Your Witness

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Issue 78

Scoping reports

A call to the *UK Register of Expert Witnesses* helpline raised a question about a 'Limited Screening Report' (LSR) that had subsequently been served in litigation. An LSR is a report written very early in a case, well before court proceedings have been issued, and based on limited information. Its purpose is to help a solicitor gain an early indication of the expert issues.

I have long been an advocate of these sorts of 'scoping report' because, being undertaken very early in the process, they ought to be able to better focus the use of expert evidence should a case proceed.

If you do write one, though, it is important to understand that you are being instructed as an *expert advisor* rather than an *expert witness*. As such, **you do not owe an overriding duty to the court** because **you are not instructed under Part 35** of the Civil Procedure Rules (CPR). You are simply a paid advisor to the party. You could, therefore, expect to be giving the party professional advice on how best to present the case – something an expert witness should never do. For this reason, it can sometimes be difficult to make the transition from expert advisor to expert witness should the claim move forward.

Any report prepared as an expert advisor should be clearly marked as 'not for the court' so that it **cannot be deployed in litigation**. Of course, the party can still use it as a bargaining chip in its negotiations.

However, any attempt to drag the expert into CPR-compliant work (e.g. answering questions) on the basis of the scoping report must be resisted. The move from expert advisor to expert witness proper (i.e. one instructed under CPR 35) must be carefully considered and formally agreed. It is inevitable, in my view, that such a move will involve the writing of a second, CPR-compliant report.

Most of this issue of *Your Witness* is dedicated to the new guidance for experts working in civil proceedings in England and Wales. It is gratifying to see that in the new guidance the contrasting roles of expert advisor and expert witness are given due prominence (see the section *expert advisors* on page 2).

Changes to CPR

The Government is taking forward its whiplash reform work (see *www.justice.gov.uk/civil-justice-reforms/personal-injury-claims*). New sections in the CPR mean that from 1 October 2014 fees for medical reports in 'soft tissue injury' cases that fall within the ambit of the Road Traffic Accident Protocol have been capped as follows:

First report

- £180 regardless of area of expertise

Second report

- £180 (GP or physiotherapist)
- £360 (A&E consultant)
- £420 (orthopaedic consultant)

Medical records

- As there is a presumption that reports will have been written without sight of the medical records (except in the case of an orthopaedic report), if it becomes necessary to consider the medical records, an addendum report on the medical records is limited to £50.

Answers to questions

- The cost for answering questions put under CPR Part 35 is limited to £80.

To guard the independence of the medical expert, no fee is payable if the expert has provided, or will provide, treatment to the claimant or is associated with any person who has given, or will give, treatment to the claimant.

Guidance on remuneration of experts

On 5 September 2014 the Legal Aid Agency (LAA) published revised guidance about expert witnesses in cases funded by legal aid. The guidance, which can be found by browsing to *https://www.gov.uk/expert-witnesses-in-legal-aid-cases*, covers matters such as:

- maximum rates for different types of expert witness
- how to apply for prior authority, including benchmarks for working 'unusual' hours
- expert activity time guidelines
- expert witness standards in family matters, and
- arrangements for specific expert types, including independent social workers, experts in risk assessment, drug and alcohol testing and DNA testing.

The LAA also offers guidance on forensic science laboratory charges in criminal cases, together with fee guides for clinical negligence experts and risk assessment experts.

New edition

Preparations for edition 28 of the *UK Register of Expert Witnesses* have begun. A draft of your entry for the new edition will be sent in the New Year for you to check, sign and return. **If you will be away during the first half of January 2015** you may wish to contact us now so that we can make appropriate alternative arrangements.

Chris Pamplin

New expert witness guidance

CJC updates guidance for experts... at last!

The long-awaited update to the 2007 *Protocol for the Instruction of Experts to give Evidence in Civil Claims* (written by the Civil Justice Council; CJC) is with us at last. Renamed *Guidance for the instruction of experts in civil claims*, it leaves much of the original guidance in place but adds some new material in areas that have changed, or been introduced, since 2007. It is scheduled to replace the current version in 'autumn 2014'.

Rather than reproduce the entire document here (it is readily available at *www.jspubs.com/cjcguidance2014*), we take the opportunity to work through the new guidance, drawing out the key points for experts. So what follows is a refresher on the guidance that has not changed, and an introduction to the areas that have. References in the form §1 represent the paragraph number in the new guidance. New material is highlighted red.

Purpose

The purpose of the guidance is now to allow litigants, experts and those who instruct them to '*... understand best practice in complying with Part 35 and court orders*'. In the original, the purpose was to provide '*... clear guidance as to what they are expected to do in civil proceedings*' in the interests of '*good practice*' (§1).

Pre-action protocol

As before, experts and those instructing them (so not the lawyer's client) must have regard to the objectives underlying the pre-action protocols. These are:

- to **ensure early and full disclosure** of the expert issues
- to **agree as many of the expert issues before proceedings begin**, and
- to **support efficient management** of the proceedings (§2).

Specialist proceedings

Experts, and those who instruct them, still need to be aware of other court guidance and of specialist proceedings in some cases (§3).

Judicial notice and limitation

Proportionality makes it harder to adduce expert evidence

The 2007 guidance warned that the courts could take account of any failure to comply with the protocol, and stated that if complying with the protocol would time bar a case, then the protocol could be bypassed but the court had to be told of such abrogation. Perhaps the CJC feels that both are self-evident truths because both have been removed for the 2014 update.

Need for experts

Of course, proportionality is now paramount in the civil justice system's pursuit of justice. So we are offered a new section on the need for experts (§4). It requires those intending to instruct experts specifically to consider whether, bearing in mind Civil Procedure Rules (CPR) Parts 1 and 35, such evidence '*... is required to resolve the proceedings...*' – it used to say '*... reasonably required*'. We are reminded that the court's permission is required to use expert evidence in court proceedings, but that in general the parties are free to instruct an expert for their own private purposes without any particular permission (§5).

Expert advisors

There is helpful emphasis given to the important difference between expert witnesses instructed under CPR 35 and expert advisors – upon whose opinions the parties do not intend to rely (§6). There is also implicit acceptance that an expert advisor can later take on the role of expert witness proper (§7). The new guidance does not apply to expert advisors (§8).

Duties and obligations of experts

The duty for experts to exercise reasonable care, comply with any professional codes and have an overriding duty to the court all remain (§9).

The overriding objective: Experts are reminded of their obligation to help the court achieve the overriding objective set out in CPR 1.1. Helpfully, a meaning of '*proportionate*' is spelt out – '*... keeping the work and costs in proportion to the value and importance of the case to the parties...* ' (§10). The previous exhortations **not** to stray into mediation or otherwise trespass on the court's function are gone, but clearly they still apply!

Other duties: An expert's duty to independence (§11), to stay within their area of expertise (§12), to take into account all material facts (§13) and to promptly flag up any change of opinion (§14) all remain.

Sanction: There remains the warning that failure to comply with court rules or court judgments may have consequences (§15). However, instead of stressing the wholly exceptional case of *Phillips -v- Symes* (in which the expert ended up with a wasted costs order of £100,000s following 'reckless' behaviour), the guidance speaks only of sanctions on the parties. Before any, possibly reckless, expert starts to relax, though, an entirely new section on sanctions (see page 6) has been added at §89–92 (not §86–88 as written in §15).

Appointment of experts

Before instructing an expert, a lawyer must still establish that the expert has the appropriate expertise, understands the duties of an expert witness, has capacity to perform the work to the required timescale and at a cost proportionate to the matters in issue, can attend trial if needed and has no potential conflict of interest (§16). Oddly, the need to establish a description of the work required has been removed.

Terms of appointment: The agreement of terms at the outset of the instruction remains. It must include setting out the nature of the instruction (i.e. party expert, SJE or advisor), the services required, the timescale, the basis for the expert

fees and payment terms. Both cancellation fees and the acceptance, or otherwise, of any fee reduction based on court assessment should also be defined. Furthermore, the expert should be reminded that the court has powers to limit the expert fee (§17). In an addition to the guidance, parties are reminded that CPR 35.4(2) requires them to provide estimates of the cost of the proposed expert evidence in every case. The need to make arrangements for dealing with questions to experts and expert discussions is unchanged (§18), while those instructing experts remain under a duty to keep experts informed about deadlines and court orders that touch on the work of the expert (§19).

Instructions

The requirement to give clear instructions stays (§20) – for all the good it did in the previous version! In a move that may in fact cause confusion, there is now a need, when disclosing documents, for the solicitor to make '*... clear which have been served and which are drafts and when the latter are likely to be served...* '. In so far as this helps experts to avoid pulling quotes from a draft witness statement which changes in the final version – something that has made more than one expert look foolish in the witness box – then this has to be for the good.

But there is a long-standing problem with lawyers sending experts 'background material' that should not be cited in the expert report. The practice is unhelpful and risks putting experts in breach of their duty under CPR 35.10(3) to state the '... s*ubstance of all material instructions*'. Whether a document attracts legal privilege is a legal issue outside the competence of expert witnesses. If an expert is shown evidence that is relevant to the opinion given in the expert report, the source of that evidence must be noted in the report. Alternatively, if a lawyer sends an expert material that should not be cited, in our view the expert should return it unread. But what an expert should never do is ignore known evidence relevant to the opinion.

Agreed instructions: A new section requires those who instruct experts to try to agree the instructions and use the same factual material as the baseline (§21). It's a helpful reminder to non-lawyers that a reason experts may come to radically different opinions could be because they are given different evidence to consider at the outset! It is reinforced by the new requirement (§25) for experts to highlight where such evidential discrepancies occur.

Acceptance of instructions: As before, experts should be prompt in confirming, or otherwise, their willingness to accept the instruction to act (§22). The associated requirement, to advise promptly if circumstances change to cast doubt over the expert's ability to complete the instructions, is expanded (§23). Experts should say if their instructions are insufficiently clear, impose an unrealistic timeframe, or fall outside the expert's area of expertise. The potential difficulties that can arise when an expert advisor – a partisan advisor to a party – moves to the role of expert witness – instructed under CPR 35 with an overriding duty to independence and the court – are noted explicitly. The requirement for experts to stay within their area of expertise is unchanged (§24).

Move from expert advisor to expert witness with care

Agreed payment terms: In an attempt to reduce the perennial problem of experts and lawyers bickering over fees, the guidance states that experts should agree payment terms with those who instruct them (§26). But experts are reminded that they are always required to provide cost estimates and the court has the power to limit the amount paid as part of an order for budgeted costs. It seems to us that the latter power applies only in multi-track cases and relates to costs between the parties – it does not override the fees due under the contract agreed between the expert and the solicitor.

Withdrawal from an instruction

The guidance for experts on withdrawing from instructions is essentially unchanged (§27). However, it no longer states that the reason for contemplating withdrawing should be '*substantial and significant*'. Perhaps that goes without saying!

Asking the court for directions

The guidance on when and how an expert can take advantage of the power contained in CPR 35.14 – to ask the court for directions – remains unchanged. However, an example is included of when such a request might be needed (§28). There is also advice to include the phrase '*expert's request for directions*' on any request (§29). It remains to be seen whether that will remove the confusion such requests are reported to have created hitherto in court offices.

Access to all information

What should an expert do if it is felt that required information is being withheld? The advice has changed. Formerly, if, following discussions with those who instructed the expert, this wasn't resolved, the expert sought direction from the court. Now, the guidance places a greater duty on the expert to identify both missing information and those cases where experts are working on a dissimilar evidence base. If such problems are identified, the expert is required simply to tell the instructing solicitor (§30).

New duty on experts to identify information gaps

There is also a new duty upon the solicitor to specifically alert experts if any documents being sent are updated versions of material sent previously, and to note whether they have been filed with the court and/or served on the other party (§31).

The expert's attention is drawn to the power under CPR 35.9 for the court to require that

SJE will still be used in smaller claims

information be disclosed by another party. In the 2007 guidance it was the responsibility of the expert to decide if the cost of obtaining the further information was proportionate. That was always a tall order for an expert with no legal training and who did not have conduct of the case! Now new guidance requires the expert to inform the instructing solicitor of what is needed and its significance to the expert issue. It is then, presumably, for the lawyer to decide on proportionality (§32). Any request for further information should be put to the expert's own instructing solicitor in writing, and should set out why it is needed and its importance to the expert issues (§33).

Single joint experts

The standing assumption on using single joint experts (SJE) in small claims and fast-track cases remains (§34), with the aim being to agree or narrow issues that are not contentious (§35). The redeployment of a party-appointed expert as an SJE requires full disclosure of the expert's prior involvement in the case (§36). The ability to appoint party experts to 'shadow' an SJE remains, as does the inability to recover any associated costs from another party (§37).

The exhortation to parties to agree joint instructions for an SJE stays (§38). If that isn't possible, then separate instructions can be given but the parties should then try to agree on their disagreements and set them out in the instructions (§39). What happens when the parties disagree on their disagreements is covered in a moment!

An SJE's right to joint and several liability for payment from all parties remains (§40), although it is now a requirement that any order limiting an expert's fee is copied to the expert (previously the expert was merely notified of the existence of such an order).

So what's an expert to do when the parties are unable to agree on anything? The position remains unchanged. If left waiting for instructions, the expert can set a deadline (normally 7 days hence), after which work will commence. If that approach means a report is written that fails to take into account instructions received after the deadline, then that is acceptable but the expert must clearly disclose that limitation (§41).

Separating fact and opinion is key

Guidance on the conduct of the SJE remains unchanged. SJEs must keep all parties informed at all times (§42); they must have an equal duty to all the parties which is subservient to the overriding duty to the court (§43); and meetings with just one party (e.g. conference with counsel) must be agreed by all parties, as well as who is to pay the expert for attending such a meeting (§44). An SJE, like a party expert, may seek directions from the court (§45), while the SJE report should be served on all parties simultaneously (§46). It should be noted that even if there are multiple sets of instructions, only one report should be prepared even if it contains multiple opinions necessitated by conflicting assumptions of fact. SJEs remain open to cross-examination by all the parties (although the new guidance puts it as the milder '*all parties may ask questions*') on the rare occasion that an SJE steps into the witness box (§47).

Expert reports

The content of the expert report is still governed by the instructions, the general obligations, CPR 35 and its practice direction, and the expert's overriding duty to the court. But the need to follow any court directions is spelt out (§48). Objectivity and impartiality must be maintained (§49), and the report should be addressed to the court and comply with the CPR 35 guidance on form and content (§50). Reference to various model forms of report are extended to include the template for medical reports created by the Ministry of Justice (§51).

The mandatory statements to be included in a report have been expanded slightly. An expert must still understand his duties and comply, and continue to comply, with these duties. In addition, though, an expert must confirm his awareness of CPR 35, its practice direction and the CJC guidance (§52). Naturally, the statement of truth as set out in CPR 35 PD 3.3 must also appear in the report (§53). It reads:

> *'I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.'*

The guidance on defining qualifications remains unchanged (§54): the level of detail should reflect the complexity of the case.

Material instructions: Guidance about the mandatory statement on the substance of all material instructions remains, with the stress on transparency. If an expert is shown something that is relevant to his opinion, it must feature in the summary of instructions given (§55).

Tests: Unchanged from the earlier guidance, where tests are carried out, details of the methodology, and information about any technician who conducted such tests, must be provided (§56). However, the previous guidance on reliance on the work of others has been removed – presumably because it simply reiterated that found elsewhere in the update.

Facts: Facts must still be separated from opinion, and opinion must be linked to the underlying facts. Experts must distinguish those facts they know to be true from those they are asked to assume (§57). When it comes to the facts, the guidance adds stress to the point that experts must be guided primarily by their

instructions – which is a warning to experts to restrict themselves to their letter of instruction.

Experts are still required to offer multiple opinions when the material facts are in dispute. In such cases, experts should only express a view that favours one version of the facts over others if they do so based on their expertise. Exactly why they hold such a view must be explained fully in their report (§58). Experts must cite the published sources that support their mandatory statement of the range of opinion (§59). When no source for the range exists, experts must still say what they believe the range would be (§60).

Service of the report: New guidance is given that before filing and serving an expert report, *solicitors* must check that any witness statements and other expert reports relied upon by the expert are the final served versions (§61).

Conclusions of the report: A summary of the conclusions is mandatory and is usually put at the end of the report. However, if the complexity of the case so demands, an 'executive summary' at the front of the report is permitted (§62).

Sequential exchange of expert reports: New guidance applies to the sequential exchange of reports (§63). The defendant's expert report will usually be produced in response to the claimant's. The defendant's report should then:

(i) confirm whether the background set out in the claimant's expert report is agreed, or identify those parts that in the defendant's expert's view require revision, setting out the necessary revisions. The defendant's expert need not repeat information that is dealt with adequately in the claimant's expert report.

(ii) focus only on those material areas of difference with the claimant's expert's opinion. The defendant's expert report should identify those assumptions of the claimant's expert that are considered to be reasonable (and agreed with) and those that are not.

(iii) in particular, where the experts are addressing the financial value of heads of claim (e.g. the costs of a care regime or loss of profits), the defendant's expert report should contain a reconciliation between the claimant's expert's loss assessment and the defendant's, identifying for each assumption any conclusion different from that of the claimant's expert.

Amendment of reports

The basis upon which a report may require amendment (i.e. following questions, an expert meeting or the disclosure of new evidence) remains unchanged (§64), as is the prohibition on asking experts to alter their opinions. Naturally, requests to change reports to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues are still permitted (§65).

As previously, if an expert's opinion changes following a meeting of experts, then a short, signed and dated note will generally suffice. If the change of opinion is based on new evidence, however, the expert must amend the report, explaining the reasons. Furthermore, those instructing the expert must inform the other parties (§66). While this guidance has been streamlined somewhat, it remains essentially unchanged from the 2007 version.

Sequential report exchange process set out

Written questions to experts

Experts continue to have a duty to answer questions that have been '*properly put*' under the CPR, with the party instructing them risking sanctions if the expert refuses (§67). The answers given form part of the report (§68). Guidance about what happens when an expert has doubts about whether questions have been properly put has been reworded. It now stresses the point that asking the court to help resolve the issue should be an approach of last resort; experts should first discuss the matter with those who instruct them, and then with those asking the questions (§69).

Discussions between experts

The court still has the power to direct discussions between experts for the purposes set out in CPR 35.12. In addition, the parties keep the ability to agree that discussions can take place between their experts at any stage. However, there is a new reminder that discussions are not mandatory unless ordered by the court (§70).

The original guidance on the purpose of such discussions was to:

(i) identify and discuss the expert issues in the proceedings

(ii) reach agreed opinions on those issues and, if that is not possible, narrow the issues

(iii) identify those issues on which they agree and disagree, and summarise their reasons for disagreement on any issue, and

(iv) identify what action, if any, may be taken to resolve any of the outstanding issues between the parties.

In 2014 it is strengthened by a welcome, if stark, warning that the purpose of such discussions is '*not to seek to settle the proceedings*' (§71).

New guidance at §72 deals with an SJE meeting with a party-appointed expert (one who has been authorised by the court). In such cases, the remit of any meeting will normally be limited by the remit of the party-appointed expert.

Further new guidance at §73 sets out that where there is sequential exchange of expert reports, with the defendant's expert report prepared in accordance with the guidance at §61, the joint statement should focus on the areas of disagreement. The only exception accommodates the need for the claimant's expert to consider and respond to material, information and commentary included within the defendant's expert report.

Meetings of experts are not about settling claims

Non-compliance may result in sanctions

The need to balance the cost of holding discussions against the value of the case remains (§74), so telephone discussions will be the norm in anything other than higher value multi-track cases. The parties, their lawyers and experts should co-operate to produce an agenda, but in the new guidance this is restricted to multi-track cases (§75), leaving open what happens in the vast majority of lower value cases.

Guidance on what should be contained in the agenda remains unchanged. It should indicate what has been agreed and summarise concisely the matters in dispute. And it is often helpful to include questions to be answered by the experts. If agreement cannot be reached promptly or a party is unrepresented, the court may give directions for the drawing up of the agenda.

The agenda should be circulated to experts and those instructing them to allow sufficient time for the experts to prepare for the discussion (§76). The prohibition on telling experts not to reach agreement in meetings remains in force (§77), as does the bar on the content of discussions between experts being referred to at trial unless the parties agree (§78).

However, the 2007 guidance on the parties' lawyers only being present at discussions between experts if all the parties agree or the court so orders has, regrettably, now been removed.

Guidance on the content of the joint statement has not changed (§78). The joint statement should set out:

(i) issues that have been agreed and the basis of that agreement
(ii) issues that have not been agreed and the basis of the disagreement
(iii) any further issues that have arisen that were not included in the original agenda for discussion, and
(iv) a record of further action, if any, to be taken or recommended, including, if appropriate, a further discussion between experts.

There is, though, new guidance at §80 which states that the joint statement should include a brief re-statement that the experts recognise their duties, as well as an express statement that the experts have not been instructed to avoid reaching agreement on any matter within their competence. As previously, the joint statement should be agreed and signed by all the parties to the discussion as soon as practicable. Sadly, there is still no explicit guidance on what an expert should do when faced with another expert who refuses to follow the guidance!

Agreements reached by experts following discussions still do not bind the parties, although this is accompanied by the warning that in refusing to be bound the party runs the risk of subsequent cost sanctions (§82).

In the hot tub

§83 issues new guidance on the use of concurrent evidence: so-called 'hot tubbing'. It explains how the process works, and outlines its benefits, before noting that experts need to be told in advance of the trial if the court has made an order for concurrent evidence.

Attendance at court

Guidance on the duties of those instructing experts for attendance at court is reworded but, in essence, unchanged (§84). Solicitors should ascertain the availability of experts before trial dates are fixed; keep experts updated with timetables (including the dates and times experts are to attend court), the location of the court and the content of court orders; and inform experts immediately if trial dates are vacated or adjourned.

Experts are reminded that they have an obligation to attend court, and should take proper steps to ensure their availability (§85). Guidance on the use of the witness summons to help achieve this (which does not affect the contractual obligations of the party to pay their expert) remains (86).

Finally, §87 introduces to solicitors a new obligation that is highly likely to be ignored routinely. When a case has concluded, by either a settlement or trial, the solicitor should inform the instructed expert(s). We won't be holding our breath!

Conditional and contingency fees

The new 2014 guidance inexplicably, and unhelpfully, weakens the previous total ban on payments to experts that depend on the outcome of the case. In the 2007 guidance such terms should be neither offered nor accepted; to do so would '*... contravene experts' overriding duty to the court and compromise their duty of Independence*'. But now we have only strong discouragement (§88). The guidance remains firmly against such fees, but we wonder why it was felt necessary to weaken the previous absolute ban.

Sanctions

An entirely new section on sanctions has been included in the 2014 guidance. Sanctions can apply to solicitors or experts (§89). In the case of the expert, there could be recourse to a professional body (§90). Once proceedings have started, the sanctions can include the court reducing (even to zero) the fee the expert will receive, or the expert report can be ruled inadmissible (§91).

To finish on a high, the final section alerts experts to the more serious sanctions they could face: contempt of court proceedings, perjury proceedings or a claim against their professional indemnity insurance (which you do, of course, have, don't you?).

Conclusion

While only modest changes have been made, it is good to see the CJC updating its helpful guidance. It is required reading for all experts.

New criminal practice direction

On 6 October 2014, a new criminal practice direction *33A: Expert Evidence* was added to the Criminal Procedure Rules (CrimPR) offering guidance on the approach the court should take to assess the reliability of expert evidence. It forms part of the Government's implementation of the Law Commission's report on the subject (see *Your Witness* 75). The practice direction reads:

33A.1 Expert opinion evidence is admissible in criminal proceedings at common law if, in summary, (i) it is relevant to a matter in issue in the proceedings; (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and (iii) the witness is competent to give that opinion.

33A.2 Legislation relevant to the introduction and admissibility of such evidence includes section 30 of the Criminal Justice Act 1988, which provides that an expert report shall be admissible as evidence in criminal proceedings whether or not the person making it gives oral evidence, but that if he or she does not give oral evidence then the report is admissible only with the leave of the court; and Part 33 of the Criminal Procedure Rules, which in exercise of the powers conferred by section 81 of the Police and Criminal Evidence Act 1984 and section 20 of the Criminal Procedure and Investigations Act 1996 requires the service of expert evidence in advance of trial in the terms required by those rules.

33A.3 In the Law Commission report entitled '*Expert Evidence in Criminal Proceedings in England and Wales*', report number 325, published in March, 2011, the Commission recommended a statutory test for the admissibility of expert evidence. However, in its response the government declined to legislate. The common law, therefore, remains the source of the criteria by reference to which the court must assess the admissibility and weight of such evidence; and rule 33.4 of the Criminal Procedure Rules lists those matters with which an expert's report must deal, so that the court can conduct an adequate such assessment.

33A.4 In its judgment in *R -v- Dlugosz & Others* [2013] *EWCA Crim 2*, the Court of Appeal observed (at paragraph 11): 'It is essential to recall the principle which is applicable, namely in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury.' Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such factors.

33A.5 Therefore factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include:

(a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;

(b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);

(c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

(d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;

(e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;

(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

(g) if there is a range of expert opinion on the matter in question, where in that range the expert's own opinion lies and whether the expert's preference has been properly explained; and

(h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

33A.6 In addition, in considering reliability, and especially the reliability of expert scientific opinion, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:

(a) being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;

(b) being based on an unjustifiable assumption;

(c) being based on flawed data;

(d) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or

(e) relying on an inference or conclusion which has not been properly reached.

PD 33A seeks to implement some of the Law Commission report changes

We were entirely unsurprised by the Government's decision not to fund any of the proposed changes that arose from the Law Commission's detailed and careful work investigating the reliability of expert evidence. Indeed, those who have observed the Ministry of Justice's approach to limiting expert witness fees paid out of the legal aid fund – an unsophisticated and irrational scheme that pays no heed to the effect on access to justice – cannot be taken aback that the Government is unwilling to pay for the recommended reliability test. But **the problems highlighted by the Law Commission remain, and it is the duty of all who are interested in justice to do what they can to ameliorate them.**

Experts could, perhaps, do worse than to test their own opinions against the reliability factors set out by the Law Commission and embodied in this latest addition to the CrimPR.

Wise experts should test their opinions against reliability factors

Services for registered experts

Expert witnesses listed in the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 65). You can read them all on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, disclosure and fees.

Court reports – FREE

Accessible freely on-line are details of many leading cases that touch upon expert evidence.

LawyerLists

Based on the litigation lawyers on the *Register*'s Controlled Distribution List, *LawyerLists* enables you to purchase top-quality, recently validated mailing lists of litigators based across the UK. Getting your own marketing material directly onto the desks of key litigators has never been this simple!

Register logo – FREE to download

All experts vetted and currently listed may use our undated logo to advertise their inclusion. A dated version is also available. So, successful re-vetting in 2014 will enable you to download the 2014 logo.

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We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for help, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2014 dated logo. The results of the re-vetting process are published in summary form in the printed *Register*, and in detail in the software and on-line versions of the *Register*.

Profiles and CVs – FREE

As part of our service to members of the legal profession, we provide free access to more detailed information on our listed expert witnesses. At no charge, you may submit:

- a **profile sheet** – a one-page A4 synopsis of additional information
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If you opt for our Professional service level you can use our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment, etc.

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Our *Expert Witness Year Book* contains the current rules of court, practice directions and other guidance for civil, criminal and family courts. It offers ready access to a wealth of practical and background information, including how to address the judiciary, data protection principles, court structures and much more. It also provides contact details for all UK courts, as well as offices of the Crown Prosecution Service and Legal Aid Agency. And with a year-to-page and month-to-page calendar too, you'll never be without an appointment planner.

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