionate administration of justice that such evidence of fact which is given by an expert as such should be controlled by the court and that CPR 35 should be construed as permitting such control accordingly.

Experts—overriding duty to the court[1]

35.3—(1) It is the duty of experts to help the court on matters within their expertise. 35.3

(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

Rule 35.3: Effect of rule

This rule makes it crystal clear that the duty of an expert (as defined in r.35.2) to the court overrides any obligation which they may owe to their lay or professional client. However, in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 at [57], the Supreme Court stressed the crucial role which the instructing party's legal team must play in, amongst other things, ensuring that an expert is aware of the their duties: 35.3.1

> It falls in the first instance to counsel and solicitors who propose to adduce the evidence of a skilled witness to assess whether the proposed witness has the necessary expertise and whether his or her evidence is otherwise admissible. It is also their role to make sure that the proposed witness is aware of the duties imposed on an expert witness. The legal team also should disclose to the expert all of the relevant factual material which they intend should contribute to the expert's evidence in addition to his or her own pre-existing knowledge. That should include not only material which supports their client's case but also material, of which they are aware, that points in the other direction [...] The skilled witness should take into account and disclose in the written report the relevant factual evidence so provided.

Duties and responsibilities of experts

It is of paramount importance that an expert is familiar with the duties and responsibilities imposed on them at common law and under the applicable procedural rules; see *R v Pabon* [2018] EWCA Crim 420; [2018] Lloyd's Rep. F.C. 258 (CACD), where it was noted, in criminal proceedings and hence in respect of the comparable duty in Criminal Procedure Rules r.19.2 to that in CPR r.35.1, that a failure to do so can undermine the integrity of the judicial process and render the expert liable to sanctions. The case law as to the duties and responsibilities of experts, in relation to the court and to the party was considered by Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer")* [1993] 2 Lloyd's Rep. 68 (Comm Ct). His Lordship said (at 81–82) that they included the following: 35.3.2

1. 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 or content by the exigencies of litigation (*Whitehouse v Jordan* [1981] 1 W.L.R. 246, HL, at 256, per Lord Wilberforce).
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise (see *Polivitte Ltd v Commercial Union Assurance Co Plc* [1987] 1 Lloyd's Rep. 379 at 386, per Garland J, and *Re J* [1991] F.C.R. 193, per Cazalet J. An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions on which their opinion is based. They should not omit to consider material facts which could detract from their concluded opinion (*Re J*, above).
4. An expert witness should make it clear when a particular question or issue falls outside their expertise.
5. If an expert's opinion is not properly researched because they consider that insufficient data are available then this must be stated with an indication that the opinion is no more than a provisional one (*Re J*, above). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification that qualification should be stated in the report (*Derby & Co Ltd v Weldon (No.9), The Times*, 9 November 1990, CA, per Staughton L.J.
6. If, after exchange of reports, an expert witness changes their view on the material having read the other side's expert report or for any other reason, such change of view should be communicated (through legal representative) to the other side without delay and when appropriate to the court.

[1] Amended by the Civil Procedure (Amendment) Rules 2009 (SI 2009/2092).

Appendix 2 – White Book Rule 35.6 with Notes

expert in whom he had lost confidence. He was granted permission to rely on the third expert's evidence on condition of disclosure of the first expert's report (the second expert's report having already been disclosed).

In *Vilca v Xstrata Ltd* [2017] EWHC 1582 (QB); [2017] B.L.R. 460 (QBD), a damages claim for personal injury allegedly sustained at a demonstration in Peru in 2012, the parties agreed that the court would need at trial expert evidence on Peruvian law, and each party should instruct their own expert. The defendant's expert had to withdraw because of ill health. The claimant submitted that the court should allow a change of expert only on condition that the instructions, materials and any draft of the defendant's expert's report was disclosed, but the judge (who was to be the trial judge) disagreed as this was not a case of expert shopping, there was no suspicion of abuse of process by the defendant, and the documents would be a distraction and a hindrance at trial.

Use of plans, photographs and models as evidence

35.5.6 Where evidence of this type forms part of expert evidence but is not contained in the expert's report, the party proposing to adduce such evidence must give notice to the other party when serving the expert's report (r.33.6(6)).

Witness summonses

35.5.7 Difficulties in securing the presence of an expert witness at trial, including where the expert is double-booked with other court work, can sometimes be overcome by cooperation between trial centres at diary manager or designated civil judge level. It may, however, be necessary to require an expert witness to attend court to give evidence or produce documents by a "witness summons" (see provisions in Pt 34 (Depositions and court attendance by witnesses)). Expert witnesses often do not realise that service of a witness summons is not a hostile act but only a "prior booking system" to ensure that over-committed experts give evidence in court in one case rather than another.

The court has the power to compel the attendance of an expert witness. In exercising that power, the court will have regard to (i) the court is entitled to every witness's evidence, whether of fact or opinion; (ii) the expert's connection with the case; (iii) their willingness to attend; (iv) whether they might have other important work which might be disrupted by attendance and (v) whether another expert of equal calibre is available: *Society of Lloyds v Clementston (No.2)* [1996] C.L.C. 1205, CA. Save in exceptional circumstances, a witness summons to compel attendance at trial cannot be used to get round a party's obligation to pay the expert: *Brown v Bennett (Witness Summons), The Times*, 2 November 2000, Ch D. See further Pt 34 (Witnesses, depositions and evidence for foreign courts).

Written questions to experts[1]

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

(a) an expert instructed by another party; or

(b) a single joint expert appointed under rule 35.7.

(2) Written questions under paragraph (1)—

(a) may be put once only;

(b) must be put within 28 days of service of the expert's report; and

(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.

(3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.

(4) Where—

(a) a party has put a written question to an expert instructed by another party; and

(b) the expert does not answer that question,

the court may make one or both of the following orders in relation to the party who instructed the expert—

(i) that the party may not rely on the evidence of that expert; or

(ii) that the party may not recover the fees and expenses of that expert from any other party.

Rule 35.6: Effect of rule

35.6.1 Under r.35.6 a party may put to an expert instructed by another party written questions about his/her report in accordance with the terms of the rule. The answers form part of the report (r.35.6(3)). Where an expert does not answer a question put, r.35.6(4) comes into play.

[1] Amended by the Civil Procedure (Amendment) Rules 2009 (SI 2009/2092).

This is a useful provision. 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 76; [2001] C.P. Rep. 77, CA, the Court of Appeal stressed the usefulness of the ability to put written questions to an expert in enabling a party to obtain clarification of a report prepared by an expert instructed by the other side or to arrange for a point not covered in the report, but within the expert's expertise, to be dealt with. The importance of putting appropriate and sufficient written questions to an opponent's expert in order to give them an opportunity to answer criticisms of their report (and the potential consequences of failing to do so), was put into sharp focus in *Griffiths v TUI UK Ltd* [2023] UKSC 48. Written questions may be put once only (without the court's permission) and must be put within 28 days of receipt of the expert's report. Questions must also be proportionate. Practice Direction 35 para.6.1 (see para.35PD.1) states that, where a party sends a written question or questions direct to an expert, a copy of the questions should, at the same time, be sent to the other party or parties.

One approach to dealing with excessive or onerous questions is for the expert to exercise their right to ask the court for directions (see r.35.14 below).

An omission from this rule is the time-scale within which an expert should reply to written questions. Parties should invite the court to include a suitable timescale in directions. In most circumstances 28 days would be reasonable.

Court's power to direct that evidence is to be given by a single joint expert[1]

35.7—(1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert. 35.7

(2) Where the parties who wish to submit the evidence ("the relevant parties") cannot agree who should be the single joint expert, the court may—

(a) select the expert from a list prepared or identified by the relevant parties; or

(b) direct that the expert be selected in such other manner as the court may direct.

Rule 35.7: Effect of rule

Where parties wish to adduce expert evidence on a particular issue, r.35.7 empowers the court to direct that such evidence is to be given by a single joint expert. Such a direction can be made on the application of a party, or of the court's own initiative (see rr.3.1 and 3.3). Such a course may significantly reduce delay, costs and the length of trial, and may reduce the scope for the perpetuation of "polarised" expert opinions: please see, in this regard, Cotter J's criticism of parties' "very marked aversion" to the use of single joint care experts in clinical negligence or higher value personal injury claims "despite the fact there is often no principled reason against such an instruction": *Muyepa v Ministry of Defence* [2022] EWHC 2648 (KB) at [288]. 35.7.1

This discretionary power may be exercised at any time. In order to further the overriding objective, see *MP v Mid Kent Area Healthcare NHS Trust* [2001] EWCA Civ 1703; [2002] 1 W.L.R. 210, CA at [14]. It will more usually be capable of being exercised where it appears to the court, on the information then available, that the issue falls within a substantially established area of knowledge and where it is not necessary for the court to sample a range of opinion or where the issue is uncontroversial.

Care should be taken to ensure that a direction that evidence be given by a single joint expert is not given prematurely. In *S v Birmingham HA (No.1)* [2001] Lloyd's Rep. Med. 382 (QBD) such an order was given prior to the defence being served i.e., at a time when it was not clear what the nature of the issues to be determined were likely to be, and was set aside on appeal. In *Yearsley v Mid Cheshire Hospitals NHS Trust* [2016] EWHC 1841 (QB), a clinical negligence claim pleaded at around £500,000, Whipple J held that it would not be appropriate to direct that a single joint expert opine as to whether or not the claimant had dementia, as, amongst other things, this was an issue which could potentially go to the heart of the case, being relevant to the question of capacity and of serious importance to quantum. Rather, the parties were given permission to adduce evidence from their own experts ([7]–[8]).

The main difficulty with this rule is where the court becomes involved in the dispute at a late stage and where, as a result, the parties have already needed, or chosen, to obtain advice from an

[1] Amended by the Civil Procedure (Amendment) Rules 2009 (SI 2009/2092).

Appendix 3 – White Book Rule 35.10 with Notes

fiths will apply equally to the evidence of single joint experts and are discussed, e.g. in para.35.0.3 above.

In *Tucker v Watt* [2005] EWCA Civ 1420, CA, a trial judge was held on appeal not to have erred in reaching a conclusion based upon the claimant's evidence when the defendant had resisted the calling of a joint expert to be cross-examined who had taken a different view on causation in his written report to the claimant's evidence ([36]–[38]).

In *HJ (A Child) v Burton Hospitals NHS Foundation Trust* [2018] EWHC 1227 (QB) a birth injury clinical negligence claim, the defendant on appeal contended that the Recorder wrongly accepted the evidence of the claimant's occupational therapist ("OT") in relation to aspects of the claimant's care needs where it was in conflict with that of the jointly instructed orthopaedic surgeon "who enjoyed primacy". The High Court disagreed because it was clear the Recorder had the orthopaedic evidence well to the forefront of his mind, the parties had not put the OT's report to the surgeon or called him to give oral evidence so the Recorder had to work with the evidence before him, had done so commendably, and the OT had hands-on experience of assessing care and equipment needs while the surgeon did not.

Power of court to direct a party to provide information[1]

35.9 Where a party has access to information which is not reasonably available to another party, the court may direct the party who has access to the information to— 35.9

(a) prepare and file a document recording the information; and

(b) serve a copy of that document on the other party.

Rule 35.9: Effect of rule

This rule is a particular application of the overriding objective's aim of securing equality of arms (see r.1.1(2)(a)). It does not provide the means to obtain access to a party's expert report. It simply provides the means to obtain information, which is presumably derived from a source of expertise accessible to the other party. Practice Direction 35 para.4 (see para.35PD.4) states that where the court makes an order under this rule, the document to be prepared recording the information should set out sufficient details of any facts, tests or experiments which underlie any part of the information to enable an assessment and understanding of the significance of the information to be made or obtained. 35.9.1

This rule, which does not appear to be relied upon very often, would seem to apply most readily to situations where one party has researched and developed a technical process over a long period of time and is therefore possessed with particular information and expertise in that area. It might thus be reasonable for the court to require that party to share information as to those matters which might reasonably assist the opposing party's expert without the necessity of time-consuming and expensive research before they can form a view. Any direction under r.35.9 would have to take into account such matters as commercial confidentiality in the use of such information in connection with the proceedings. It is hard to conceive of circumstances whereby such information could be sought by a party before proceedings have commenced. There seems to be no basis upon which a court could order an examination, experiment or tests on the matter in issue before preparing and filing the document recording the information. An application on notice in writing would be made to the court stating what order the applicant is seeking and the reasons relied upon by the applicant. Such an application may be supported by evidence from the applicant's expert setting out their particular difficulties in the absence of such information and the advantage that such information would have as to the just and expeditious resolution of the case. On the face of it, there is nothing to prevent a court of its own motion making such an order under this rule, if it was satisfied upon evidence before it that it was necessary to make such an order to enable the court to deal with the case justly, considering its objectives of ensuring so far as is practical that the parties are on equal footing, expense could be saved and that the matter could be dealt with expeditiously.

Contents of report[2]

35.10—(1) An expert's report must comply with the requirements set out in Practice Direction 35. 35.10

(2) At the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.

(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

[1] Amended by the Civil Procedure (Amendment) Rules 2009 (SI 2009/2092).

[2] Amended by the Civil Procedure (Amendment) Rules 2009 (SI 2009/2092) and the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390).

(4) The instructions referred to in paragraph (3) shall not be privileged(GL) against disclosure but the court will not, in relation to those instructions—

(a) order disclosure of any specific document; or

(b) permit any questioning in court, other than by the party who instructed the expert,

unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.

Rule 35.10: Effect of rule

35.10.1 An expert's report does not serve the same purpose as a statement of case. Its function "is to provide opinion evidence, agreeing or disagreeing with allegations which are contained in the claimant's case" and not to advance a party's case, see *Pacific Biosciences of California, Inc v Oxford Nanopore Technologies Ltd* [2018] EWHC 806 (Ch), Ch D at [46]. An expert's report must comply with the provisions of this rule and the requirements set out in the relevant practice direction (see para.35PD.1). The purpose of the requirement in r.35.10(2) is to remind the expert preparing a report that their duty to "help the court" overrides any obligation to the person from whom they have received instructions or by whom they are paid (r.35.3(2)). Full compliance with this duty would include ensuring that the report includes everything which the expert regards as being relevant to the opinion which they have expressed, and that any matter which would affect the validity of that opinion has been drawn to the attention of the court. This is not without controversy however, as experts sometimes step outside their area of expertise and include in their reports matters which they may regard as being relevant to their opinion evidence but which the parties (and the court) do not and which, on occasions, may even be prejudicial to the instructing parties' positions.

An expert's report which is to be adduced in evidence should carry a statement of truth (see Practice Direction 35 (Experts and Assessors), para.3.3 (see para.35PD.1)) (see also Pt 22 (Statements of Truth)).

Form and content of expert's report

35.10.2 Practice Direction 35 para.3.1 states that an expert's report should be addressed to the court and not to the party from whom the expert has received their instructions. The report must deal with the matters itemised in para.3.2 of that Practice Direction. In addition, by para.3.2(9)(b), it should comply with the guidance in Guidance for the Instruction of Experts in Civil Claims 2014 (see para.35EG.1).

In *Oldham MBC v GW* [2007] EWHC 136 (Fam); [2007] 2 F.L.R. 597 (Fam), at [91], generally applicable guidance was given on the approach to take where expert evidence is important to the outcome in contested proceedings. Ryder J emphasised that: (i) experts need clear instructions and access to all relevant documents, not selected ones; (ii) the expert's report should set out the expert's analytical process, differentiate between facts, assumptions, deductions and note inconsistent or contradictory features of the case; (iii) the expert should identify the professional range of opinion and use a "balance sheet" approach to their own opinion; (iv) the expert should volunteer where an opinion from other expertise is likely to assist the parties and the court; and, (v) the expert should not stray into the role of decision-maker.

In *Dyson Ltd v Vax Ltd* [2011] EWCA Civ 1206; [2013] Bus. L.R. 328, CA at [10], the importance of ensuring that experts are given clear instructions as to the question or questions they are to address in their report was stressed. It was further stressed that experts should so confine themselves.

A failure to ensure that an expert's report is properly focused on relevant issues may result in substantial wasted costs; see, *Trebor Bassett Holdings Ltd v ADT Fire & Security Plc* [2011] EWHC 1936 (TCC); [2011] B.L.R. 661 (TCC). It is the lawyer's responsibility to ensure an expert is properly instructed, and as part of that the expert properly understands the duties imposed on them. The court should be cautious about criticising an expert unless it is clear the fault was the expert's rather than the instructions; see *Medimmune Ltd v Novartis Pharmaceuticals Ltd & Medical Research Council* 2011 EWHC 1669 (Pat) at [107]-[114].

Material instructions

35.10.3 The requirement that the expert's report must state the substance of all material instructions, whether written or oral, adds considerably to the value to the court of the expert's report received. Further, the discipline of reciting instructions serves to reinforce the expert's overriding duty to the court, and ensure that relevant material, whether it supports the case of the party instructing the expert or does not, is before the court so that it can properly carry out its role as trier of fact (r.35.3). For guidance as to the meaning of "instructions" for the purposes of r.35.10(3) and (4), see *Pickett v Balkind* [2022] EWHC 2226 (TCC) per HH Judge Paul Matthews (sitting as a judge of the High Court) at [90]-[93].

In a given case, the drawing of a distinction between material and non-material instructions may be difficult especially where the expert was instructed early in a dispute when a party was still considering whether he/she had a claim and against whom. One view is that, in these circumstances, the expert should be sent fresh instructions once the court has given permission for

expert evidence: this will usually be at directions stage following completion of the allocation questionnaires. Oral instructions can cause a particular problem: so it is important that parties, lawyers, and experts keep careful notes of all discussions which might amount to instructions.

Privilege

35.10.4 Under r.35.10(4) the withdrawal of privilege against disclosure is restricted to the substance of all material instructions on which an expert's report is based (r.35.10(3)) (for guidance as to meaning of "privilege", see Glossary). The expert's report must recite the "substance" of those instructions. The significance of the withdrawal of privilege in relation to material instructions is that it opens up the possibility that the opposing party may be able to apply for disclosure of the actual instructions themselves and, perhaps, of related documents, and, further, that it exposes the expert to cross-examination at trial about their instructions. The objective is to ensure that the instructions are transparent and, normally, that should be achieved without disclosure of documents or cross-examination being required. Consequently, r.35.10(4) provides that the court will not, in relation to material instructions (a) order disclosure of any specific document, or (b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider that the statement of the substance of all material instructions given in the expert's report is inaccurate or incomplete. Practice Direction 35 para.5 (see para.35PD.1) adds that, if the court is so satisfied, it will allow cross-examination "where it appears to be in the interests of justice" to do so.

Material supplied to an expert by the party instructing them and on which they are to advise constitutes their instructions and is subject to r.35.10(4) and may therefore be subject to an order for disclosure, see *Morris v Bank of India*, 15 November 2001, unrep., Ch D.

In *Lucas v Barking, Havering and Redbridge Hospitals NHS Trust* [2003] EWCA Civ 1102; [2004] 1 W.L.R. 220, CA the Court of Appeal, in approving *Morris v Bank of India*, held that one party might not as a matter of course call under r.35.10(4) for the immediate disclosure of documents constituting an expert's instructions or referred to in his report (here an earlier medical report and a witness statement). The court would only order their disclosure if there were grounds for believing the statement in the expert's report about the instructions was inaccurate or misleading. The court also said that the mere mention of a privileged document in an expert's report does not necessarily waive privilege in the document, if the contents of the privileged document are not to be relied upon by the discloser and that r.31.14 (which deals with inspection of documents referred to in other evidence disclosed) was unlikely to have been intended to change the law of privilege to require "automatic" disclosure.

Drafts of experts' reports are not subject to r.35.10(4). It only applies to reports which a party intends to rely upon. As such there is no power to direct the disclosure of draft expert reports whether they are referred to as drafts or not. Part 35 does not alter the application of litigation privilege to such reports; see *Jackson v Marley Davenport Ltd* [2004] EWCA Civ 1225; [2004] 1 W.L.R. 2926, CA at [14]–[15].

If a party chooses to "deploy in court" letters to their expert by relying upon them in a witness statement in support of an interlocutory application, the party has waived privilege in the letters and they must be disclosed; see *Dunlop Slazenger International v Joe Bloggs* [2003] EWCA Civ 901, CA.

Literature to be served with reports

35.10.5 *Wardlaw v Farrar* [2003] EWCA Civ 1719; [2003] 4 All E.R. 1358, CA, at [23]–[24], decided that in clinical negligence claims being conducted in the County Court or District Registries, the judges should adopt the standard direction of the King's Bench Masters that any material or literature upon which an expert wished to rely must be served either with their report or at the latest one month before trial. Permission would be needed from the trial judge before an expert witness could introduce additional material at trial. The point of principle is applicable to experts' reports in any discipline. In *Breeze v Ahmad* [2005] EWCA Civ 223; [2005] C.P. Rep. 29, CA, the Court of Appeal endorsed the approach set out in *Wardlaw*. It further emphasised that any literature relied upon by one party's expert should be reviewed by the other party's expert and be available for the trial judge.

Composite expert reports

35.10.6 In *Rogers v Hoyle* [2013] EWHC 1409 (QB); [2013] Inquest L.R. 75 (QB), Leggatt J permitted the claimant to rely upon a published investigation report of the Air Accident Investigation Branch of the Department of Transport. This contained statements of fact of witnesses, and opinions of the (not identified) in-house and third-party investigators. The judge permitted reliance as the report contained a "wealth of relevant and potentially important evidence which bears directly or indirectly on whether the claimant's death was caused by the defendant's negligence", and said that it was for the trial judge to make such use of the report as she thought fit. In reaching his decision, Leggatt J at [116]–[118], as approved by Christopher Clarke LJ in *Rogers v Hoyle* [2014] EWCA Civ 257; [2015] Q.B. 265, CA at [52]–[55], stated that, as a matter of principle, where an expert expresses opinions on disputed issues of fact that do not call for expertise to evaluate such opinion, whilst technically inadmissible, should be treated as a matter of weight. Where it is inadmissible it should be given no weight. Any such inadmissible matters should not be required to be excised

from expert reports as that would be inconsistent with the overriding objective of saving expense, and hence it was not justified by effective case management. The defendant's arguments that the anonymity of the authors would make the evidence unsafe, and that relying on such reports as evidence in civil proceedings could deter witnesses from co-operating with investigations, were dismissed. And see *Moylett v Geldof* [2018] EWHC 893 (Ch), Ch D for an application of the principle identified by Leggatt J in *Rogers v Hoyle* [2013] EWHC 1409 (QB); [2013] Inquest L.R. 75 (QB). In *A v B* [2019] EWHC 275 (Comm); [2019] 4 W.L.R. 25, Moulder J held that the principle in *Rogers v Hoyle* (that, as a general rule, the whole of an expert's report, including any inadmissible parts, should be placed before the trial judge, rather than the court undertaking an editing exercise at an interim stage) applied to expert reports governed by CPR Pt 35.

Confidentiality ring

35.10.7 The court is able to use its case management powers under r.32.1 in order to enable an expert who wishes to refer to confidential material to provide the same in unredacted form to a confidentiality ring of legal representatives: see *Zverev v Ace Group International Ltd* [2020] EWHC 3513 (Ch). On confidentiality rings generally, see para.31.3.36.

Use by one party of expert's report disclosed by another

35.11 **35.11 Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial.**

Rule 35.11: Effect of rule

35.11.1 It is not necessary for a party to seek permission to rely upon an expert's report which had been disclosed by a party who had ceased to be involved in the proceedings, even though the court had not given specific permission for the remaining parties to rely upon those reports, but the party seeking to so rely should advise the other remaining parties which reports they intended to rely upon and for what purpose, see *Gurney Consulting Engineers v Gleeds Health and Safety Ltd* [2006] EWHC 43 (TCC), applied by *Shepherd & Neame v EDF Energy Networks (SPN) Plc* [2008] EWHC 123 (TCC); [2008] Bus. L.R. D43 (TCC) at [11]–[14].

Note that, where two claims have been ordered to be case managed and tried at the same time but have not been formally consolidated, a party to one claim will not be able to rely upon r.35.11 so as to use a report disclosed by a party to the other claim: see *Jarman v Brighton and Sussex University Hospitals NHS Trust* [2020] EWHC 3238 (QB) (though the court granted permission in that case pursuant to r.35.1).

Discussions between experts[1]

35.12 **35.12—(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to—**

(a) identify and discuss the expert issues in the proceedings; and

(b) where possible, reach an agreed opinion on those issues.

(2) The court may specify the issues which the experts must discuss.

(3) The court may direct that following a discussion between the experts they must prepare a statement for the court setting out those issues on which—

(a) they agree; and

(b) they disagree, with a summary of their reasons for disagreeing.

(4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.

(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.

Rule 35.12: Effect of rule

35.12.1 In higher-value cases, expert evidence is often the most costly, and hotly-contested, aspect of the case. Rule 35.12 empowers the court to direct experts to hold discussions and, if it does so, it will also ordinarily direct them to produce a statement. The process is designed to promote the identification, where possible resolution and otherwise the narrowing, of the issues between experts with concomitant time and cost-saving. Accordingly, r.35.12 is an important rule. It should be read in conjunction, in particular, with paras 9.1–9.8 of PD 35.

In terms, r.35.12 requires the experts, not simply to identify those parts of their evidence which are in issue, but to identify the expert issues in the proceedings and, where possible, to "reach

[1] Amended by the Civil Procedure (Amendment No.5) Rules 2001 (SI 2001/4015) and the Civil Procedure (Amendment) Rules 2009 (SI 2009/2092).

Appendix 4 – White Book Rule 35.14 with Notes

Consequence of failure to disclose expert's report

35.13 A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission. 35.13

Rule 35.13: Effect of rule

35.13.1 Expert evidence is to be restricted to that which is reasonably required to resolve the proceedings (r.35.1). Rule 35.4 states that no party may call an expert or put in evidence an expert's report without the court's permission. The general rule is that expert evidence is to be given in a written report. In terms, none of the rules in Pt 35 imposes on a party who has obtained the court's permission to call an expert or put in evidence an expert's report a duty to disclose that report, or to disclose it to particular persons within a particular time but, clearly, the court may impose directions to that effect and may vary or revoke them subsequently. Rule 35.13 assumes that a party has been directed to disclose an expert's report and has failed to do so. The rule imposes a sanction: that party may not use the report at trial or call the expert to give evidence orally unless the court gives permission. Rule 3.9 (Relief from sanctions) may be engaged where a party fails to comply with r.35.13, or with a practice direction or court order, relating to the pre-trial disclosure of an expert's report, and any sanction for such failure takes effect in accordance with r.3.8.

In *Baron v Lovell* [2000] P.I.Q.R. P20, CA, the importance of prompt disclosure of an expert's report was emphasised. If a party holds back disclosure to just before trial they may not be permitted to rely upon it or, at the least, they may be subject to cost sanctions. Where, as in *Meredith v Colleys Valuation Services Ltd* [2001] EWCA Civ 1456; [2002] C.P. Rep. 10, CA, there is late formal disclosure but the expert report is already, informally, in the hands of the other party, an order debarring the non-disclosing party from reliance on it may be inappropriate: a costs order may be the preferable sanction. The courts expect parties to organise their expert evidence early in the case. Parties should ensure that where they intend to seek to rely on additional expert evidence they make an application to that effect in good time before a case management hearing; see *Ahmed v Stanley A Coleman & Hill (A Firm)* [2002] EWCA Civ 935, CA.

In an appropriate case, a party who obtains permission to adduce expert evidence but then persistently fails to disclose the same runs the risk of strike out. In the medical negligence case of *Bot v Barnick*, 17 December 2019, unrep., the claimant had obtained permission to adduce expert obstetric evidence. Three years post-issue, and a number of extensions of time later, she had still not served the same and could not satisfy the court that she would be likely to do so in the near future. Yip J observed that a claim against a professional could not be maintained without supporting expert evidence and, in all the circumstances of the case, struck out the claim under CPR r.3.4(2)(c).

Where claimants in a group action wish to pursue recovery of the costs of an undisclosed expert report, where the action settled, they must elect whether to disclose the report. If they choose not to disclose, they must rely on other evidence to justify recovery of costs of the report, see *Gower Chemicals Group Litigation v Gower Chemicals Ltd* [2008] EWHC 735 (QB); [2008] 4 Costs L.R. 582 (QB).

Expert's right to ask court for directions[1]

35.14—(1) Experts may file written requests for directions for the purpose of assisting them in carrying out their functions. 35.14

(2) Experts must, unless the court orders otherwise, provide copies of the proposed requests for directions under paragraph (1)—

(a) to the party instructing them, at least 7 days before they file the requests; and

(b) to all other parties, at least 4 days before they file them.

(3) The court, when it gives directions, may also direct that a party be served with a copy of the directions.

Rule 35.14: Effect of rule

35.14.1 An expert, in carrying out their function, operates within a framework stipulated by the instructions they have received, by the directions, if any, given by the court, and by the rules in this Part. When, upon a party's application the court grants permission to adduce expert evidence, the court may attach directions (r.35.4). They may also be attached when the court gives a direction for a discussion between experts (r.35.12) and where it gives a direction under r.35.7 for a single joint expert to be used. Within this framework, it is the duty of the expert to help the court; this duty overrides their obligations to others (r.35.3). An expert has to copy any request to the court to their instructing party seven days, and to any other party four days, in advance of filing it. Care should

[1] Amended by the Civil Procedure (Amendment No.5) Rules 2001 (SI 2001/4015) and the Civil Procedure (Amendment No.5) Rules 2009 (SI 2009/2092).

be taken to ensure that this requirement does not result in experts being deprived of direct access to the case management judge.

Orders

35.14.2 Practice Direction 35 para.8 requires parties to serve upon experts copies of any order that requires an instructed expert to take a step in the proceedings or that otherwise affects the expert.

Consequences of withdrawal of funding

35.14.3 In *MS v Lincolnshire CC* [2011] EWHC 1032 (QB), the claimant's public funding was withdrawn. Neither expert was prepared to continue unless instructed by a solicitor and so no meeting of the experts had taken place. The court held that it was not right to compare a wilful refusal or dilatory failure by a party or its expert to comply with a court's direction to a situation in which the party was prevented from complying by circumstances beyond his control. The judge should have approached the application for summary judgment on the basis of the ruling most favourable to the claimant that a trial judge could reasonably make rather than the ruling that the judge himself would be likely to make. The judge should have allowed the claimant to put in his reports on the basis that the weight to be attached to them, if any, would be a matter for the trial judge. Furthermore, it was not accepted that the reports would have no real evidential value; if they contained material that was not effectively challenged, there was no reason why a judge should not rely on that material; see [13]–[16] of the judgment.

Assessors[1]

35.15 **35.15—(1) This rule applies where the court appoints one or more persons under section 70 of the Senior Courts Act 1981 or section 63 of the County Courts Act 1984 as an assessor.**

(2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience.

(3) An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to—

(a) prepare a report for the court on any matter at issue in the proceedings; and

(b) attend the whole or any part of the trial to advise the court on any such matter.

(4) If an assessor prepares a report for the court before the trial has begun—

(a) the court will send a copy to each of the parties; and

(b) the parties may use it at trial.

(5) The remuneration to be paid to an assessor is to be determined by the court and will form part of the costs of the proceedings.

(6) The court may order any party to deposit in the court office a specified sum in respect of an assessor's fees and, where it does so, the assessor will not be asked to act until the sum has been deposited.

(7) Paragraphs (5) and (6) do not apply where the remuneration of the assessor is to be paid out of money provided by Parliament.

Rule 35.15: Effect of rule

35.15.1 The Senior Courts Act 1981 s.70(1), states that the High Court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified "and hear and dispose of the cause or matter wholly or partially with their assistance" (see Vol.2 para.9A-261). The County Courts Act 1984 s.63(1) is to similar effect and enables a County Court judge to sit with one or more assessors (see Vol.2, para.9A-537).

Under r.35.15, when read with r.3.3, an assessor may be appointed by the court of its own initiative and the assessor's remuneration shall form part of the costs of the proceedings. The court may appoint several assessors, for example, where a case raises several matters calling for different skills and experiences.

The court may vary or revoke an order or direction made under this rule (r.3.1(7)). As to assessors in the Admiralty Court, see r.61.13 (see Vol.2).

Rule 18A of CPR Sch.2 CCR Ord.49 (Miscellaneous Statutes) states that r.35.15 applies to proceedings under para.5 of Sch.2 to the Telecommunications Act 1984.

Appointment of assessor

35.15.2 See Practice Direction 35 paras 10.1–10.3 (para.35PD.10) on the process for the appointment of an assessor, and objection to such an appointment. Also see County Courts Act 1984 s.63(5) on

[1] Amended by the Civil Procedure (Amendment) Rules 2009 (SI 2009/2092).

26. Experts should agree the terms on which they are to be paid with those instructing them. Experts should be aware that they will be required to provide estimates for the court and that the court may limit the amount to be paid as part of any order for budgeted costs (CPR 35.4(2) and (4) and 3.15).

Experts' Withdrawal

27. Where experts' instructions are incompatible with their duties, through incompleteness, a conflict between their duty to the court and their instructions, or for any other reason, the experts may consider withdrawing from the case. However, experts should not do so without first discussing the position with those who instruct them and considering whether it would be more appropriate to make a written request for directions from the court. If experts do withdraw, they must give formal written notice to those instructing them.

Experts' right to ask court for directions

28. Experts may request directions from the court to assist them in carrying out their functions (CPR 35.14), for example, if experts consider that they have not been provided with information they require. Experts should normally discuss this with those who instruct them before making a request. Unless the court otherwise orders, any proposed request for directions should be sent to the party instructing the expert at least seven days before filing any request with the court, and to all other parties at least four days before filing it.

29. Requests to the court for directions should be made by letter clearly marked "expert's request for directions" containing:

a. the title of the claim;
b. the claim number;
c. the name of the expert;
d. why directions are sought; and
e. copies of any relevant documentation.

Experts' access to information held by the parties

30. Experts should try to ensure that they have access to all relevant information held by the parties, and that the same information has been disclosed

Appendix 6 – White Book Rule 45.19 with Notes

will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice it will award no more than the fixed costs in r.45.18.

The fixed costs regime set out in Section III of Pt 45 applies during the pre-action processes set out in the RTA Protocol and with which parties are expected to comply before starting proceedings. Paragraph 7.62 of the RTA Protocol and para.7.44 of the EL/PL Protocol state that, where the parties agree to settle during Stage 2 of the Protocol process, on terms that the defendant within a particular time should pay the claimant damages, the defendant should pay to the claimant those damages, together with any unpaid Stage 1 fixed costs in r.45.18, the Stage 2 fixed costs in that rule, and relevant disbursements allowed in accordance with r.45.19. (Any offer to settle made at any stage by either party must include the Stage 2 fixed costs in r.45.18; see para.7.44 of the RTA Protocol and para.7.41 of the EL/PL Protocol.)

Paragraph 7.70 of the RTA Protocol and para.7.30 of the EL/PL Protocol state that, where the parties are unable to agree the amount of damages payable at the end of the Stage 2 process of the Protocol, the defendants must pay to the claimant their final offer of damages, again together with any unpaid Stage 1 fixed costs in r.45.18, the Stage 2 fixed costs in that rule, and, if they have not been agreed, disbursements in accordance with r.45.19(2) which the defendant believes to be reasonable ("a non-settlement payment"). (Where disbursements are disputed, the parties may have recourse to the procedure in r.46.14 (Costs-only proceedings).)

Other provisions in the RTA Protocol which have the effect of requiring fixed costs to be paid by one party to another before court proceedings are started without recourse to the court for a costs order being required (unless the paying party fails to comply) are: para.5.9 (Claimant's reasonable belief of the value of the claim), and para.6.18 (liability admitted under Stage 1). The comparable provisions in the EL/PL Protocol are, respectively, para.5.9 and para.6.16.

Where, in proceedings under the Stage 3 Procedure, the court considers that further evidence must be provided by any party, and the claim is not suitable to continue under that procedure, and orders that the claim will continue under Part 7, the court will not allow the Stage 3 fixed costs (Practice Direction 49F para.7.3).

Disbursements[1]

45.19—(1) Subject to paragraphs (2A) to (2E), the court— **45.19**

(a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but

(b) will not allow a claim for any other type of disbursement.

(2) In a claim to which either the RTA Protocol or EL/PL Protocol applies, the disbursements referred to in paragraph (1) are—

(a) the cost of obtaining—

(i) medical records;

(ii) a medical report or reports or non-medical expert reports as provided for in the relevant Protocol;

(b) court fees as a result of Part 21 being applicable;

(c) court fees payable where proceedings are started as a result of a limitation period that is about to expire;

(d) court fees in respect of the Stage 3 Procedure; and

(e) any other disbursement that has arisen due to a particular feature of the dispute.

(2A) In a soft tissue injury claim, or a claim which consists of, or includes, a claim for a whiplash injury, to which the RTA Protocol applies, the only sums (exclusive of VAT) that are recoverable in respect of the cost of obtaining a fixed cost medical report or medical records are as follows—

(a) obtaining the first report from an accredited medical expert selected via the MedCo Portal: £180;

(b) obtaining a further report where justified from an expert from one of the following disciplines—

(i) Consultant Orthopaedic Surgeon (inclusive of a review of medical records where applicable): £420;

(ii) Consultant in Accident and Emergency Medicine: £360;

[1] Amended by the Civil Procedure (Amendment) Rules 2013 (SI 2013/262), the Civil Procedure (Amendment No.6) Rules 2013 (SI 2013/1695), the Civil Procedure (Amendment No.6) Rules 2014 (SI 2014/2044), the Civil Procedure (Amendment No.8) Rules 2014 (SI 2014/3299) and the Civil Procedure (Amendment No.2) Rules 2021 (SI 2021/196).

(iii) General Practitioner registered with the General Medical Council: £180; or

(iv) Physiotherapist registered with the Health and Care Professions Council: £180;

(c) obtaining medical records: no more than £30 plus the direct cost from the holder of the records, and limited to £80 in total for each set of records required. Where relevant records are required from more than one holder of records, the fixed fee applies to each set of records required;

(d) addendum report on medical records (except by Consultant Orthopaedic Surgeon): £50; and

(e) answer to questions under Part 35: £80.

(2B) Save in exceptional circumstances, no fee may be allowed for the cost of obtaining a report to which paragraph (2A) applies where the medical expert—

(a) has provided treatment to the claimant;

(b) is associated with any person who has provided treatment; or

(c) proposes or recommends treatment that they or an associate then provide.

(2C) The cost of obtaining a further report from an expert not listed in paragraph (2A)(b) is not fixed, but the use of that expert and the cost must be justified.

(2D) Where appropriate, VAT may be recovered in addition to the cost of obtaining a fixed cost medical report or medical records.

(2E) In this rule, "accredited medical expert", "associate", "associated with", "fixed cost medical report", "MedCo", "soft tissue injury claim" and "whiplash injury" have the same meaning as in paragraph 1.1(A1), (1A), (10A), (12A), (16A) and (20), respectively, of the RTA Protocol.

(3) In a claim to which the RTA Protocol applies, the disbursements referred to in paragraph (1) are also the cost of—

(a) an engineer's report; and

(b) a search of the records of the—

(i) Driver Vehicle Licensing Authority; and

(ii) Motor Insurance Database.

Rule 45.19: Effect of rule

45.19.1 Before the re-enactment of Part 45, with effect from 1 April 2013, by the Civil Procedure (Amendment) Rules 2013 (SI 2013/262), r.45.19 was r.45.30. Subject to transitional provisions, the disbursements that could be allowed under para.(2)(b) of r.45.30 are not allowable under r.45.19. See further para.45.16.3 above, for the effect of the transitional provisions rendering such disbursements recoverable after 1 April 2013, in certain circumstances (and for explanation of the recoverability of "success fees" after that date, no longer provided for in Section III).

Where the parties agree to settle during Stage 2 of the relevant Protocol process, on terms that the defendant should pay the claimant damages, the defendant must pay the disbursements in r.45.19 within a particular time; see para.7.47 of the RTA Protocol, and para.7.44 of the EL/PL Protocol. (Any offer to settle made at any stage by either party must include an agreement in principle to pay disbursements (above, respectively, para.7.44 and para.7.41).)

Provisions as to the recoverability by the claimant of the costs of obtaining medical reports and non-medical expert reports and specialist legal advice are contained in para.7.31 of the RTA Protocol; cf paras 7.1 to 7.8 of the EL/PL Protocol.

Costs in "soft tissue injury" and "whiplash injury" claims

45.19.2 Paragraphs (2A) to (2E) were added to this rule by the Civil Procedure (Amendment No.6) Rules 2014 (SI 2014/2044) with effect from 1 October 2014, for the purposes explained in para.45.16.4 above. The references to whiplash injury claims were added by the Civil Procedure (Amendment No.2) Rules 2021 (SI 2021/196) with effect from 31 May 2021. For the definitions of "soft tissue injury" and "whiplash injury" see para.45.16.4.

See also r.45.29I.

Appendix 7 - Practice Direction 27a – Small Claims Track

5.5 Nothing in this practice direction affects the duty of a judge at the request of a party to make a note of the matters referred to in section 60 of the County Courts Act 1984.

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Non-attendance of a party at a hearing

6.1 Attention is drawn to rule 27.9 (which enables a party to give notice that he will not attend a final hearing and sets out the effect of his giving such notice and of not doing so), and to paragraph 3 above.

6.2 Nothing in those provisions affects the general power of the court to adjourn a hearing, for example where a party who wishes to attend a hearing on the date fixed cannot do so for a good reason.

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Costs

7.1 Attention is drawn to Rule 27.14 which contains provisions about the costs which may be ordered to be paid by one party to another.

7.2 The amount which a party may be ordered to pay under rule 27.14(2)(b) (for legal advice and assistance in claims including an injunction or specific performance) is a sum not exceeding £260.

7.3 The amounts which a party may be ordered to pay under rule 27.14(2)(e) (loss of earnings) and (f) (experts' fees) are:

(1) for the loss of earnings or loss of leave of each party or witness due to attending a hearing or staying away from home for the purpose of attending a hearing, a sum not exceeding £95 per day for each person, and

(2) for experts' fees, a sum not exceeding £750 for each expert.

(As to recovery of pre-allocation costs in a case in which an admission by the defendant has reduced the amount in dispute to a figure below £10,000, reference should be made to paragraph 7.4 of Practice Direction 26 and to paragraph 7.1(3) of Practice Direction 46.)

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Appeals

8.1 Part 52 deals with appeals and attention is drawn to that Part and Practice Direction 52.

8A An appellant's notice in small claims must be filed and served in Form N164.

8.2 Where the court dealt with the claim to which the appellant is a party:

(1) under rule 27.10 without a hearing; or

(2) in his absence because he gave notice under rule 27.9 requesting the court to decide the claim in his absence,

an application for permission to appeal must be made to the appeal court.

8.3 Where an appeal is allowed the appeal court will, if possible, dispose of the case at the same time without referring the claim to the lower court or ordering a new hearing. It may do so without hearing further evidence.

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Appendix A: INFORMATION AND DOCUMENTATION THE COURT USUALLY NEEDS IN PARTICULAR TYPES OF CASE

ROAD ACCIDENT CASES (where the information or documentation is available)

- witness statements (including statements from the parties themselves);
- invoices and estimates for repairs;
- agreements and invoices for any car hire costs;
- the Police accident report;
- sketch plan which should wherever possible be agreed;
- photographs of the scene of the accident and of the damage.

BUILDING DISPUTES, REPAIRS, GOODS SOLD AND SIMILAR CONTRACTUAL CLAIMS (where the information or documentation is available)

- any written contract;

Appendix 7.1 - Extract - Practice Direction 35 – Experts and Assessors – Civil Procedure Rules

(6) where there is a range of opinion on the matters dealt with in the report –

(a) summarise the range of opinions; and

(b) give reasons for the expert's own opinion;

(7) contain a summary of the conclusions reached;

(8) if the expert is not able to give an opinion without qualification, state the qualification; and

(9) contain a statement that the expert –

(a) understands their duty to the court, and has complied with that duty; and

(b) is aware of the requirements of Part 35, this practice direction and the Guidance for the instruction of Experts in Civil Claims 2014.

3.3 An expert's report must be verified by a statement of truth in the following form –

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.

I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Part 22 deals with statements of truth. Rule 32.14 sets out the consequences of verifying a document containing a false statement without an honest belief in its truth.)

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Information

4 Under rule 35.9 the court may direct a party with access to information, which is not reasonably available to another party to serve on that other party a document, which records the information. The document served must include sufficient details of all the facts, tests, experiments and assumptions which underlie any part of the information to enable the party on whom it is served to make, or to obtain, a proper interpretation of the information and an assessment of its significance.

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Instructions

5 Cross-examination of experts on the contents of their instructions will not be allowed unless the court permits it (or unless the party who gave the instructions consents). Before it gives permission the court must be satisfied that there are reasonable grounds to consider that the statement in the report of the substance of the instructions is inaccurate or incomplete. If the court is so satisfied, it will allow the cross-examination where it appears to be in the interests of justice.

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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.

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Single joint expert

7 When considering whether to give permission for the parties to rely on expert evidence and whether that evidence should be from a single joint expert the court will take into account all the circumstances in particular, whether:

(a) it is proportionate to have separate experts for each party on a particular issue with reference to –

(i) the amount in dispute;

(ii) the importance to the parties; and

c. can produce a report, deal with questions and have discussions with other experts within a reasonable time, and at a cost proportionate to the matters in issue;

d. are available to attend the trial, if attendance is required; and

e. have no potential conflict of interest.

17. Terms of appointment should be agreed at the outset and should normally include:

a. the capacity in which the expert is to be appointed (e.g. party appointed expert or single joint expert);

b. the services required of the expert (e.g. provision of an expert's report, answering questions in writing, attendance at meetings and attendance at court);

c. time for delivery of the report;

d. the basis of the expert's charges (e.g. daily or hourly rates and an estimate of the time likely to be required, or a fixed fee for the services). Parties must provide an estimate to the court of the costs of the proposed expert evidence and for each stage of the proceedings (CPR.35.4(2);

e. travelling expenses and disbursements;

f. cancellation charges;

g. any fees for attending court;

h. time for making the payment;

i whether fees are to be paid by a third party;

j. if a party is publicly funded, whether the expert's charges will be subject to assessment; and

k. guidance that the expert's fees and expenses may be limited by the court (note expert's recoverable fees in the small claims track cannot exceed £750: see PD 27 paragraph 7).

Appendix 9 – Wilson-v-Al-Khader

- some required close regard to a mass of literature (not always literature that the particular expert had referred to in his or her report);
- to answer the questions would take many hours of work (in some cases as much as two or three working days) with costs implications that required no elaboration. Dr Torrens added that to answer the questions would result in a document as lengthy as her original report;
- they perceived them to be cross-examination;

Mr Audland QC observed further that:

- some questions sought to go behind matters which would be privileged;
- some questions were based on statements by the claimant the reliability of which was likely to be tested at trial, so were premature.

34. The initial response of the claimant's advisers was to re-visit and modify the questions. In some cases the question was withdrawn; in others the question was followed by some words of explanation as to its basis or what had prompted it; in others the expert was given the option, if preferred, of leaving the question to be dealt with in cross-examination at trial. By way of further modification or concession, the claimant's advisers' position by the time of the hearing was that the defendant's experts should answer those questions which they felt appropriate to answer and in other cases should decline to answer, but giving reasons so that the claimant's advisers could then consider whether or not to press the question by way of an application for an order. There was some support for such an approach in the notes to CPR 35.6 in the White Book, which said that if an expert received a set of questions which (s)he considered went beyond the spirit of the rule, the right approach was to "answer the clearly relevant questions and only to decline to answer the remainder if (i) to do so would be clearly prejudicial to the instructing party's position, *or*, (ii) the time and cost of replying to the questions was disproportionate". Mr Audland QC's response to these modifications was that they did not answer the basic objections to the questions and quite impermissibly placed a burden on the experts to decide what were and were not proper questions.

35. In his submissions, Mr Grant pointed out that the expert evidence was detailed and complex (running to some 900 pages). It was therefore scarcely surprising that the claimant's questions were also detailed and complex. A significant component of the questions dealt with an oversight on the part of the defendant's experts, which was that they had not clarified their opinions in the light of the expert evidence which dealt with the speed of the collision – an important point in the case. They had not, he submitted, dealt or dealt sufficiently with the claimant's pre-existing vulnerability or with a crucial letter from the hospital which treated her in the aftermath of the collision and which supported her case that she had suffered a sub-arachnoid haemorrhage as a direct consequence. (He separately observed, with justification, that this letter, albeit helpful, had been improperly obtained by the defendant and then simply listed as an anonymous document at item 25 of their list for the claimant to discover – conduct which did not reflect well upon the defendant.) Mr Grant drew attention to the authority of *Mutch v Allen* [2001] EWCA Civ 76. In that case the Court of Appeal allowed a question to the claimant's expert which went beyond simple clarification. (Mr Audland QC and Mr Grant referred to this type of question as a "question by way of extension".) This authority does not, to my mind, take matters much further in that 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. Lastly, Mr Grant took me skilfully through a representative section of the questions. He submitted that the questions were relevant, that they were carefully and moderately drafted and that they would elicit evidence in a way that was collaborative, expeditious and cost-effective.

Discussion

36. Notwithstanding the cost and effort that have gone into the questions and notwithstanding that the motives of Mr Dickinson and Mr Grant have simply been to advance their client's case to

be disturbed. It is not for the Appeal Court to substitute its own exercise of discretion for that of the lower court but only to review the correctness of the decision of the lower court within the parameters that I have described. In that way, ultimately, it is not for me to decide whether I or another judge might have decided this case differently, it is rather a question of considering whether the Master made a decision that was within the range that he was entitled to decide. In my judgment, there are a number of different approaches that could have been taken to deal with the core concern of the Defendants in this case. The Master was entitled, in those circumstances, to make a choice of how to proceed. My attention has been drawn on appeal, although that is, I accept, not really focused upon in the course of the oral exchanges before the Master below whether the question in this case was a legitimate clarification question within the meaning of CPR Part 35.6. That provision provides that:

> "(1) A party may put written questions about an expert's report (which must be proportionate) to—
> (a)an expert instructed by another party; or
> (b)a single joint expert appointed under rule 35.7.
>
> (2)Written questions under paragraph (1)—
> (a)may be put once only;
> (b)must be put within 28 days of service of the expert's report; and
> (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."

Neither has the court given permission, nor does the other party agree, in this case, and, therefore, the rules constrain the Defendant to asking questions only for the purpose of clarification. True, it is, that in the question letter, that is what the Defendant's solicitors purport to do because they say the questions are raised "pursuant to

CPR Part 35 and for the purposes of clarification." However, in my judgment, when one considers question 14, the two questions there asked are not clarifications. They are invitations to express an opinion that, conspicuously, the expert in question had not expressed in the report pursuant to which the questions were being raised. The questions, firstly, were the general question of what is the life expectation of a woman in a vegetative state following traumatic brain injury at the age of 40. The second question specifically asked, how many years it is likely that the Claimant will survive. These 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. Mr Spencer submits that in those circumstances, the Claimant's solicitors were proper and entitled, when asked by the Doctor if he had to answer the questions, to advise him in the letter that they confirmed to the Defendants that he did not have to answer the questions because they took the view that these were not CPR Part 35 legitimate questions and I agree.

9. Moreover, the Master, in approaching this case, was entitled, in my judgment, to take this view, as this Master did, that absent any evidence to the contrary, undermining the assertions or justification for the assertions contained in the letter dated 23 March 2015, it was not appropriate to go behind a professional man's unwillingness to answer the question unless or until further, fuller information was first provided. In the course of exchanges with the bar, I postulated what would be the position of counsel if asked to advise on an issue, in circumstances where that could give rise to either the expression of opinion, qualified by all of the reservations that counsel might wish to provide, or, alternatively, could be met with the refusal to express an opinion unless or until the material thought to be relevant was available. These are the legitimate choices of