WITNESSES AND EVIDENCE

Given by

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1. INTRODUCTION

This is, of course, a very wide topic. It is hoped that the following provides an overview of all the issues encountered daily together with many of those encountered less frequently.

The CPR rules are stated as at the 19th of April 2016. However, amendments can be frequent. If in doubt, the following link is helpful:

https://www.justice.gov.uk/courts/procedure-rules/civil

2. LAY WITNESS EVIDENCE

BACKGROUND:

The rules: CPR 32.2

(1) The General rule is that any fact which needs to be proved by the evidence of witnesses is to be proved –

(a) at trial, by their oral evidence given in public; and
(b) at any other hearing, by their evidence in writing.

PREPARATION:

General position with regard to statements – take them early and get them signed.

Benefits –

a. Knowing where the case stands;

b. You know you can trace them;

c. You can then summons them if need be.

It also focuses the mind on what the issues are at an early stage and, therefore, helps with a case plan.

a. What is in dispute? Liability? Quantum?
b. Who can give evidence about each issue?

This will stand the case in good stead, even if addenda are required.

It also has the advantage that they will be incurred costs if and when the matter is budgeted.

CONTENTS:

32PD paras 17 – 22 set out the formal requirements for witness statements (Appendix 1 for ease of reference).

It is worth reflecting on some of these issues:

a. 32PD 18.1 "*The witness statement must, if practicable, be in the intended witness's own words, the statement should be expressed in the first person…..";*

b. 32PD 22.1 *"Any alteration to a witness statement must be initialled by the person making the statement";*

c. 32PD 20 *"A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence; it must include a statement by the intended witness that he believes the facts in it are true"*

32PD 25.1 - Any defects *can* lead to the court refusing to admit it in evidence or disallow the costs of its preparation. The latter is probably more likely but, obviously, important.

It is difficult to over-emphasise the importance of these issues. The accuracy of witness statements and any possible discrepancies that can be (and frequently are) exploited in cross-examination at trial should be avoided. They can arise because the witness simply says the wrong thing or alters his/her mind; there is nothing you can do about that. However, if they are drafting errors or inelegant wording, that is your fault and you have harmed your client's case. The closer to his/her natural use of language that you stick, the less likely that is to happen.

You can help:

a. A witness statement (particularly on liability) prepared as close in time to the incident as possible is likely to be more accurate than one prepared later;

b. In terms of liability, independent witnesses are more likely to be available/traceable at the address they gave at the scene, close in time to the accident. 3 years later when they have moved and you need an enquiry agent, costs go up and they may not be found/may have poor recollection/decline to become involved;

c. If you take a proof of evidence at an early stage, please ensure that it is signed at that stage. Not only do you have that evidence in the bank, you can also exchange that evidence; witness summons him/her; and/or serve a Civil Evidence Act notice in order to rely upon it. An unsigned statement is, largely, useless (albeit see Witness Summaries: CPR 32.9).

The ramifications are arguably now more serious than ever.

Firstly, and obviously, the witness statement needs to be verified by a statement of Truth (CPR 22). The importance of the statement of truth needs to be hammered home to the witness given CPR32.14

(1)Proceedings for contempt of court may be brought against a person if he 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

To avoid any confusion over draft statements, statements that were amended and final versions, there is nothing at all wrong with the version served containing hand-written amendments. The other side will see it and likely be thinking that is a careful witness who has given proper consideration to the matter.

Avoid at all costs, the statement of Truth being on a separate page at the end of the statement. I have lost count of how many times a witness has said, at trial, "but this is not the version I signed". I also know of one incident in such a case where the ramifications for the fee earner was the loss of his/her job. Do not do it.

Further, there is now the very real spectre of the Claimant losing QOCS protection so the impetus increased.

SPECIAL PROVISIONS FOR WITNESS STATEMENTS –

PART 8 PROCEEDINGS:

Probably the most obvious for our purposes is in respect of seeking approval of a PI award for a child or protected party but you could also have proceedings for a declaration.

Filing and serving written evidence
8.5

(1) The claimant must file any written evidence on which he intends to rely when he files his claim form.
(2) The claimant's evidence must be served on the defendant with the claim form.
(3) A defendant who wishes to rely on written evidence must file it when he files his acknowledgment of service.
(4) If he does so, he must also, at the same time, serve a copy of his evidence on the other parties.
(5) The claimant may, within 14 days of service of the defendant's evidence on him, file further written evidence in reply.
(6) If he does so, he must also, within the same time limit, serve a copy of his evidence on the other parties.
(7) The claimant may rely on the matters set out in his claim form as evidence under this rule if the claim form is verified by a statement of truth.

What happens if you do not?

8.6
(1) No written evidence may be relied on at the hearing of the claim unless –
(a) it has been served in accordance with rule 8.5; or
(b) the court gives permission.
(2) The court may require or permit a party to give oral evidence at the hearing.
(3) The court may give directions requiring the attendance for cross-examination of a witness who has given written evidence.
(Rule 32.1 contains a general power for the court to control evidence)

Practice Direction 8B – Pre-action protocol for Low Value personal injury claims in RTA and low value PI (EL and PL) claims – stage 3 ("the protocol"):

8PD 8.5 and 8.6 do not apply.

Instead:

6.1 The claimant must file with the claim form –
(1) the Court Proceedings Pack (Part A) Form;
(2) the Court Proceedings Pack (Part B) Form (the claimant and defendant's final offers) in a sealed envelope. (This provision does not apply where the claimant is a child and the application is for a settlement hearing);
(3) copies of medical reports;
(4) evidence of special damages; and
(5) evidence of disbursements (for example the cost of any medical report) in accordance with rule 45.19(2).

7.1 The parties may not rely upon evidence unless –
(1) it has been served in accordance with paragraph 6.4;
(2) it has been filed in accordance with paragraph 8.2 and 11.3: or
(3) (where the court considers that it cannot properly determine the claim without it), the court orders otherwise and gives directions.

What does all that mean?

a. **Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013:**

Witness statements

7.11 In most cases, witness statements, whether from the claimant or otherwise, will not be, required. One or more statements may, however, be provided where reasonably required to value the claim.

Submitting the Stage 2 Settlement Pack to the defendant

7.32 The Stage 2 Settlement Pack must comprise—

(1) the Stage 2 Settlement Pack Form;

(2) a medical report or reports;

(3) evidence of pecuniary losses;

(4) evidence of disbursements (for example the cost of any medical report);

(4A) in a soft tissue injury claim, the invoice for the cost of obtaining the fixed cost medical report and any invoice for the cost of obtaining medical records;

(5) any non-medical expert report;

(6) any medical records/photographs served with medical reports; and

(7) any witness statements.

7.32A In a soft tissue injury claim, the Stage 2 Settlement Pack is of no effect unless the medical report is a fixed cost medical report. Where the claimant includes more than one medical report, the first report obtained must be a fixed cost medical report from an accredited medical expert selected via the MedCo Portal and any further report from an expert in any of the disciplines listed in paragraph 7.8B(3)(a) to (d) must also be a fixed cost medical report.

7.33 The claimant should send the Stage 2 Settlement Pack to the

defendant within 15 days of the claimant approving —

(1) the final medical report and agreeing to rely on the prognosis in that report; or
(2) any non-medical expert report,
whichever is later.

7.34 Where the defendant alleges contributory negligence because of the claimant's failure to wear a seat belt, the Stage 2 Settlement Pack Form must also suggest a percentage reduction (which may be 0 per cent) in the amount of damages.

And that is it. There is no opportunity to adduce further evidence thereafter within the Stage 3 process.

b. Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims

Witness Statements
7.10 In most cases, witness statements, whether from the claimant or otherwise, will not be required. One or more statements may, however, be provided where reasonably required to value the claim.

Submitting the Stage 2 Settlement Pack to the defendant
7.30 The Stage 2 Settlement Pack must comprise—
(1) the Stage 2 Settlement Pack Form;
(2) a medical report or reports;
(3) evidence of pecuniary losses;
(4) evidence of disbursements (for example the cost of any medical

report);
(5) any non-medical expert report;
(6) any medical records/photographs served with medical reports; and
(7) any witness statements.

And that is it. There is no opportunity to adduce further evidence thereafter within the Stage 3 process.

TRANSLATION:

32PD 23.2 –

23.1 If the court directs that a witness statement is to be filed, it must be filed in the court or Division, or Office or Registry of the court or Division where the action in which it was or is to be used, is proceeding or will proceed.

23.2 Where the court has directed that a witness statement in a foreign language is to be filed:

(1) the party wishing to rely on it must –

(a) have it translated, and
(b) file the foreign language witness statement with the court, and

(2) the translator must make and file with the court an affidavit verifying the translation and exhibiting both the translation and a copy of the foreign language witness statement.

3. PART 7 PROCEEDINGS – STEPS LEADING TO TRIAL

ISSUING PROCEEDINGS:

Obviously, there is no need for witness statements to be filed or served when proceedings are issued but, if the witness statements are already prepared and signed, the Particulars of Claim can mirror them. That way, whether the Particulars of Claim are signed by the Claimant or by you on his behalf, there can be no "free" cross-examination point regarding any discrepancy. It is a real problem and one that can be readily avoided in this way.

DIRECTIONS AND COSTS MANAGEMENT:

Obviously, directions will then be given and, if appropriate, costs management will take place.

Beware:

CPR 32.1 –

(1) The Court may control the evidence by giving directions as to –

(a) The issues on which it requires evidence;

(b) The nature of the evidence which it required to decide those issues; and

(c) The way in which the evidence is to be placed before the Court.

(2) The Court may use its power under this rule to exclude evidence that would otherwise be admissible.

(3) The Court may limit cross-examination.

Another benefit in having prepared the witness evidence prior to issuing proceedings is that you know exactly what evidence you have and what issue each witness deals with. You can explain it fully. If you cannot and, for example you are suggesting that there will be, say, 10 witnesses but the case is not of huge value, you can readily see how you may run into trouble. You may even end up in the position that a further application for permission will be required (at cost) or worse, the matter is considered dealt with.

As yet, there is no clear authority as to how this may be applied prospectively.

Once it is decided what evidence is required, a date for filing and serving the witness evidence will be given.

Beware:

32.10 –

If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the Court, then the witness may not be called to give oral evidence unless the court gives permission.

Therefore, a failure to do this is a breach of a Court Order in accordance with CPR 3.8:

> *(1) Where a party has failed to comply with a rule, practice direction or Court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.*

So, if you are running into trouble with a deadline looming, what to do?

1. CPR 3.8(4): makes provision for any direction to do something (here, file the witness statement) to be extended by up to 28 days by prior written agreement so long as the extension does not put at risk any hearing date;

2. In default of agreement, before the deadline, apply for an extension of time for service of the witness statement;

3. If you know what evidence the witness is going to give or know the matters upon which you propose to question the witness but cannot do so, prepare a witness summary in accordance with CPR 32.9. A without notice application for permission to serve that, in time, (if granted) will suffice to comply (even if further steps are then required). I have never seen it used but it is there in the rules:

32.9 –

(1) A party who –

(a) is required to serve a witness statement for use at trial; but

(b) is unable to obtain one, may apply, without notice, for permission to serve a witness summary instead.

(2) A witness summary is a summary of –

(a) the evidence, if known, which would otherwise be included in a witness statement; or
(b) if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness.

(3) Unless the court orders otherwise, a witness summary must include the name and address of the intended witness.

(4) Unless the court orders otherwise, a witness summary must be served within the period in which a witness statement would have had to be served.

(5) Where a party serves a witness summary, so far as practicable rules 32.4 (requirement to serve witness statements for use at trial), 32.5(3) (amplifying witness statements), and 32.8 (form of witness statement) shall apply to the summary.

4. If you have missed the deadline, do not panic! However, immediately make a CPR 3.9 application. Following Denton v TH White Ltd [2014] EWCA Civ 906, provided that a fair trial can still be had (limb 3 of Denton), you *should* be all right. However,

please avoid this situation. Remember though, at limb 3, the reasons for the default and any previous defaults can come back into play.

INTERLOCUTORY APPLICATIONS:

As an aside – CPR 23.7:

Any written evidence in support must be served with the application (at least 3 days before the date of the hearing). The contents of that statement (and any documents already before the Court) is the only evidence before the Court. That is often overlooked and it is frustrating as Counsel not to be able to say something that supports the application when there is no evidence.

NOTICE TO ADMIT FACTS:

A much underrated procedure in my view! It is a good way to put the other side under pressure to answer and, if necessary, to focus their minds.

CPR 32.18 –

(1) A party may serve notice on another party requiring him to admit the facts, of the part of the case of the serving party, specified in the notice.

(2) A notice to admit facts must be served no later than 21 days before the trial.

(3) Where the other party makes any admission in response to the notice, the admission may be used against him only –

a. In the proceedings in which the notice to admit is served; and
b. By the party who served the notice.

(4) The Court may allow a party to amend or withdraw any admission made by him on such terms as it thinks just.

NOTICE TO ADMIT OR PRODUCE DOCUMENTS:

This is probably not often relevant but useful if there is some sort of suspicion about a document or a surveillance video is not agreed to be accurate.

CPR 32.19 –

(1) A party shall be deemed to admit the authenticity of a document disclosed to his under Part 31 (disclosure and inspection of documents) unless he serves notice that he wishes the document to be proved at trial.

(2) A notice to prove a document must be served –

a. *By the latest date for serving witness statements; or*
b. *Within 7 days of disclosure of the document, whichever is later.*

MEDICAL RECORDS:

Firstly, disclosure of them – please keep control of the disclosure yourself and do not allow Defendants to have authorities to seek records themselves. It is only those that are "relevant" you will be ordinarily be obliged to disclose.

Once you have them, please do check them for consistency and, if there is something in there that requires an explanation, certainly think whether you want this to go into the witness statement.

Importantly, watch out for whether they can be used at trial and the formalities have been fulfilled. See: Denton Hall v Fifield (2006) Lloyds Rep Med 251

In the case of an apparent inconsistent statement in the Claimant's medical records, the Defendant will want to investigate the position. Such records can, of course, be put to the witness in cross-examination to see if their contents are agreed or not. If the witness admits the discrepancy all well and good for the Defendant but it may be thought unlikely! If not, they will need to be proved as hearsay by the Defendant. The statement in the notes itself (if proved in this way) is not evidence of the truth of the document's contents but it

can be evidence which goes to the Claimant's credibility if the Court concludes that an inconsistent statement has been made.

The Court made the process for using medical records clear:

Buxton L.J.:

> *"First, a party who seeks to contradict a factually pleaded case on the basis of medical records or reports should indicate that intention in advance, either by amendment of his pleadings or by informal notice. Then, the opposite party must indicate the extent to which they take objection to the accuracy of the records. When the area of dispute is identified, a decision will have to be taken as to whether the records need to be formally proved by either of the means referred to in §3 above. Thereby, not only will the ambit of the dispute be clarified in advance, but also it will be clear what interpretation is sought to be put on what my Lord has called somewhat Delphic records: for an example, see §14 above.*
>
> *Two consequences may then follow. First, if the foregoing precautions have not been taken, the trial judge may be reluctant to permit reference to reports of the patient's statements*

in the medical records for the purpose of contradicting her evidence. Any such reluctance is unlikely to be criticised by this court. Second, on the other side of the coin, if there is unreasonable failure to admit that such statements were made, to the extent that it is necessary to call busy doctors to court simply in order formally to prove them, then such failure of co–operation is likely to be penalised, possibly severely, in costs".

Overall, if the Defendant wishes to use them/refer to them at trial, they should serve a Civil Evidence Act notice in good time. Further, if the records come to light early enough, they should refer to them in the pleadings. There is a technical point to be taken if they do not.

PART 18 REQUESTS:

It is easy to forget the utility of this part. CPR 18.1 is actually quite wide-ranging.

(1) The Court may at any time order a party to –

(a) clarify any matter which is in dispute in the proceedings; or

(b) give additional information in relation to any such matter,

whether or not the matter is contained or referred to in a statement of case.

VIDEO SURVEILLANCE EVIDENCE:

Whilst there is a limited way in which the Claimant can obtain an order preventing the Defendants from adducing surveillance evidence that they have obtained, basically, it is limited to cases of "ambush" where the Defendant has held on to the evidence beyond the period of time that was reasonable and the trial date is in jeopardy.

The principles can be distilled from Rall v Hume [2001] EWCA Civ 146 and Douglas v O'Neill [2011] EWHC 601 (QB) which conveniently cites and considers the relevant earlier case law.

Rall involved surveillance footage obtained in about February 2000 which was disclosed in June 2000; and footage from September 2000 which was disclosed in October 2000. By that stage, the matter had been listed for a 4-hour disposal hearing in January 2001. Upon receipt of indication that the Claimants objected to the video evidence, the Defendants made application to rely on it at the CMC on the 13th of December 2000.

Douglas involved a more protracted history.

The salient points can be summarized as follows:

a. A video film or recording is a document within the extended meaning of CPR 31.4. A Defendant who wishes to use such a film to attack the Claimant's case is subject to all the rules of disclosure and inspection in CPR 31. Accordingly, there is an entitlement to the entirety of the footage;

b. Accordingly, the Claimant is deemed to admit the authenticity of the film unless he/she serves notice that the document is to be proved at trial (CPR 32.19) and the person who took the film will then be required to give evidence accordingly;

c. If the Claimant accepts that the film shows him/her, in the absence of any ruling by the Court, the film is available to the Defendant for the purposes of cross-examination of the Claimant or the expert witnesses;

d. There is a duty on both parties under CPR 1.3 to assist the Court to further the overriding objective including giving directions to ensure the trial proceeds smoothly;

e. The starting point is that where a video is available which, according to the Defendant, might substantially reduce the damages to which the Claimant is entitled, the Defendant should be permitted to cross-examine upon it so long as this does not amount to "trial by ambush";

f. The Court may, however, control the evidence pursuant to CPR 32.1;

g. “Ambush” involves “deliberate” delay in disclosure. “Delay” was considered by:

i. Hallett J. (as she then was) in Uttley v Uttley (18th July 2001) – She considered that the insurers were entitled to hold on to the video for a reasonable period of time whilst they secured signed witness evidence from the Claimant so that they could assess what his case was; and

ii. O’Leary v Tunnelcraft Ltd [2009] EWHC 3438 (QB) where Swift J. stated that the case did fall within trial by ambush when the video was not disclosed until a short time before a settlement meeting and trial. She said, “There was no reason, in my judgment, why the footage which had been taken in August 2009, should not have been disclosed earlier”. She was concerned that from the time of the application before her there remained only 31 days to trial. She considered all the steps that would be necessary consequent upon the disclosure.

Footage that was obtained by trespass will not necessarily be excluded (far from it). However, the Court will probably express its disapproval by the making of adverse costs Orders. See: Jones v University of Warwick [2003] EWCA Civ 151.

See also: Watson v Ministry of Defence (2016) QBD (Judge Yelton) 08/04/16 for a very recent decision– Appendix 2

4. IN THE RUN UP TO TRIAL

VIDEO LINK:

DO NOT LEAVE THIS UNTIL THE LAST MOMENT

There is no substitute for reading the entirety of 32PD 29.1 and annexe 3. It is lengthy, complex and anyone who has ever tried to oganise one will tell you, time-consuming!

CIVIL EVIDENCE ACT NOTICE:

If you are aware, at the time of filing and serving the witness statement that the maker of the statement will not be being called to give evidence, you must tell the other party at that time and give a reason why – CPR 33.2.

The other party call then apply, within 14 days, for permission to cross-examine that witness.

If, later on, you receive notice that a witness is not coming, please do serve a Civil Evidence Act notice and give a reason why the witness is not to be called. In my view, "because it would not be proportionate" is not a reason but I have seen it given more than once now!

The basic position is that the hearsay is admissible but it is a question of what weight the trial judge will give to the evidence. If notice has been served (even if late) and the reason is reasonable, there is a better chance of some weight being afforded to it.

WITNESS SUMMONS:

Think about whether you need one. Personally, if it is an important, independent witness, I would serve a witness summons to ensure their attendance.

Generally, the summons is binding if it is served at least 7 days before the date on which the witness is required to attend court (although the Court may direct otherwise) – CPR 34.5

Ordinarily, the Court will serve unless you request otherwise – CPR 34.6. If the Court is to service, you will need to deposit witness expenses with the Court.

INTERPRETER:

In the case of anyone whose first language is not English, you should consider whether to have an interpreter at trial. It is one thing speaking in perfectly understandable English in the relative calm of a conference. It is completely another understanding questions asked of you and replying in exactly the way you want to in the environment of a court room.

I have seen one trial adjourned, with costs, after the first 10 minutes of a trial when the Claimant simply could not make himself understood. The Claimant paid the costs with a "show cause" as to why his solicitors ought not to.

Even under the fixed costs regime (CPR 45.12(2)(c)), the costs of an interpreter ought to be recoverable unless the witness really is a near-fluent English speaker and it is clearly not reasonable to have incurred the disbursement.

BUNDLE:

Fairly self-explanatory but, be careful to object to any documents that are not agreed to be admissible.

32PD 27 –

27.1 The court may give directions requiring the parties to use their best endeavours to agree a bundle or bundles of documents for use at any hearing.

27.2 All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless –

(1) the court orders otherwise; or

(2) a party gives written notice of objection to the admissibility of particular documents.

5. MISCELLANEOUS

EVIDENCE FOR FOREIGN COURTS:

See: CPR 34.16 onwards

AFFIDAVITS:

A relatively infrequent step nowadays.

CPR 32.15 –

(1) Evidence must be given by affidavit instead of or in addition to a witness statement if this is required by the court, a provision contained in any other rule, a practice direction or any other enactment.

(2) Nothing in these Rules prevents a witness giving evidence by affidavit at a hearing other than the trial if he chooses to do so in a case where paragraph (1) does not apply, but the party putting forward the affidavit may not recover the additional cost of making it from any other party unless the court orders otherwise.

If you do need to draft one, the requirements are set out in 32PD paras 2-10.

ORDER FOR CROSS-EXAMINATION:

CPR 32.7 –

(1) Where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence.

(2) If the court gives permission under paragraph (1) but the person in question does not attend as required by the order, his evidence may not be used unless the court gives permission.

(Rules 78.26 to 78.28 contain rules in relation to evidence arising out of mediation of certain cross-border disputes. Rule 78.27(1)(b) relates specifically to this rule.)

The discretion is wide. The most obvious circumstance in PI litigation is a Disposal Hearing where judgment has been entered. Several Courts in this area list the matter for a disposal hearing in accordance with 26PD 12.4.

Much will depend upon the reason for the application. It seems to me that the Defendant is unlikely to secure an order for no apparent/good reason for the cross-examination in the interests of proportionality.

MEDICAL REPORTS:

Obviously, they cannot be disclosed without the Claimant's instructions. The Claimant ought to have checked their contents for factual consistency. However, in advance of finalizing witness statements as to quantum, please check them for consistency in terms of the factual background to the case. This avoids yet another "open goal" for cross-examination.

USE OF A WITNESS STATEMENT SERVED BY ANOTHER PARTY WHEN WITNESS NOT CALLED/EVIDENCE NOT RELIED UPON:

If another party serves a witness statement but declines to call the witness at trial or put the witness statement forward as hearsay evidence, any other party may put the witness statement in as hearsay evidence – CPR 32.5(5).

There is no power for the Court to permit another party to call the witness. See: The Society of Lloyds v Sir William Otho Jaffray BT QBD (Mr. Justice Cresswell) 09/06/2000

APPENDIX 1

WITNESS STATEMENTS

Heading

17.1 The witness statement should be headed with the title of the proceedings (see paragraph 4 of Practice Direction 7A and paragraph 7 of Practice Direction 20); where the proceedings are between several parties with the same status it is sufficient to identify the parties as follows:

	Number:
A.B. (and others)	Claimants/Applicants
C.D. (and others)	Defendants/Respondents
	(as appropriate)

17.2 At the top right hand corner of the first page there should be clearly written:
(1) the party on whose behalf it is made,
(2) the initials and surname of the witness,
(3) the number of the statement in relation to that witness,
(4) the identifying initials and number of each exhibit referred to, and
(5) the date the statement was made.

Body of witness statement

18.1 The witness statement must, if practicable, be in the intended witness's own words, the statement should be expressed in the first person and should also state:
(1) the full name of the witness,
(2) his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer,
(3) his occupation, or if he has none, his description, and
(4) the fact that he is a party to the proceedings or is the employee of such a party if it be the case.

18.2 A witness statement must indicate:
(1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and
(2) the source for any matters of information or belief.

18.3 An exhibit used in conjunction with a witness statement should be verified and identified by the witness and remain separate from the witness statement.

18.4 Where a witness refers to an exhibit or exhibits, he should state 'I refer to the (description of exhibit) marked'…''.

18.5 The provisions of paragraphs 11.3 to 15.4 (exhibits) apply similarly to witness statements as they do to affidavits.
18.6 Where a witness makes more than one witness statement to which there are exhibits, in the same proceedings, the numbering of the exhibits should run consecutively throughout and not start again with each witness statement.

Format of witness statement
19.1 A witness statement should:
(1) be produced on durable quality A4 paper with a 3.5cm margin,
(2) be fully legible and should normally be typed on one side of the paper only,
(3) where possible, be bound securely in a manner which would not hamper filing, or otherwise each page should be endorsed with the case number and should bear the initials of the witness,
(4) have the pages numbered consecutively as a separate statement (or as one of several statements contained in a file),
(5) be divided into numbered paragraphs,
(6) have all numbers, including dates, expressed in figures, and
(7) give the reference to any document or documents mentioned either in the margin or in bold text in the body of the statement.
19.2 It is usually convenient for a witness statement to follow the chronological sequence of the events or matters dealt with, each paragraph of a witness statement should as far as possible be confined to a distinct portion of the subject.

Statement of Truth
20.1 A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence; it must include a statement by the intended witness that he believes the facts in it are true[13].
20.2 To verify a witness statement the statement of truth is as follows:
'I believe that the facts stated in this witness statement are true'.
20.3 Attention is drawn to rule 32.14 which sets out the consequences of verifying a witness statement containing a false statement without an honest belief in its truth.
(Paragraph 3A of Practice Direction 22 sets out the procedure to be followed where the person who should sign a document which is verified by a statement of truth is unable to read or sign the document.)
21 Omitted
Alterations to witness statements
22.1 Any alteration to a witness statement must be initialled by the person making the statement or by the authorised person where appropriate (see paragraph 21).

22.2 A witness statement which contains an alteration that has not been initialled may be used in evidence only with the permission of the court.

APPENDIX 2

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WATSON v MINISTRY OF DEFENCE (2016)

QBD (Judge Yelton) 08/04/2016
CIVIL EVIDENCE - PERSONAL INJURY - CLINICAL NEGLIGENCE (LTL) ADMISSIBILITY : CLINICAL NEGLIGENCE : DISCLOSURE : EXPERT EVIDENCE : HIP : MEDICAL EVIDENCE : VIDEO EVIDENCE : CIVIL PROCEDURE RULES 1998 r.32.1
It was in the interests of justice to admit video surveillance obtained by the Ministry of Defence challenging the range of movement in the hip of its former employee, who had brought a clinical negligence claim against it, even though that evidence was to be admitted only weeks before the trial was due to commence.
The defendant applied to admit video surveillance evidence of the claimant.

The claimant had brought two consolidated claims against the defendant, her former employer. The defendant accepted liability in respect of a professional negligence claim but denied liability in respect of the clinical negligence claim concerning the deterioration of the claimant's hip, which she attributed to the defendant's failure to act promptly concerning a hip image sent in 2005 and her hip problem not being diagnosed until 2010. The claimant stated that she was unable to work, was permanently crippled and in severe pain. Consequently she was discharged from the army in 2012. The trial was scheduled for May 2016. The defendant's application to adjourn the trial was dismissed, and disclosure of medical evidence was ordered. The claimant's expert in his November 2015 report found that the level of restriction displayed by the claimant was disproportionate to what he had found and that although she was experiencing pain her disablement seemed mild, and her presentation in the examination room was out of keeping with her movement in reality. The defendant's expert had seen a video of the claimant and concluded in his February 2016 report that her inability to bend over and pick things up was either through fear or conscious exaggeration. The defendant decided that video surveillance of the claimant was necessary and she was observed picking things up from the floor. It received the surveillance in March 2016 and disclosed it to the claimant the following week. There had been no indication from the claimant that it was her in the surveillance evidence.

HELD: (1) It was not appropriate for the court to view the surveillance of the claimant; it had to be viewed against the background of all the evidence, which was the role of the trial judge. There would be a danger of half trying the case by watching the surveillance and stating whether it would affect the trial. The surveillance was of clear significance, especially given the observations of the claimant's expert about checking the claimant's behaviour in the examination room against her behaviour in day-to-day life. The burden of proof fell on the defendant. Once privilege was waived in respect of the surveillance, the defendant had to disclose it and the court had a discretion under CPR r.32.1 to admit or exclude the surveillance. The claimant's submission that the defendant should have obtained surveillance evidence in November 2015 following the claimant's expert's report was wrong. The defendant was entitled to obtain its own expert report first.
Its application did not amount to an ambush of the claim, albeit late in the day. It was in the interests of justice to admit the surveillance,

Rall v Hume [2001] EWCA Civ 146, [2001] 3 All E.R. 248 applied. The trial judge would be in an impossible position if the defendant's expert were to state that he could not tell if the claimant's restricted movement was because of fear or conscious exaggeration but could not show conscious exaggeration. The case undoubtedly needed much work if the trial date was to be kept, but the trial should not be adjourned to allow the parties more time to deal with the surveillance evidence; the previous application for adjournment had been dismissed and there were a large number of experts required to give evidence,
Douglas v O'Neill [2011] EWHC 601 (QB) considered. With considerable effort the trial date could be kept.

(2) The admission of the surveillance operatives' witness statements was a subsidiary issue. Were the claimant to admit that it was her in the video surveillance, the operatives' statements would not be necessary and it was probable that they would not be cross-examined. It followed that the statements would be admitted.

Application granted
Counsel:
For the claimant: Michael Mylonas QC
For the defendant: Andrew Ward

Solicitors:
For the claimant: Irwin Mitchell
For the defendant: Government Legal Department
LTL 11/4/2016 EXTEMPORE

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APPENDIX 3

Shirley Hennessy's practice encompasses all areas of Personal Injury with Brain Injury and Catastrophic Spinal Injury being particular interests. Most accidents arise out of workplace incidents or road traffic accidents. Shirley has always represented Claimants and Defendants and continues to do so.

She is also regularly instructed in Professional Negligence matters, many of which have arisen out of the handling of personal injury actions by the Legal Profession but has also acted in many Medical/Dental matters too.
Shirley has also developed a specific expertise at dealing with Group Litigation encompassing Personal Injury; Professional Negligence; Nuisance; and Product Liability. Most recently, Shirley has been involved in the Group Litigation resulting from the collapse of a Crane on a building site in Liverpool. The main issue was that of Secondary Victims who had suffered psychiatric injury as a result of witnessing the collapse and their eligibility to claim damages.

Shirley also conducts general Civil Litigation, in particular, Contractual Disputes; Consumer Protection; and Housing matters. She also appears in the Coroner's Court.
Shirley is also pleased to be able to say that she appeared in the House of Lords in a case which sought to define the Duty of Care of a Regulatory Body.

Shirley is a qualified Commercial mediator and has also acted as an Arbitrator. She is a Deputy District Judge (Civil).
Shirley is content to accept appropriate cases on a CFA basis. Post-April 2013, there will be no uplift applied.

Shirley was the former Editor for the Academy of Experts

Magazine, “The Expert and Dispute Resolver”.

Notable cases

AB and OTHERS v VARIOUS HEALTH AUTHORITIES (LSD LITIGATION) 1999-2002: Group action concerning negligent use of LSD for therapeutic purposes in the 1950’s and 1960’s

AB and OTHERS v MEGGIT QBD 1999-2006: Dental Negligence Group Action

MORETON v MDU LTD [2006] EWHC 1948 (Admin)

BAILEY v WARREN [2006] EWCA 51: Mental Capacity

AB and OTHERS v WIGAN BC (2006)(Nuisance and Article 8 Liability and Quantum Group Action)

SAYERS v SMITHKLINE BEECHAM (MMR Litigation) QBD (2000-2003): Product Liability Group Action

AB and OTHERS v MOD (Atomic Veterans Litigation) - Group action for negligence brought by servicemen suffering from cancer and various stress diseases alleged to be as a result of taking part in the nuclear testing programme in the 1950’s.

WORTHAM v PHILLIPS – Catastrophic head injury case with jurisdictional issues over accident in Canada

TRENT STRATEGIC HEALTH AUTHORITY V JAIN [2009] UKHL 4 – Duty of care of Regulatory bodies

GRAY v TONER CC(Liverpool) HHJ Stewart QC LTL 7/4/11 – recoverability of interest on costs in CFA cases

WILSON v ROAD CONTRACT SERVICES LIMITED CC (Liverpool) HHJ Wood QC 12/11/14: First Appeal in Liverpool Post-Denton

AKERS & OTHERS v BOWMER KIRKLAND & OTHERS HC (Liverpool) Recorder Lewis Q.C. sitting as a Deputy High Court Judge, July 2014, Unreported Preliminary issue regarding the extent of liability to Secondary Victims for psychiatric damage caused by the Defendants' negligence