

STEWARTS

# Expert Witness – The View from the Cross-Examiner

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**The Structural**

All about *you* and what *you* have done  
("playing the man, not the ball")

**The Substantive**

All about *your opinion* – how it's reasoned;  
why it's wrong/unreliable/less attractive  
("playing the ball")

### **Why do we need expert evidence?**

- Parties, their legal teams and judges need assistance on matters outside their expertise

### **An example: Trevor Guy v Mace & Jones**

- A dispute over “stolen” land raises an issue as to the value of the land.
  - That raises issues as to what it could be used for
  - Additional issues as to costs of decontaminating it to make it usable
- **Conclusion:** 2 experts needed:
  - Property valuer
  - Decontamination expert

## **But how does the judge decide?**

- He evaluates the merits of the respective experts:
  - Who is the more experienced? Who has the more relevant experience?
  - Whose evidence is to be preferred – and why?
  - But it's not a "winner takes all"; judges often come up with a blended conclusion based on all the evidence

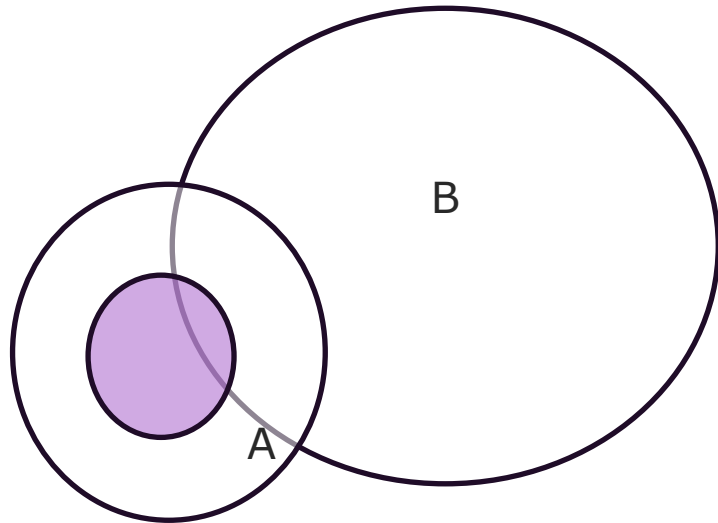
**The cross-examiner's job is to give the Judge reasons to prefer his/her expert**

**They do that using the 2 fold process – structural and substance**

### **To be a good expert you need 3 qualities**

- Expertise (most importantly relevant expertise)
- Independence and integrity
- The ability to explain complex and unfamiliar things.





$$C = SN(d_1) - N(d_2)Ke^{-rt}$$

**C** = Call premium  
**S** = Current stock price  
**t** = Time until option exercise  
**K** = Option striking price  
**r** = Risk-free interest rate  
**N** = Cumulative standard normal distribution  
**e** = Exponential term

**s** = St. Deviation  
**ln** = Natural Log

$$d_1 = \frac{\ln(S/K) + (r + s^2/2)t}{s \cdot \sqrt{t}}$$

$$d_2 = d_1 - s \cdot \sqrt{t}$$

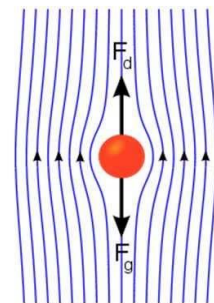
### Stokes Law

- Drag force  $F_d = 6 \pi \eta r u$

$\eta$  = viscosity

- Force of gravity

$$F_g = \frac{4}{3} \pi r^3 (\rho_s - \rho_f) g$$



Source:  
<http://www.answers.com/topic/stokes-law>

**What tools does the cross-examiner use?**

- Your report(s)
- Your opposite number's report
- The list of matters agreed/not agreed
- The trial materials – everything in the trial bundles
- Google
- Your previous reports or publications
- Questioning technique: closed (leading) and open (non-leading) questions



Accounts	▲	2014	2015	2016
Cash		£11,486.00	£0.00	£0.00
Net Worth		£53.00	£12,453.00	£12,312.00
Total Current Assets		£22,159.00	£27,798.00	£23,972.00
Total Current Liabilities		£5,496.00	£15,167.00	£11,438.00

<a href="#">MS LOIS DEAN</a>	Company Secretary	-	08 Jan 2010	-
<a href="#">Mr Owen Terence Dean</a>	Director	Jul 1994	20 May 2015	07 Jul 2015



**First stage is about YOU and the WORK you have done –  
“*playing the man – not the ball*”**

**YOU:**

- Your expertise and experience
- Any biases you may have
- Your independence and your integrity
- Do you understand your duties as an expert

Your expertise and experience:

- Is it really your area?
- Is it relevant experience?
- Are you up to date?
- Is this more your opposite number's area of expertise?

Are you a “Claimant’s man” or a “Defendant’s man”

Do you know the party in respect of who you are providing evidence?

Do you have any animosity to the other side?

Have you any “skin in the game”? – you shouldn’t have

## **KNOW YOUR DUTIES AS AN EXPERT**

In summary:

- It is your duty to assist the Court on matters within your expertise.
- That overrides any obligation to the persons from whom you received instructions or who is paying you.

## PD35 – General Requirements

- Your evidence should be you independent product uninfluenced by the pressures of litigation
- You should assist the Court with unbiased, objective opinion on matters within your expertise
- If a matter falls outside your expertise, make that clear
- If you can't reach a firm opinion, make that clear – and explain why
- If your view changes on any material matter, make that clear to all parties without delay – and the court if necessary
- Do not assume the role of an advocate. Do not argue the case.

## **PD35 – an easy win for the cross-examiner:**

PD35 ¶3.2(9) states that an expert's report **MUST** contain a statement that the expert:

- Understands their duty to the court, and has complied with that duty; and
- Is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014.

- What questions were you asked?
- Were they the right ones?
- What information and documentation did you have? What you read?
- Was information provided correct? Was it complete?
- What enquiries or investigations you made (if any)
- Whether you had any assistance; if so, from whom?
- And what do we know about them?
- How long you took and whether you had sufficient time

- Expect to have your reasoning and conclusions put under the microscope.
- If your reasoning isn't set out or clear, you will be asked to explain it.
- Make sure you understand your conclusions and the reasons clearly.



Common techniques used to cross-examination on the merits (“*playing the ball*”):

- The range of legitimate professional opinion/ legitimate alternative methodologies
- The microscopic dissection of reasoning to check the conclusion
- Turning the kaleidoscope:
  - The verification of assumptions relied on – and then:
    - Attacking the assumptions and/or
    - Changing the assumptions
  - The addition of new information – and the evaluation of its effect on conclusions

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- Know your duties – be able to summarise them – and always comply with them
  - Remember you are an expert there to assist the Court – not an advocate for the party calling you
  - Assist the Court to decide the issues before it – don't appear to be deciding them yourself and don't purport to decide the facts. If facts are in issue they are a matter for the Judge.
  - Expect the unexpected:
    - Questions about you and your experience
    - Questions about the work you have done to arrive at your opinion
  - Understand your conclusions and the reasoning you followed to arrive at them
  - Understand your opposite number's conclusions and how they arrived at them
  - Understand the differences between you and the reasons for them

- Prepare: fail to prepare; prepare to fail
- Answer the question:
  - Preferably the one asked – not the one you would have liked to have been asked
  - Don't be evasive
- Concede where appropriate – don't stick with demonstrably bad points
- Remember your role – expert not advocate
- Don't engage in argument with counsel. Simply answer the question.

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- Give your answers to the Judge and ensure you are pitching the level correctly – don't lecture or patronise. Be the helpful guide. Make eye contact.
  - Take your time
  - Read carefully anything you are asked to review
  - If you need to look at something – ask to do so
  - Remain calm and courteous
  - Remember the Judge sees everything: your demeanour in court is as important as your demeanour when giving evidence
  - When you are in the course of giving evidence do NOT discuss the case with anyone

- We provide expert witness familiarisation sessions to help you prepare to give evidence
- We will not discuss the facts of the actual case, the issues arising or your opinions
- We will give guidance and advice on how best to prepare for giving evidence, what to expect and how to give best evidence in court

- Maintain an active interest in expert/legal issues
- There is an excellent website: [Civil Litigation Brief – Updates and Commentary on Civil Procedure, by Gordon Exall, Barrister, Kings Chambers, Leeds, Manchester & Birmingham. 4-5 Gray’s Inn Square, London.](#)
- Plenty of regular updates on cases concerning expert evidence which will stop you falling into common traps

**ANY QUESTIONS?**

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