

FACILITATING THE ULITISATION OF EXPERT EVIDENCE

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“The Use of Expert Evidence in Ensuring the Just Disposal of Matters”

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Abstract

The concept of the “overriding objective” arises almost exclusively in the civil litigation arena. However, its tenets are of general application. The aim of the overriding objective is to ensure efficiency while at the same time guaranteeing fairness to all parties engaged in proceedings before the Court. The overriding objective of ensuring that cases are resolved justly is therefore equally applicable to criminal proceedings. This paper will address the issues relating to expert evidence within that general framework.

The use of expert evidence ought to comply with the requirements of the overriding objective in both civil and criminal matters. We will explore the practical considerations that should govern the conduct of matters where expert evidence is required. This paper is intended to provoke thought on the ways in which expert evidence should be marshalled to ensure compliance with the requirements of justice and fairness.

The use of expert evidence in proceedings often ensures that the Court receives the benefit of an objective and impartial assessment of issues requiring specialised knowledge. The Court will therefore ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and their attorneys to, at all times when dealing with expert evidence, comply with their duties associated with the overriding objective.

Chief among the considerations are the following:

- a) whether there is a need for expert evidence;
- b) when should the decision be taken as to whether expert evidence is required;
- c) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
- d) whether evidence is required from more than one expert in any single discipline;
- e) whether a common expert is appropriate for all or any part of the evidence;
- f) the nature and extent of expert reports, including any in reply;
- g) the issues that it is proposed each expert will address;
- h) the arrangements for experts to prepare a joint-report, if so, how; and
- i) whether any aspect of the expert evidence needs be given orally.

The general approach to these issues ought to be the mode which best safeguards the interests of justice while ensuring that cases are disposed of expeditiously, justly and fairly.

Expert evidence as a mechanism for ensuring justice

1. Lord Woolf¹, writing extrajudicially in 1996, reckoned that **“two of the major generators of unnecessary cost in civil litigation were uncontrolled discovery and expert evidence”**.² The ultimate result, he said, was that potential litigants were discouraged from pursuing legitimate claims when faced with the issue of costs.³
2. Now, some 22 years later, a litigant in Jamaica is likely to agree with this statement as, for many, the expenses and delays associated with litigation are highly prohibitive. The use of expert evidence has typically been associated with increased cost and delays for one reason or the other and there are similar concerns for criminal matters.
3. There has been some legislative intervention through amendments to statute and the rules of court⁴ to address these concerns, though it appears there has been greater intervention in civil procedure as opposed to criminal.
4. Despite these concerns regarding the use of expert evidence, it cannot be denied that its utilisation ensures that justice is done in appropriate cases.⁵ Where effectively utilised, expert evidence furthers the ‘overriding objective’ of ensuring that cases are dealt with justly.
5. Although the overriding objective is invoked almost exclusively in the civil arena, its applicability is of much wider import.⁶ The obligation to deal with cases justly is equally applicable to criminal matters. An attorney therefore has an explicit

¹ His recommendations influenced several provisions of Part 35 of the Civil Procedure Rules in England and Wales. Some of these provisions are reflected in Part 32 of Jamaica’s Civil Procedure Rules, 2002

² Lord Woolf in Access to Justice: Final Report (July 1996), Chapter 13 at paragraph 1.

³ Lord Woolf in Access to Justice: Final Report (July 1996), Chapter 13 at paragraph 2.

⁴ See recent amendments to the Evidence Act for example

⁵ See for example **Dial and Another v State of Trinidad and Tobago** [2005] UKPC 4, [2005] 1 WLR 1660 where fresh ballistics expert evidence admitted on appeal proved the prosecution’s witness had given false evidence at trial thereby resulting in a finding that the conviction was unsafe.

⁶ As an example, see the ‘overriding objective’ contained in the England and Wales Criminal Procedure Rules, 2015, which stipulate that the overriding objective is to see that cases are dealt with justly, which includes the duty to, among other things, deal with cases efficiently and expeditiously.

obligation to assist the court in achieving the overriding objective⁷ even when expert evidence is utilised.

6. Cases involving specialised areas of knowledge require expert evidence to assist the court or jury to understand the implication of particular facts. Although not obliged to accept the expert's evidence,⁸ the court's ability to do justice is enhanced from having the benefit of impartial and independent expert opinion.
7. The expert's role is an important one for it assists the court to arrive at a just conclusion while not supplanting **“the court's role as the ultimate decision-maker on matters that are central to the outcome of the case”**.⁹
8. Unlike lay witnesses whose evidence is limited to matters they have seen, heard or experienced, an expert's evidence is opinion-based and derives from training and experience in an area requiring specialised knowledge.
9. There are several issues that should be considered by counsel in both civil and criminal matters. The attorney must ensure that the use of expert evidence effectively guarantees the justice of the case rather than undermine it. Where the attorney fails to do so, the court may exercise a vigilant role in safeguarding the interest of justice through the orders it makes relative to the utilisation of expert evidence.

Is an expert required?

10. The application of the “overriding objective” creates a new paradigm for the management of cases through the Courts. One “new” approach is the agreement of facts and issues by the parties ahead of a trial. This becomes even more critical and vital where the consideration of potential experts' evidence is involved. Simply, not all scientific, technical or other specialised facts to be proved or issues to be resolved will require the assistance of an expert. The parties may agree these facts and issues, thereby obviating the necessity for experts.

⁷ **National Commercial Bank Jamaica Ltd (Successors to Mutual Security Bank Ltd) v K & B Enterprises Ltd** [2005] JMCA Civ 70

⁸ See **Joan Allen and Anor. V Rowan Mullings** [2013] JMCA App 22 at paragraph 46; Cross on Evidence. 6th Edition. London. Butterworths. 1985. P. 441

⁹ **Pora v The Queen** [2015] UKPC 9 at paragraph 24.

11. Expert evidence is only necessary where it will assist the court to resolve the issues in dispute,¹⁰ as it (the court) is the ultimate arbiter of whether such evidence is required. If the court can understand the evidence without the assistance of an expert there is no need to call one.¹¹
12. The guiding principles were set out by King CJ in **The Queen v Bonython** in these words:

"before admitting the opinion of a witness into evidence, the Judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. The first question may be divided into two parts:

- (a) Whether the subject matter of the opinion is such that a person without instructions or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing specialised knowledge or experience in the area; and*
- (b) Whether the subject matter of the opinion forms part of the body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the Court.*

The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject matter to render his opinion of value in resolving the issues before the Court."¹²

13. An attorney should, in preparing for litigation, consider which aspects of his client's case require evidence from ordinary witnesses and whether expert evidence is needed to prove any other allegation intended to be raised at trial. To properly do so, he must have regard to the questions outlined in **Bonython**.
14. The necessity is usually evident in cases where the matters to be raised lie outside the experience and understanding of the judges of the facts. Matters typically requiring the need to call an expert are those relating to science, medicine, professional competence, or questions relating to foreign law.¹³ The list is not exhaustive.

¹⁰ Part 32.2, Civil Procedure Rules, 2002;

¹¹ **Thermos Ltd v Aladdin Sales & Marketing Ltd** [2000] F.S.R. 402; **R v Turner** [1975] Q. B. 834

¹² [1984] 38 SASR 45 at 46

¹³ Halsbury's Laws of England, Volume 27 (2015) at paragraph 565 re "Expert evidence: general principles"

15. In professional negligence cases for example, there is a presumption that expert evidence will be required to prove or disprove allegations.¹⁴ Cases involving boundary disputes may also require the evidence of an expert trained in the field.¹⁵
16. In civil cases, an expert may not be called unless the court's permission is first sought and obtained.¹⁶ The party intending to call the expert witness bears the burden of proving that an expert is required.¹⁷
17. The necessity for expert evidence arises from the pleadings (or statements in the case of criminal matters), where those facts, if proven, would stand as the basis for the expert's opinion to the court.¹⁸ The expert's opinion should therefore be hypothetical since the facts to support the findings are yet to be proved in evidence.
18. In considering whether expert evidence will be required, the court must look at all factors, including the nature of the dispute, the amount of money at stake and the delay likely to be occasioned by the calling of expert witnesses.¹⁹

The application to appoint an expert

19. The application to appoint an expert must be made as soon as practicable to ensure efficiency and that matters are disposed of in a timely manner. Parties in criminal matters should disclose at the earliest possible stage, to the court and other parties, their intention to rely on expert evidence.

¹⁴ See for example, **ACD (Landscape Architects) Ltd v Overall and Anor.** [2012] EWHC 100 (TCC)

¹⁵ **Joan Allen and Anor. V Rowan Mullings** [2013] JMCA App 22 at paragraph 42

¹⁶ Part 32.6(1), Civil Procedure Rules, 2002

¹⁷ **JP Morgan Chase Bank v Springwell Navigation Corporation** [2007] 1 All ER (Comm) 549 at paragraph 19; **Barings Plc and ANR v. Coopers & Lybrand and Ors** [2001] EWHC Ch 17 [2001] EWHC Ch 17 (9th February, 2001)

¹⁸ **Terlan Ibragimov v Valerij Fedorco and Anor.** [2014] ECSCJ No. 298 at paragraph 21.

¹⁹ **Cogrove and Anor. v Pattison and Anor.** [2000] All ER (D) 2007; see also **Christianne Kelsick v Dr. Ajit Kuruvilla et al** Civil Appeal No. P277 of 2012 (Trinidad and Tobago Court of Appeal)

20. Whether in civil or criminal matters, the information necessary to determine whether the expert should be allowed are:²⁰
 - a. The field requiring expert evidence;
 - b. The name of the proposed expert;
 - c. The nature of the expert witness's expertise; and
 - d. The nature of the expert evidence to be adduced
21. Identification of the area of expertise and name of the proposed expert witness constrains the attorney to assess and determine the area of the case requiring expert evidence and the nature of such expert evidence.
22. In civil and criminal matters, the expert's duty is owed to the court.²¹ He must therefore discharge his duty impartially regardless of the party who has instructed him. Full disclosure is therefore required.

When should the application be made?

23. The court has very wide case management powers to control the evidence to be given at any hearing or trial.²² Accordingly, it may give directions regarding the issues requiring evidence and the nature of the evidence required to decide those issues.
24. The court's permission for a party to call an expert witness in civil matters should generally be obtained at the case management conference (CMC).²³ Its power to determine the manner in which the evidence should be placed before the court should be invoked at that time.²⁴ The court must then give detailed directions relating to the expert evidence.

²⁰ Part 32.6(3), Civil Procedure Rules, 2002

²¹ **R v Bowman** [2006] EWCA Crim 417 at paragraph 176; CPR 32.3(1) and (2).

²² Part 29.1(1), Civil Procedure Rules; See also **VRL Operations Limited v National Water Commission and Ors.** [2015] JMSC CIV. 93 at paras 8 - 10

²³ Part 32.6(2), Civil Procedure Rules, 2002

²⁴ Part 29.1(1)(b), Civil Procedure Rules.

25. This course is preferred since the issues relating to the admissibility of expert evidence should, as far as possible, be dealt with in advance of trial.²⁵ The process of sifting the evidence of a proposed expert should never be a matter dealt with on the day of trial as those issues are likely to cause significant delay.
26. In providing guidance to practitioners, Harrison JA in **National Commercial Bank Jamaica Ltd (Successors to Mutual Security Bank Ltd) v K & B Enterprises Ltd**, had this to say:

*“The cases of **Barings Plc**²⁶ (supra) and **Woodford & Ackroyd**²⁷ (supra) are therefore useful authorities on the question of admissibility of an expert report. They establish that for the cheap and expeditious disposal of cases, it was desirable that there should be a power to rule prior to trial that evidence, be it expert or non-expert, is admissible or not admissible. This will quite likely avoid unnecessary expense of instructing experts, commissioning their reports, and securing their attendance at trial. Furthermore, the reasons underlying the new rules, require that expert evidence, needs to be prepared in a structured manner under the supervision of the Court. Judges sitting at first instance should therefore assert greater control over the preparation for the conduct of hearings than has hitherto been customary.”²⁸*

27. Although the general requirement is that the application should be made at CMC, the court may, in an appropriate case, appoint an expert at the pre-trial stage. A party must satisfy the court that there are compelling reasons why the application was not made at the CMC.²⁹ The affidavit in support of the application must clearly set out the difficulty in obtaining the expert so the court can determine whether there are “**bona fide and cogent reasons for the failure to comply with the general rule**”³⁰.

²⁵ **Barings Plc and ANR v. Coopers & Lybrand and Ors** [2001] All ER (D) 110 (Feb) per Evans-Lombe, J. at para 22

²⁶ **Barings Plc and ANR v. Coopers & Lybrand and Ors**

²⁷ **Woodford & Ackroyd (A Firm) v Burgess** [1999] EWCA Civ 620 (20 January 1999)

²⁸ [2005] JMCA Civ 70

²⁹ See **Cornelius v Stevens & Stevens** ANUHCV2006/0234, Judgment delivered December 5, 2008, paragraph 42 (Eastern Caribbean Surpeme Court)

³⁰ **Terlan Ibragimov v Valerij Fedorcov and Anor.** [2014] ECSCJ No 298 at paragraph 31 (Eastern Caribbean Supreme Court)

28. In criminal matters, issues relating to proposed experts should also be dealt with ahead of trial. Parties should utilise the Plea and Case Management Hearing to indicate to the Judge the necessity for particular witnesses.³¹ The Crown must disclose its intention to rely on expert evidence. The defendant also has an obligation, in the interest of fairness and justice, to share the report with the Crown if he intends to call the expert.³² This issue was dealt with in **Gibson v the Attorney General**³³, where the Caribbean Court of Justice said:

“[43] On the question of the sharing of any report obtained by the defence as a result of funding provided by the State, both courts below held that there was no obligation on the accused to make any such report available to the Crown (Court of Appeal para 45; High Court para 49). The legitimate interests of the accused that are served here are the right to silence, the right to avoid self-incrimination and the right to require the prosecution to prove its case. In our order we decided this question in a slightly different manner from the way in which the courts below did. We adjudged that the defence was not obliged to disclose the contents of any report from the expert if the latter was not going to be called to give evidence at the trial. But we decided that if the defence proposed to call the expert to give evidence then the defence was obliged to share his/her report with the Crown.

[44] Nothing in our decision conflicts with the legitimate interests of the accused or with any constitutional right of his. On the contrary we consider that this part of our order further satisfies the overall objective of fairness. There is no right, constitutional or other, on the part of the defence to surprise the Crown with expert evidence in the middle of a trial. A fair trial is not one that is fair only to the accused. It is a trial that is fair to all. Even in the absence of legislation requiring such disclosure, it is competent for the Court to order it as a corollary to an order which the Court makes at the behest of the appellant so as to ensure the fairness of the trial.”

Relevance of expert evidence

29. Another pertinent consideration relating to the admissibility of expert evidence is its relevance. Such evidence is admissible only where it will help the court to resolve the matters in dispute. If the evidence sought to be admitted is wholly irrelevant, its admission would only be a waste of time.

³¹ See Practice Direction No 1 of 2016 at paragraph 2

³² This is consistent with Section 31CB of the Evidence Act

³³ CCJ Appeal No CV 1 of 2010

30. In **Jhamiellah Gordon v Jevon Paul Devere Chevannes**,³⁴ the Court of Appeal considered whether Master Lindo (as she then was) was correct in excluding evidence sought to be introduced as expert evidence. Panton P, in delivering the judgment of the court, ruled that expert evidence was only necessary where it was relevant to the issues to be determined. He put it this way:

*“I fail to see how the mere consideration of a report of a proposed expert witness would make a judicial decision to grant or not to grant permission an erroneous one. Generally speaking, it would seem to me that consideration of a report is more likely to be helpful rather than not. It may well be that although the witness qualifies as an expert, the material to be introduced into evidence is wholly irrelevant to the issues for determination at the trial. In such a situation, a party would be properly prevented from calling a witness who would merely be causing a lengthening of a trial, as well as, the incurring of unnecessary costs...”*³⁵

31. Attorneys should scrupulously guard against unnecessary waste of time through the admission of evidence which is irrelevant and therefore unhelpful to the court.
32. The management of expert evidence should also be a prevailing consideration in criminal matters for, in as much as it may be helpful to the court, its misuse can have serious consequences.

Should there be more than one expert?

33. There is no presumption in favour of a single joint expert in all cases.³⁶ The court must assess whether the case is an appropriate one for a single joint expert rather than several.
34. In making a case for the use of single experts in civil matters, Lord Woolf articulated that there may be several considerations in favour of appointing a single expert, including the prospect of saving time and money. He said:

“A single expert is much more likely to be impartial than a party's expert can be. Appointing a single expert is likely to save time and money, and

³⁴ [2012] JMCA Civ 41

³⁵ [2012] JMCA Civ 41 at paragraph 8

³⁶ **Oxley v Penwarden** [2001] CPLR 1

to increase the prospects of settlement. It may also be an effective way of levelling the playing field between parties of unequal resources. These are significant advantages, and there would need to be compelling reasons for not taking them up. It is certainly not sufficient to say that a party is entitled to adduce separate expert evidence provided he is willing to pay for it.”³⁷

35. Of course, there may be circumstances where the interest of justice requires the use of experts called by either side. Lord Woolf acknowledged this when he said:

“There are in all areas some large, complex and strongly contested cases where the full adversarial system, including oral cross-examination of opposing experts on particular issues, is the best way of producing a just result”³⁸

36. For this reason, the Court may determine whether a single expert should give evidence on a particular issue instead of the parties instructing their own witnesses.³⁹ As a corollary to this power, the court may select the expert from a proposed list of experts or direct that he/she be selected in another manner where the parties cannot agree on the single expert.⁴⁰

37. The court may also give directions relating to instructions to the single expert witness, payment of his fees and inspections and examinations to be carried out by him.⁴¹

38. If only to promote transparency and prevent unnecessary litigation as to the propriety of conduct between counsel and the expert, communication with the single expert must be open and transparent and copied to all other counsel.⁴²

39. For good reasons, Part 32.10(4), (5) and (6) of the Civil Procedure Rules also provide that:

³⁷ Access to Justice: Final Report (July 1996), Chapter 13 at paragraph 21.

³⁸ Access to Justice: Final Report (July 1996), Chapter 13 at paragraph 19.

³⁹ Parts 32.9(1) and (5), Civil Procedure Rules, 2002; see generally **VRL Operators Limited v National Water Commission** [2015] JMCA Civ 69 where a single expert was appointed

⁴⁰ Part 32.9(2), Civil Procedure Rules, 2002

⁴¹ Part 32.10, Civil Procedure Rules, 2002

⁴² **VRL Operators Limited v National Water Commission** [2015] JMCA Civ 69 at paragraph 42

- (4) *The court may, before an expert witness is instructed –*
- (a) *limit the amount that can be paid by way of fees and expenses to the expert witness; and*
 - (b) *direct that the instructing parties pay that amount into court in such proportions as may be directed.*
- (5) *Unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert witness's fees and expenses.*
- (6) *This does not affect any decision as to the party who is ultimately to bear the costs of the single expert witness.*

40. Where the case is not suitable for a single expert, the court may exercise other powers to limit expense. It may direct that the experts have a meeting (whether personally, over the telephone or otherwise) to determine the issues relevant to their expertise and where possible, arrive at agreement on issues.⁴³ They may also be directed to prepare a report regarding the applicable principles relevant to their area of expertise.⁴⁴
41. In the event that either party is dissatisfied with the report produced by the joint expert, additional questions may be put to the expert for clarification but not by way of cross-examination by post.⁴⁵ As a last resort, the court's permission may be sought to instruct a separate expert if the reasons for dissatisfaction are not fanciful and especially where a substantial sum is involved.⁴⁶ The court should also consider whether it would be unjust not to allow the expert having regard to the overriding objective. For obvious reasons, this test would be strictly applied.
42. In criminal cases, there is very little in the way of guidance regarding the appointment of joint experts. The Criminal Procedure Code for England and Wales for example, contains specific terms empowering a Judge to appoint a single joint expert as between co-defendants where they both intend to introduce expert evidence on the same issues.⁴⁷ The Rules also empower the court to give

⁴³ Part 32.14, Civil Procedure Rules, 2002

⁴⁴ Ibid

⁴⁵ **Daley v Attorney General** [2015] JMCA Civ 11 at paragraphs 27 to 30

⁴⁶ **Daniels v Walker** [2000] 1 W.L.R. 1382

⁴⁷ See Parts 19.7 of the Criminal Practice Rules, October 2015 (as amended in April 2018).

directions as to questions to the expert, his fees and any examination test or experiment to be carried out by him.⁴⁸

43. This approach would certainly limit the possibility of jurors being confused when conflicting views are given by multiple experts on the same issue. Where there are multiple experts, the court should play a greater role in explaining the expert's evidence to the jury and highlight any limitations in the evidence which may be of relevant consideration for the jurors.⁴⁹

Form and content of the expert report

44. Expert evidence must be given in a written report unless the court directs otherwise.⁵⁰ The court may give permission for this report to be admitted in evidence for the truth of its contents.⁵¹
45. The expert witness may not give evidence orally unless the evidence he intends to give is set out in a written report, such report being disclosed to the other parties.⁵² The Court however has jurisdiction to determine whether portions of an expert's report ought not to be disclosed.
46. The expert's report must be addressed to the court. By doing so, the expert is reminded at all times that his duty is to the Court; that the report is for the benefit of the court; and ought only to include what is relevant and useful to the court. This guarantees that the evidence is independent and impartial.
47. The attorney has a duty to provide clear and detailed instructions to the proposed expert. Lord Woolf in his work addressed the issue when he said:

“Another way of improving the quality of experts' reports is by ensuring that experts are given adequate instructions. From the comments I have received on

⁴⁸ Parts 19.8 of the Criminal Practice Rules, 2015 (England and Wales)

⁴⁹ Supreme Court of Judicature of Jamaica Criminal Bench Book (2017) at page 126.

⁵⁰ Part 32.7(1), Civil Procedure Rules, 2002; See also Section 31CB of the Evidence Act

⁵¹ See for example, **Cecil Reid v Global Design and Builders Limited and Ors.** [2015] JMCC Comm. 24, where the expert report of a chartered quantity surveyor was admitted in evidence at trial, permission having first been obtained at CMC to call the expert

⁵² Part 32.6(4), Civil Procedure Rules, 2002

*this point it appears that solicitors' instructions vary from detailed to perfunctory. "Please provide your usual report" is an example that has been mentioned to me, and it may well be that this is adequate for an experienced expert who is frequently instructed by the same solicitor. Many experts have, however, indicated that they would welcome more detailed and explicit instructions, and I have no doubt that solicitors would benefit from guidance in this area.*⁵³

48. While expert evidence “should be the seen to be, the independent product of the expert uninfluenced as to the form and content by the exigencies of litigation”,⁵⁴ attorneys should provide sufficient instructions for the expert to generate a report that is of assistance to the court.⁵⁵ The list of matters to be included in the expert’s report is set out in Part 32.13 of the CPR:

- (1) *An expert witness's report must –*
 - (a) *give details of the expert witness's qualifications;*
 - (b) *give details of any literature or other material which the expert witness has used in making the report;*
 - (c) *say who carried out any test or experiment which the expert witness has used for the report;*
 - (d) *give details of the qualifications of the person who carried out any such test or experiment;*
 - (e) *where there is a range of opinion on the matters dealt within in the report –*
 - (i) *summarise the range of opinion; and*
 - (ii) *give reasons for his or her opinion, and*
 - (f) *contain a summary of the conclusions reached.*
- (2) *At the end of an expert witness's report there must be a statement that the expert witness-*
 - (a) *understands his or her duty to the court as set out in rules 32.3 and 32.4; (b) has complied with that duty;*
 - (c) *has included all matters within the expert witness's knowledge and area of expertise relevant to the issue on which the expert evidence is given; and*
 - (d) *has given details in the report of any matters which to his or her knowledge might affect the validity of the report.*
- (3) *There must be also attached to an expert witness's report copies of –*

⁵³ Access to Justice: Final Report (July 1996), Chapter 13 at paragraph 56.

⁵⁴ **Whitehouse v Jordan** [1981] 1 W.L.R. 246, HL, at 256, per Lord Wilberforce

⁵⁵ It is always useful to send a copy of the relevant rules of the CPR to the expert in contemplation of him/her preparing a report in compliance with the Rules.

- (a) all written instructions given to the expert witness;
- (b) any supplemental instructions given to the expert witness since the original instructions were given; and
- (c) a note of any oral instructions given to the expert witness, and the expert witness must certify that no other instruction than those disclosed have been received by him or her from the party instructing the expert witness, the party's attorney-at-law or any other person acting on behalf of the party.

(4) Where an expert report refers to photographs, plans, calculations, survey reports or other similar documents, these must be provided to the opposite party at the same time as the service of the report.

(5) Where it is not practicable to provide a copy of the documents referred to in paragraph (4), such documents must be made available for inspection by the other party or any expert witness instructed by that party within 7 days of a request so to do.

49. In order to assist the expert in achieving impartiality, lawyers in civil proceedings should make it a practice to provide the expert with all of the pleadings, and all of the documents relevant to the facts upon which the expert is required to give his opinion. The expert should also be provided with copies of the relevant parts of the CPR and in particular CPR 32.13.

50. A failure to include the information stipulated by the CPR can be fatal to an application for admission of expert evidence. Barrow JA had this to say in **Josephine Gabriel and Co Ltd v Dominica Brewery and Beverages Ltd**:⁵⁶

"The reports of both experts did not contain a statement that the expert understood her or his duty to the court or that she or he had complied with that duty. There was no indication that either expert included in her or his report all the matters within her or his knowledge and area of expertise relevant to the issue. The instructions given to the experts were not disclosed.

..The breaches of the rules that were committed in the presentation of the expert evidence were egregious. The parties were lucky to escape the consequences of such breaches. It would have been entirely appropriate, because it would have been proportionate to the scale of the violations, for the judge to refuse to receive the evidence of both expert witnesses. The administration of justice cannot countenance the conduct of litigation in such flagrant violation of rules specifically

⁵⁶ **Josephine Gabriel and Company Limited v. Dominica Brewery and Beverages Limited** Civil Appeal No. 10 of 2004 at paragraphs 8 – 9, (Court of Appeal, Eastern Caribbean Supreme Court – Dominica)

designed to protect the courts against the danger of deception by apparently credible expertise that conceals its true intent of promoting the interests of its purchaser. Expert evidence of that character will often be of limited, if any true value...

51. Similar information should be included in an expert report for criminal matters.⁵⁷
52. The content of the report is of course very important, as the matters will assist the court to determine what weight should be given to the expert's opinion. Information relating to the expert's qualifications and whether a particular matter falls outside his expertise will be critical in determining the weight to be accorded his report.⁵⁸
53. Where the science in a given area is not yet fully developed, this should also be disclosed.⁵⁹ It would be unsafe for the court to arrive a conclusion based on expert evidence which is highly speculative. As Toulson LJ put it in **R v Holdsworth**:⁶⁰

“Conclusions of medical experts on the cause of an injury or death necessarily involve a process of deduction, that is inferring conclusions from given facts based on other knowledge and experience. But particular caution is needed where the scientific knowledge of the process or processes involved is or may be incomplete. As knowledge increases, today's orthodoxy may become tomorrow's outdated learning. Special caution is also needed where expert opinion evidence is not just relied upon as additional material to support a prosecution but is fundamental to it.”

54. The information disclosed in an expert's report is therefore critical for assessing its reliability and therefore the weigh to be given to it.

⁵⁷ **R v Bowman** [2006] EWCA Crim 417 at paragraph 177.

⁵⁸ **The “Ikarian Reefer”** [1993] 2 Lloyd's Rep. 68, at pages 81-82; **Joan Allen and Anor. v Rowan Mullings** [2013] JMCA App 22 at paragraph 44.

⁵⁹ **R v Ferdinand and others** [2014] 2 Cr App R 331(23), CA.

⁶⁰ **R v Holdsworth** [2008] EWCA Crim 971 at paragraph 57.

The need to call an expert to give oral evidence

55. An expert, having given a written report, should only be called to give oral evidence as a matter of last resort in civil matters.⁶¹ The scheme of the Civil Procedure Rules contemplates the calling of an expert to give oral evidence only in extra-ordinary cases.⁶²
56. In criminal matters, the interest of justice may require that an expert be called to give evidence and be cross-examined. However, there is no longer a requirement for this.⁶³
57. The recent amendments to the Evidence Act have introduced a new statutory framework for admission of written expert evidence.⁶⁴ Section 31CA (1) (a) provides that in civil and criminal proceedings parties may agree, either in writing or orally, to admit a document in evidence even without the maker of the document being called to give oral evidence.⁶⁵
58. Additionally, section 31CB (1) provides that evidence submitted in a written report or certificate signed by an expert shall in criminal proceedings be admissible in evidence without the need to call the expert to give oral evidence on oath.⁶⁶ A party intending to rely on the expert's report must however serve, on all other parties, notice of his intention to rely on the statement in written form together with a copy of the report. This must be done no less than thirty (30) days⁶⁷ before the commencement of the trial.⁶⁸ The report or certificate is deemed to be an expert report unless and until the contrary is proved.
59. As with the regime established under Section 31E of the Evidence Act, a party to a criminal case may, no less than five (5) days before the trial, object to the

⁶¹ **Daniels v Walker** [2000] 1 W.L.R. 1382 at page 1388

⁶² See Parts 32.7(1) of the Civil Procedure Rules, 2002

⁶³ Practice Direction No. 1 of 2016

⁶⁴ The Evidence (Amendment) Act, 2015

⁶⁵ The relevant forms are set out in the appendix to Practice Direction No. 1 of 2016

⁶⁶ Evidence Act, Section 31CB(1)

⁶⁷ Not including Saturdays, Sundays or public holidays or the day on which the notice is served

⁶⁸ Evidence Act, Section 31CB(2)

tendering in evidence of statements made by an expert witness in a report without the need to call that expert.

60. The discretion to decide whether an expert's presence is required is ultimately that of the Judge. Subsection (4) of section 31CB therefore provides that "*the court may, on an application made by either party to the criminal proceedings, or on its own motion, require the expert who has signed a report to attend and give evidence at any stage in the proceedings, where the court considers this to be necessary in the interests of justice.*"
61. Where a report is tendered pursuant to these sections, it must be read out aloud in court and become part of the record.⁶⁹ The Prosecutor should also indicate in the opening statement the nature and effect of admitting the expert report under section 31CB.⁷⁰

Costs implications with the use of expert evidence

62. Issues relating to costs should be a constant consideration for attorneys when contemplating the use of expert evidence in civil proceedings. More often than not, matters involving the use of experts tend to be more complex and involve greater legal costs and delay.
63. It is for this obvious reason that expert evidence can only be admitted with the permission of the court. This is to safeguard against parties unnecessarily incurring costs.
64. As a practical matter, an attorney ought not to instruct an expert before the court gives permission in the event that the court rules that no expert evidence is required. However, this is not meant to be applied strictly. There may be cases where it is necessary, in preparation for litigation, to instruct an expert to assess the facts of the case and provide an opinion in advance of the claim being commenced.
65. The court has complete discretion how it may award costs having considered the issues relating to expert evidence.

⁶⁹ Practice Direction No. 1 of 2016 at para 4

⁷⁰ Practice Direction No. 1 of 2016 at para 29

66. The court may even award indemnity costs to the either party to litigation in light of the conduct of their expert witness. For example, in **Orroyo and Others v Equion Energia Limited**,⁷¹ a case interpreting and applying part 44 of the UK Civil Procedure Rules relating to costs (which is similar Jamaica's Part 65), Stuart-Smith J ruled that the court should consider all the facts of the case when assessing whether to award indemnity costs. The discretion to do so is very wide.
67. In delivering the judgment, the Stuart-Smith J had to consider whether it was appropriate to award indemnity costs. He said:

"The inclusion of the new calculations in Dr Card's fourth report constituted a deliberate and serious breach of the Court's order limiting the scope of additional reports. The seriousness of the breach was compounded by the timing of the fourth report, coming as it did so shortly before trial. The additional burdens upon the Defendant when confronted by what amounted to a new expert case five weeks before trial were substantial and unwarranted. The breach was further compounded by failing to provide the workings that lay behind the new calculations until 1 October 2014, the day before the trial started. Having realised that his calculations were wrong, Dr Card then tried to improve his position by providing his fifth report on Day 22, four days before he was called to give evidence. In doing so he gave an explanation for the new calculations which was seriously misleading. Finally, Leigh Day's explanation in their letter serving the report was not a fair summary of what had happened and was itself seriously misleading.

My assessment of Dr Card's conduct and its implications are at MJ[505]-[506]. Because it was not put to him that he set out to mislead the Court, I did not make a finding that he did; and I do not do so now. But, with that important qualification, the history surrounding the fourth and fifth reports, which the Claimants acknowledge to be "most regrettable", justifies serious and unequivocal condemnation: it is a history that is way beyond the norm even allowing for the fact that Dr Card was acting under remorseless pressure. The remorseless pressures of this litigation were not confined to those imposed on the Claimants in and about the preparation of Dr Card's fourth and fifth reports; and they do not begin to justify what happened."⁷²

68. In concluding on whether to award indemnity cost the learned judge continued:

⁷¹ [2016] EWHC 3348 (TCC)

⁷² [2016] EWHC 3348 (TCC) at paragraphs 58 – 59

“Drawing these strands together, I reject the submission that the Claimants should be directed to pay costs on an indemnity basis throughout. But I come to the conclusion that the failings outlined here and in the Main Judgment progressively affected the proper course of the litigation so as to take the case beyond the norm to an extent that both justifies and requires the signal mark of an order of indemnity costs. For me the tipping point comes with the service of Dr Card's fourth report. Up until then it is possible to make excuses that are sufficient to avoid an order for indemnity costs; but the service of the fourth report, presenting what was essentially a new expert case in deliberate disregard of the Court's order was a very serious error of judgment which had extensive consequences in placing unfair additional burdens upon the Defendant and the trial process. With two qualifications, therefore, I direct that the Claimants shall pay the Defendant's costs on the indemnity basis from 29 August 2014”⁷³

69. Attorneys should therefore ensure that the conduct of their expert witness does not unduly prejudice the expeditious and fair dispensation of justice. Where the conduct is so egregious, it would be entirely appropriate for a court to award costs on an indemnity basis.
70. Although the issue of costs does not arise in criminal matters, the expenses related to the use of expert witnesses should always be considered. In relation to this point, Cage LJ had this to say in **R v Bowman**:⁷⁴

“In this case, at times, some of the experts expressed to the court for the first time opinions which had not featured in their reports. A number of additional reports were also supplied at a late stage. Mr Martin-Sperry explained forcefully the funding constraints and difficulties faced by those representing the appellant in approaching and obtaining experts' reports. We are mindful of these difficulties and aware of the constraints placed on the appellant's advisers in this appeal but they do not wholly explain why some of the material placed before the court was not included in the relevant expert's initial report. They also do not explain or excuse the failure to refer to the instructions given and material provided before the reports were written. Failure to adhere to the guidelines can cause considerable difficulties and some delay in the conduct of the proceedings. These remarks are designed to help build up a culture of good practice rather than to be seen as critical of the experts in this case. We should add that it may be that some of the difficulties experienced by

⁷³ [2016] EWHC 3348 (TCC) at paragraph 74.

⁷⁴ [2006] EWCA Crim 417 at paragraph 178

the experts were caused by late supply to them of information, from whatever source.”

Conclusion

71. Parties to litigation must ensure that the overriding objective of ensuring that cases are dealt with justly is met at all times. The attorney’s role in ensuring this is evident from the rules of court and common law principles relating to the use of expert evidence.

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