Your Witness

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Issue 57

CrimPR Pt33 update

On 5 October 2009 changes to Part 33 of the Criminal Procedure Rules (CrimPR) will come into force. These will rationalise the CrimPR by consolidating Parts 24 and 33.

Part 24 deals with the disclosure of expert evidence and Part 33 contains the main rules about expert evidence. The changes will see:

- the original Rule 33.6 subsumed into Rule 33.5
- a new Rule 33.4 – Service of expert evidence
- Rules 33.4 and 33.5 renumbered as 33.5 and 33.6 respectively, and
- a new Rule 33.9 – Court's power to vary requirements under this Part.

It should be noted that none of these changes alters the substance of the rules in Parts 24 and 33, it is just a helpful rationalisation.

You can access the revised CrimPR by visiting *www.jspubs.com/Experts/library/lib_eridx.cfm* and following the link under *Rules and guidance* to the *Criminal Procedure Rules*. We will also be including these new rules in the new edition of our *Expert Witness Year Book* for 2010.

Unpublished literature

I was down at the British Medical Association the other day where I heard a very interesting presentation by Grahame Aldous QC. At one point he considered the citation of unpublished literature in an expert's report. The CPR Part 35 Practice Direction requires experts to give details of any literature relied upon in a report. The Masters assigned to clinical negligence actions at the Royal Courts of Justice impose the following useful extra requirement that:

> *'Any unpublished literature upon which any expert witness proposes to rely shall be served at the same time as service of his report together with a list of published literature. Any supplementary literature upon which any expert witness proposes to rely shall be notified to all other parties at least one month before trial. No expert witness shall rely upon any publications that have not been disclosed in accordance with this direction without leave of the trial judge on such terms as to costs as he deems fit.'*

Mr Aldous went on to point out that this form of order was approved by the Court of Appeal in *Breeze -v- Ahmed* [2005] *EWCA Civ* 223. In this case, a judgment was set aside and a new hearing ordered because the claimant's expert had not been given a proper opportunity to consider literature referred to at trial by the defendant's expert.

Literature searches

While on the subject, I recently received the following from an expert listed in the *Register*:

> *'There is clearly a requirement for an expert to read current journals. That involves being aware of the "state of the art" and of papers that have been published recently. However, that is a very different thing from holding the whole of the speciality literature in one's head. When the subject of the case is obscure, one could not expect an expert to know the world literature in that field. Also, the expert may be asked to look for literature on a particular topic. This can be very time consuming and may yield the unimpressive result that there is no literature on the subject! It is quite unreasonable to discount out of hand the time taken for literature searches on esoteric subjects.'*
> *Jeffrey Hillman, Ophthalmic Surgeon*

My own view is that if something can be fairly seen as being within the scope of your expertise, there ought *not* to be a specific charge for any research because ensuring that you are up to date with your specialism is part of offering an expert service. But, if a particular instruction takes you 'off piste', so to speak, then it would be reasonable to let those who instruct you know this. If they want, they can instruct you to follow up the lead in full knowledge of the costs involved. Do you agree? I would be interested to hear your thoughts on this.

Survey 2009

What is it that expert witnesses most want to know about their colleagues? Well, how much they charge comes close to the top of the list! It is also the question we are most frequently asked by experts new to litigation work. And, of course, the MoJ and Legal Services Commission may be interested too!

In my mind, there is no more useful way to satisfy this demand for information than to conduct regular surveys among our readers and to publish the results in *Your Witness*. I make no apology, then, for enclosing with this issue a questionnaire on your work as an expert witness, your terms, conditions and charging rates, and the trends in your volume of work.

I would be grateful if you can find a little time to complete the short questionnaire, anonymously if you prefer, and to return it to me in the next few days. Alternatively, you can complete the survey on line. Simply point your web browser to *www.jspubs.com* and click on the *Survey 2009* link. I hope to report back in a future issue of *Your Witness*.

Dr Chris Pamplin

Pre-trial testing: our response

356 contributions from expert witnesses help shape our response

In the last issue we looked in some detail at the proposals contained in the Law Commission's Consultation Paper on '*The admissibility of expert evidence in criminal proceedings in England and Wales*' issued on 7 April 2009. To help inform the debate and promote the widest possible engagement of expert witnesses in the consultation process, we wrote a first draft of a *Register* response. This was posted on our website in early April 2009. The 2,500+ experts in the *Register* were then invited to consider the response and feed back their own views. We also enabled experts to contribute by taking part in a detailed on-line survey followed by a shorter survey that asked contributors to record their level of support for some key statements.

In the event, 124 expert witnesses contributed to the first survey (of whom 54 classed themselves as scientists) and 232 expert witnesses contributed to the second survey. In the final response we sought to balance the various views received.

The full response can be read by pointing your browser to *www.jspubs.com* and following the shortcut to *LC Consultation*. What follows here is the executive summary from our final response to the Consultation Paper.

The Law Commission proposal to introduce a pre-trial assessment of the expert evidence put before juries in criminal trials is to be broadly welcomed. Expert evidence is unusual in that it is based heavily in opinion. Unlike the *facts* brought to the court by other witnesses, *opinions* do not lend themselves so readily to testing through adversarial challenge. An experienced expert witness convinced of the veracity of his (properly formed) opinion cannot be deflected easily by a non-expert advocate. Indeed, the court already sees expert evidence as being a special type of evidence, and we contend that it deserves special handling if it is to inform rather than mislead, particularly in criminal trials dominated by expert evidence.

Based on 356 contributions from expert witnesses, we feel that the Law Commission's proposals – including the use of guidelines to assist judges in their determination of evidential reliability for scientific and for experienced-based expert evidence – are workable in practice. Indeed, most of our expert witness contributors think that (i) with a little extra effort the required evidence of underpinning reliability could be provided and (ii) the tests would be likely to expose expert evidence with an inherently unreliable provenance.

Crucially, though, our expert witness contributors recognise that weeding out expert evidence with an inherently unreliable provenance will not do enough to solve the problem of expert evidence *that is itself unreliable* going before criminal juries. But they do think that the introduction of pre-trial meetings of the judge, lawyers and expert witnesses (similar to *Daubert* hearings in the US jurisdiction) would be more likely to achieve this. Such meetings would be designed to explore the expert evidence and provide time for its importance *in the context of the litigation* to be subject to a period of quiet reflection – a necessity denied in the current system. The vast majority of our expert witness contributors think that this approach would be likely to identify unreliable or irrelevant expert evidence before it is put before a jury.

As currently drafted, the additional time it would take for expert witnesses to prepare the evidence necessary to pass the tests set by the proposals will have non-trivial cost implications. Unless the Legal Services Commission has sufficient funds to meet this extra cost, the proposals will fail in practice.

The Law Commission's views on the generic accreditation of experts *as expert witnesses* have been overtaken by the work of the Forensic Science Regulator. Accreditation may **seem** to offer an enhanced level of confidence in expert evidence. However, the truth is that accreditation can never assure quality because quality comes from each individual's *ongoing* rigorous and error-free implementation of proper procedures; *a priori* accreditation can give us merely some measure of past performance. The only meaningful accreditation of an expert witness is as an *expert*, and that has to be undertaken by the expert's professional regulatory body.

Cost implications and the MoJ consultation

New MoJ attempt to cap expert fees does not bode well

We report on pages 6–7 the latest attempt, this time by the Ministry of Justice, to control the cost of expert evidence. This does not bode well for the Law Commission's proposals.

Requiring experts to prepare the additional justification material will involve extra costs which will have to be met by the Legal Services Commission. We asked experts how much extra time they thought it would take to put together the required body of evidence. The clear majority considered that it would add over 25% more time. Furthermore, 25% of our expert witness respondents thought it could more than double the time it currently takes for them to write a report. Nearly half of our respondents thought that the exercise would have to be repeated for each case, while only 6% thought it would be a one-off task. Clearly, then, the cost implications of these proposals are not trivial.

When we posited 'Unless the Legal Services Commission has sufficient extra funds to meet the additional cost that will arise as experts prepare the necessary evidence of reliability, these proposals will fail to work in practice', more than 85% of our respondents agreed.

Causation in clinical negligence

Causation in negligence cases has traditionally been determined by the *but for* test. In such cases the claimant would generally succeed if it could be shown that the injury would not have been suffered *but for* the defendant's negligent act or omission. However, the application of the test in clinical negligence cases can be very difficult. In such cases there may be many factors leading to the injury, and the precise effect of a defendant's negligence may be very hard to determine.

In recent times there have been a number of cases that have challenged the effectiveness of the *but for* test and sought to set a lower threshold for the establishment of causation. In this article we set out the development of the case law relating to causation in medical negligence over the past five decades.

Bolam

Before the question of causation can be considered by the courts, the claimant must first prove that the defendant has been negligent. The test for clinical negligence is well established. When dealing with a person professing particular skill, one is entitled to assume that such a person owes a duty of care to exercise that skill to a reasonably high standard of competency and will act in accordance with proper professional practice. The legal test was set out by McNair J in *Bolam*[1]. A defendant will not be guilty of clinical negligence:

> *'... if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art'.*

The effect of this was to provide a defence to any claim of negligence by the simple act of producing before the court another doctor willing to say he would have done the same thing in the given circumstances. This, of course, was widely seen by claimants as too easy a defence.

Bolitho

It was not until 40 years later that the *Bolam* defence was refined. In the 1998 judgment in the case of *Bolitho*[2], Browne-Wilkinson J said that

> *'... the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such an opinion* ***has a logical basis****. In particular in cases involving, as they so often do, the weighing of risks against benefits the judge before accepting a body of opinion as being responsible, reasonable or respectable will need to be satisfied that in forming their views the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter'.*
> (emphasis added)

By this means, the court finally gave itself the power to consider whether the defendant and his supporters' actions stood up to logical analysis.

Seldom is negligence the only cause

It is, of course, not sufficient in itself to prove negligence on the part of the defendant. To succeed, a claimant must also prove that the negligence caused the injury. At least that was the case until recently.

In complex cases, the experts might agree that a clinical practitioner fell short of the standard of competence expected of the profession, but they might be unable to agree that it was this negligence that caused the claimant's injury. In some cases, there might be a number of factors at play, and medical knowledge might be such that it is impossible for the experts to identify with certainty which of these factors was to blame for the injury.

Apportionment of causation

Mustill J in *Thompson*[3] said that, in his view, where precise quantification and apportionment was not possible, the court should:

> *'... make the best estimate which it can, in the light of the evidence, making the fullest allowance in favour of the plaintiffs of the uncertainties known to be involved'.*

This was followed by Stuart-Smith LJ in *Holtby*[4], who went a step further. He said that he did not think that such cases should be determined on the onus of proof, but instead the question should be whether:

> *'... on consideration of all the evidence the claimant has proved that the defendants are responsible for the whole or a quantifiable part of his disability. The question of quantification may be difficult and the court only has to do the best it can using its common sense.'*

It should be noted that neither Mustill J nor Stuart-Smith LJ were postulating a lesser test for causation, but rather were leaving the question to be decided by the application of a more subjective approach. In the case of Mustill J, he thought that such cases should be referred to a jury.

Not the cause, but a material contributor

Telles -v- SW Strategic Health Authority

In *Telles*[5], a 1 day-old child was found to have a heart defect and a high level of metabolic acidosis. Following the diagnosis, the child was admitted to the Bristol Children's Hospital for treatment. She subsequently underwent three operations (when she was variously aged 3 days, 7 days and 10 months). Following the enquiry into the cases of children's heart surgery at the Bristol Royal Infirmary, a claim was brought, on behalf of the child, maintaining that:

(i) the surgeons had been negligent in the first operation

(ii) there had been further negligence in the clinical care received between the first and second operations, and

Bolam test is that others would do as you did

Bolitho says what was done has to have logical basis

Even if the negligence isn't the only cause of injury...

(iii) there had been further negligence during the third operation.

Upon hearing evidence, the court decided that clinical negligence had occurred only in connection with the first of the operations.

The difficult question then posed was the extent to which this negligence had resulted in the injury to the child. The child had suffered from periventricular leukomalacia (PVL). The issue to be determined was whether she'd had this condition before the first operation or whether the damage had developed after the first operation and prior to the second. In the former case, the negligence could not be the cause of the damage. In the latter case, the child's condition would most likely have been caused by the negligence.

The judge found on the evidence that the PVL was caused by hypoxia which the first operation had failed to cure because of a kinked and blocked shunt. In fact, the child had remained hypoxic from about 2.5 days before the first operation right through until the second operation. This amounted to ~15% of the whole of the damaging period. The expert evidence indicated that, from a scientific viewpoint, the amount of damage caused during that period was impossible to quantify and that, in any event, it was unlikely that damage would have been suffered equally over the whole period.

Did the negligence in this case satisfy the *but for* test on causation? Technically, probably not. But the parties had reached a prior agreement that if the judge was unable to make any apportionment between the two periods, then the child was entitled to full compensation. Consequently, this was the finding made.

Notwithstanding that the parties in *Telles* had reached an agreement allowing the judge to make the finding he did, the litigation still serves to highlight the difficulties posed by the *but for* test in cases where science is unable to make an apportionment and only part of the claimant's medical condition can be attributed to the defendant's negligence. It might be argued that justice demands that when a significant part of a person's injury has been caused by the negligence of another, then the claimant should be entitled to succeed. Equally, however, where experts are unable to prove that all or a substantial part of the damage is attributable to the defendant's negligence, why should he be required to pay for it?

... it is enough to show that it made a material contribution

Bailey -v- MoD and Portsmouth Hospitals

In *Bailey*[6], the court was again required to rule on a clinical negligence case where the experts were unable to agree on the causal effect of the defendant's negligence.

In this case, a patient with obstructive jaundice suffered acute pancreatitis and serious internal bleeding following the failure of an operation to remove the gallstone that was the cause of the blockage. To stop the internal bleeding, the patient underwent a percutaneous trans-hepatic cholangiogram (PTC). However, during this procedure, she suffered a tear in the liver which caused significant further bleeding. An emergency laparotomy was undertaken the following day and the patient eventually suffered a cardiac arrest which resulted in permanent brain damage. It was not suggested that the surgical procedure itself had been negligent, and it was accepted that the underlying pancreatitis was an accepted risk of the surgical procedure. However, it was alleged that the post-operative procedures had been at fault and that appropriate resuscitation had not been given in a timely fashion. It was alleged that this failure had caused the patient to be more ill than she would otherwise have been and had prevented a second operation from taking place shortly after the first to remove the gallstone.

The experts in this case took the view that the pancreatitis could have developed in any event, and they were unable to state that the patient's arrest had resulted from the failure to give appropriate resuscitation after the first operation. It was generally agreed, however, that if appropriate resuscitation had been given, the patient would have been fit for a further operation the following day to remove the gallstone and check for bleeding. If this had been done, there would have been no need for the later PTC and there would have been no resulting damage to the liver.

Causation, then, was an exceedingly difficult question for the court to decide. It was impossible for expert evidence to prove that *but for* the defendant's negligence the cardiac arrest would not have happened.

Foskett J held that, although it had not been established that the cardiac arrest would not have happened if there had not been negligence on the part of the defendant, the claim should succeed because the negligence had 'materially contributed' to this uncertainty. The evidence was that the patient had arrested when she aspirated after vomiting, and that she aspirated because of debilitating weakness which, the judge found, was caused partly by the pancreatitis and partly by the consequences of the defendant's negligence.

Boustead -v- NW Strategic Health Authority

In June 2008, Mackay J handed down his judgment in the case of *Boustead*[7]. It was claimed that the medical care provided by the defendant hospital to the claimant and his mother was negligent and caused him to suffer an intraventricular haemorrhage (IVH) which resulted in brain damage leading to cerebral palsy.

The mother was very young (just 14 years old) and had concealed her pregnancy until quite an advanced stage. She was admitted to hospital suffering loss of blood and period-like pains when she was already 28 weeks pregnant. She had further episodes of bleeding, and 2 days

later decelerations of the foetal heart were seen. The consultant took the view that the pregnancy should be allowed to progress as he believed that, given the age of the mother, this posed less of a risk to her than a Caesarean section.

The problems appeared to settle until 5 days later when fresh blood loss and irregular contractions were recorded. Over the next 24 hours, the situation worsened with the mother showing signs of fulminating pre-eclampsia. Following consultation with colleagues, the consultant took the decision that the baby should be delivered vaginally and labour was induced by administering the drug syntocinon.

Repeated decelerations of the foetal heart were recorded and the syntocinon dose was initially halved but then increased. The claimant child was born later that day, 8 days after the mother was first admitted to hospital. The baby suffered IVH in the first day of life, and this led to hydrocephalous, cerebral infarction and PVL.

Experts agreed that when decelerations of the foetal heart were first detected the foetus was hypoxic but that it did not necessarily follow that hypoxic damage was being caused. However, the claimant's expert gave evidence that the decision to give syntocinon was inappropriate given the clear evidence of deceleration, and said that a reasonable obstetrician would have opted for a Caesarian section at that point.

The judge rejected allegations that there had been negligence in failing to carry out a Caesarean section after the mother had been in hospital for 2 days when there had been some evidence of foetal distress. However, the court agreed with the claimant's expert that the consultant had been negligent in his response to the mother's developing fulminating pre-eclampsia when, just under 1 week later, he had induced labour in preference to a Caesarean section which would have ensured delivery of the child at least 4 hours earlier.

The causation issues were, again, difficult in this case. Given the mother's age and the stage the pregnancy had reached, it could be (and, indeed, was) argued that the principal patient was the mother, and the baby's prospects for survival were not good. The court agreed that, at least in the early stages, the consultant had followed clinical procedures that would have satisfied the tests in *Bolam* as modified by *Bolitho*. It was the procedures that had been followed once the decision had been taken to induce birth that were called into question.

The team had been clinging to a strategy that was no longer defensible, given that both the mother and the foetus were at risk at that stage. All the experts agreed that 10–20% of babies born at 28 weeks' gestation would go on to develop IVH. When all the risk factors that had been identified in this case were present, they agreed that more than 50% of babies with this combination of factors would develop some degree of IVH. The experts were, however, unable to identify or quantify the individual causal contribution made by each factor, including the decision to induce a vaginal delivery in preference to a Caesarean section.

The court in this case decided that the hypoxia at birth had made a material contribution to the development of the IVH. Hypoxia would have been avoided if delivery had been by Caesarean section. It was held that, accordingly, causation was established and the defendants were responsible for the claimant's injuries.

A lower burden of proof

The effect of the judgments in *Telles*, *Bailey* and *Boustead* is that in a relatively few cases there will be circumstances that allow the courts to find in favour of a claimant, even where the expert evidence fails to establish a causal link between the negligence and the injury. It appears that the courts will depart from the *but for* test if it can be established that the defendant's negligence made a 'material contribution' to the injury and that such contribution is significant and more than *de minimus*.

Cumulative effect versus alternative causes

There is, however, a distinction to be drawn between cases where the material contribution is part of a cumulative effect and those where there are a number of alternative possibilities for the cause of a claimant's injury.

In *Boustead*, the experts all agreed that the negligence was part of a chain of circumstances that included prematurity, hypoxia at birth and respiratory illness due to lung immaturity. While the defendant's negligence had contributed to this to a material but undetermined extent, it was only one of a number of contributing factors. On the evidence, there were concurrent cumulative causes of the IVH, and the claimant had satisfied the burden of proving that the defendant's breach of duty made a material contribution to his disabilities. This should be contrasted with a case in which the negligence does not form part of a cumulative series of factors but, instead, injury might have been caused by one of a number of alternative causes of which the negligence is merely one possibility amongst several. In such cases, there is no cumulative effect and no provable material contribution.

Conclusion

It is likely that the gradual shift in the causation test is driven by public policy concerns, and the number of cases in which material contribution will be considered is likely to be relatively small. The essential identifying factor in such cases appears to be that the negligence made a material contribution to the injury, and that (i) the part of the injury that would have been caused in the absence of the negligence was unquantifiable, and (ii) the negligent cause formed part of a cumulative series of causes. It remains to be seen how this will develop and to what extent these decisions will be followed by the courts in other cases.

Causation can be found on a lower burden of proof

References

[1] *Bolam -v- Friern Hospital Management Committee* [1957] *1 WLR* 582.

[2] *Bolitho -v- City and Hackney Health Authority* [1998] *AC* 232.

[3] *Thompson -v- Smiths Ship Repairers (North Shields) Ltd* [1984] *QB* 405.

[4] *Holtby -v- Brigham & Cowan (Hull) Ltd* [2000] *3 All ER* 421.

[5] *Marianna Telles -v- South West Strategic Health Authority* [2008] *EWHC* 292.

[6] *Bailey -v- Ministry of Defence and Portsmouth Hospitals NHS Trust* [2007] *EWHC* 2913 (*QB*).

[7] *Boustead -v- North West Strategic Health Authority* [2008] *EWHC* B11 (*QB*).

MoJ moves to cap expert fees

New attempt to cap expert fees 5 years after the LSC tried...

On 20 August 2009, the Ministry of Justice (MoJ) published a new Consultation Paper CP 18/09 – *Legal Aid: Funding Reforms* – that includes proposals on expert fees. The Consultation Paper is available on the MoJ website. Point your browser at *www.justice.gov.uk* and follow the link to Consultations.

Scope of the consultation

For our purposes, this consultation is focusing on the fees of expert witnesses paid out of the legal aid fund in both the civil and criminal justice systems. It runs until 12 November 2009.

Understanding the issues

The Consultation Paper, which comes 5 years after the Legal Services Commission's (LSC) consultation *The Use of Experts – Quality, price and procedure*, proposes a major change to the current regime for paying expert witness fees. We are preparing a number of resources to help you get to grips with the Consultation Paper, and to make it easy for you to respond. We will alert you to these resources as they become available.

Summary of the proposals

In setting out the background to its proposals, the MoJ:

- accepts that quality expert evidence is essential to the effective running of the civil and criminal justice systems
- reports that many 'providers' (that's probably MoJ-speak for lawyers) say selection of the right expert is critical to the outcome they can achieve for their clients
- recognises that the expert witness community is a broad and disparate body and encompasses a range of motivations for undertaking forensic work
- explains that the existing pressures that tend to restrict the supply of experts willing to undertake publicly funded work has pushed cost control behind more pressing concerns over quality and supply of experts.

But the MoJ says the time has now come to start to implement cost controls in this difficult area.

> *'As difficult as it appears to be, control in this area must begin to mirror the efforts that have been made to achieve value for money in all other areas of legal aid spend.'*

... and the MoJ has learnt nothing!

The MoJ particularly notes that:

- fee rates differ between criminal and civil cases
- fee rates vary, for the same work, between experts
- disbursement spend (which includes expert fees) in public family law cases has risen by 46% in the last 4 years
- it plans to stop paying cancellation fees, to cap fees for travel time to £40/hour and to cap mileage rates to 45p in civil legal aid contracts awarded from 2010.

The MoJ's long-term aim is to reduce the spend on expert witness fees by 20% and to introduce fixed fees for experts undertaking publicly funded work. Its initial move in this direction is to cap expert witness fee rates, using the existing MoJ guidelines for determining officers as its baseline – notwithstanding that those guidelines are supposed to be updated annually but haven't changed since 2003! The MoJ says:

> *'Setting rates aims to increase transparency, ensure consistency and control the unsustainable rising costs of expert's fees.'*

The proposed rates are shown in the table overleaf.

Our initial observations on this approach include:

- the separation of expert type (see the table) appears arbitrary (Why does chemist appear in the first group?)
- the variation in rates between expert types appears arbitrary (Why are accountants, etc., capped at £490 per day in court when psychologists, etc., are capped at £500?)
- in what world other than that occupied by the MoJ does a 'full day' contain between 2.5 and 5 hours?

Difference between civil and criminal

The MoJ scratches its metaphorical head over the difference in expert fee rates between the civil and criminal arenas, and it complains that it cannot demonstrate that it is obtaining best value for money. We can help on both fronts.

In the civil arena, expert fees are set by a free market. In the criminal arena, the LSC runs a near monopoly. The free market (civil) fee rates are significantly higher than those paid by the LSC in the criminal arena. So, the skewing of the market by the LSC explains the differential and provides the evidence that it is obtaining excellent value for money!

Scale of the spend

The MoJ acknowledges that it and the LSC are in a poor position to justify the specifics of the proposal to cap fees at the stated levels.

> *'Neither MoJ nor the LSC have a direct relationship with experts. They cannot be accessed through a small number of representative groups and without resorting to extensive data collection from legal aid providers the LSC has only limited data on expert costs. The LSC is currently carrying out a further data verification exercise but we are seeking views in this consultation about how effective the proposals set out above are in taking the first step to control costs.'*

What is actually known? In 2007/08, the LSC spent £192m on disbursements, of which about two-thirds was for expert witness fees. Of this £128m, £21.4m was recovered. So the maximum spend on expert witness fees across the board appears to have been in the region of £105m.

This figure represents ~5% of the total legal aid budget. The MoJ aspires to reduce the spend on expert witness fees by 20%. So the MoJ is addressing in this proposal something like 1% of the total legal aid budget.

A poor starting point?

The MoJ asks whether we agree:

> *'... that the proposed hourly rates based on current guidelines are a reasonable starting point?'*

When the LSC ran its consultation back in 2004/05, we responded with:

> *'The LSC is hampered in its approach to expert fees because it does not currently gather data to enable it to know its annual spend on experts. Neither can it assess the differences there might be between the fees of experts working in the civil and criminal arenas, nor the various specialties.'*

Perhaps a better starting point than imposing some apparently arbitrary caps would have been for the LSC, in the intervening 5 years, to have gathered the evidence it needs to make informed decisions about expert witness fees!

Access to Justice?

Access to Justice for the most vulnerable under threat

The main concern for anyone looking at this Consultation Paper (and not just at the part dealng with expert fees) should be the impact the proposal will have on the ability of the legal aid fund to provide Access to Justice to the most vulnerable in Society. Just as with the LSC 5 years ago, from poor groundwork the MoJ has arrived at proposals that carry with them a danger of reducing the pool, and overall quality, of expert witnesses willing to work in publicly funded cases.

This negative effect is likely to be most acute for the Community Legal Service. Indeed, we predict a serious impact on supply and competition within the expert witness marketplace for civil cases if the 'meagre' (that is Lord Auld's description, not ours) fee scales on offer in the criminal arena are imposed on expert witnesses in the civil arena.

Arbitrary caps, odd variations and 2.5 hour days!

Expert Type	Work Type	Proposed Rate
General Medical (Accident and Emergency, Chemist, Dentist, General Medical Report, GP, Injury Report, Nurse, Paediatrician)	Preparation (examination/report)	£70–£100 per hour
	Attendance at court (full day)	£346–£500
Specialist Medical (Gynaecology, Obstetrics, Oncology, Orthopaedic, Radiology, Urology, Haematologist, Ophthalmology, Neurology, other specialist medical)	Preparation (examination/report)	£70–£100 per hour
	Attendance at court (full day)	£346–£500
Pathologist	Preparation (examination/report)	£70–100 per hour
	Attendance at court (full day)	£346–£500
DNA Test		Up to £100 per hour or £385 per test (£350 in London)
Drug Testing		Up to £100 per hour (£180 fixed fee in London)
Age Determination	Preparation (examination/report)	Up to £100 per hour
Other Medical	Preparation (examination/report)	£70–100 per hour
	Attendance at court (full day)	£346–£500
Psychiatric	Preparation (examination/report)	£70–£100 per hour
	Attendance at court (full day)	£346–£500
Psychologist	Preparation (examination/report)	£70–£100 per hour
	Attendance at court (full day)	£346–£500
Forensic scientist (including questioned document examiner), accountant, surveyor, engineer, medical practitioner, architect, veterinary surgeon, meteorologist	Preparation (examination/report)	£47–£100 per hour
	Attendance at court (full day)	£226–£490
Fire (assessor) and/or explosives expert	Preparation (examination/report)	£50–£75 per hour
	Attendance at court (full day)	£255–£365
Fingerprint	Preparation (examination/report)	£47–£100 per hour
	Attendance at court (full day)	£153–£256
Enquiry Agent	All work	Up to £26 per hour
Foreign Country Expert	All work	Up to £80 per hour

Table 1: Proposed caps on expert witness fees. (Source: MoJ CP 18/09 pp 32–34)

Services for registered experts

Terminator

Go to *www.jspubs.com* and follow the link to *Terminator* (look under *Resources for experts* on the right of the home page) and you will find our tool to help you create a personalised set of terms of engagement.

Little Books

Go to *www.jspubs.com* and follow the link to *Little Books* to read more about the titles in our series dedicated to providing practical guidance to busy expert witnesses.

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 61). 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

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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 2009 will enable you to download the 2009 logo.

General helpline – FREE

We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for assistance, 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 2009 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, experts may submit:

- a **profile sheet** – a one-page A4 synopsis of additional information
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At a cost of 2p + VAT per character, an extended entry offers experts the opportunity to provide lawyers with a more detailed summary of expertise, a brief career history, training, etc.

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If corporate branding is important to you, for a one-off fee you can badge your on-line and CD-ROM entries with your business logo.

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Web integration – FREE

The on-line *Register* is also integrated into other legal websites, effectively placing your details on other sites that lawyers habitually visit.

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Since 1995, we have tapped into the expert witness community to build up a body of statistics that reveal changes over time and to gather data on areas of topical interest. If you want a say in how systems develop, take part in the surveys and consultations.

Professional advice helpline – FREE

Experts who opt for the Professional service level 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.

Software – FREE

Experts who opt for the Professional service level can access our suite of task-specific software modules to help keep them informed.

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We represent the largest community of expert witnesses in the UK. As such, we have been able to negotiate with publishers and training providers to obtain discounts on books, conferences and training courses.

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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 Services Commission. And with a year-to-page and month-to-page calendar too, you'll never be without an appointment planner. Visit *www.jspubs.com* and follow the link to *Expert Witness Year Book* to read more about this annual reference work for busy expert witnesses.

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