Your Witness

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Law Commission Update

Jeremy Horder, the Law Commissioner in charge of the consultation looking at the possibility of having a *Daubert*-like pre-trial gate-keeping function given to judges in criminal trials, spoke at the recent Bond Solon conference. He reported that the consultation had elicited more than 80 responses – a large number by Law Commission standards. These had been largely in support of the basic proposals, but offered a number of ideas to modify the suggested scheme.

The Law Commission is now studying these responses, and has recalled its *Expert Evidence Working Party* (on which I sit) to help in its deliberations. The Law Commission aims to publish its final recommendations soon. Apparently, over 75% of the recommendations the Law Commission makes for amendments to criminal law are implemented, so the odds are good for some positive changes to come.

Professional regulators

I've had a number of calls on the *Register* Helpline seeming to indicate an increase in the use of the professional regulatory route to complain about expert witnesses. This trend was always possible following the high-profile action of the General Medical Council (GMC) against various paediatricians. I would be interested to hear from anyone in the *Register* who is aware of this sort of action, whether or not the subject of such action, so I can build up a clearer picture of this activity.

Judicial criticism

I have long thought that the person best placed to determine whether an expert witness has complied with his duties under the rules of court is the judge in the case. It was, then, of little surprise that I saw such merit in the scheme drawn up by Mr Justice Collins to handle complaints about expert witnesses. It was proposed by Collins when he heard the appeal from Meadow against the original GMC ruling. You may remember his comment: the GMC acted in a way that was 'almost irrational' said the good judge!

Of course, just because a judge thinks an expert has failed in his duty does *not* mean that it is so, as Judge Jacobs found when he sent an architect off to the Architects Registration Board (ARB). The ARB subsequently exonerated the expert, with some of the *apparent* failings of the expert (such as not visiting the Netherlands to actually see the building in question) lying firmly on the shoulders of others (the LSC wouldn't pay for him to go!). But Jacobs was right, in my view, to act as he did if he felt the expert was wanting. He even gave the party who instructed the expert a month to make submissions as to why the expert should not be referred.

However, I have recently noticed a growing number of judges berating experts in their judgments. The expert witnesses have little, if any, opportunity to defend themselves. In effect, they have been tried and sentenced *in absentia*.

The expert in such a case cannot obviously appeal the judgment; neither can he respond to it in any formal way. Yet the potential consequences for the expert can be very serious. Not only could he lose his forensic practice, but his professional regulator may well take up the reins. If, like the GMC, that regulator expressly does *not* take into account the context of the legal proceedings in which the expert was engaged, it could signal a career-ending turn of events.

If you can help me build a clearer picture of this type of activity, I would be very grateful. Naturally, full confidentiality would be maintained.

Expert Witness Year Book 2010 – Free!

The success of our annual *Expert Witness Year Book* has been most welcome. It has received lots of positive comments, such as:

'I received my copy of the [Year Book] yesterday and have already made reference to it on four occasions. An excellent publication.'
Eric J Mouzer, FRICS FCIARB

'I have just received the new Year Book and wanted to drop you a quick line [to say] GREAT BOOK'
Richard Emery, MILT MIMIS

'The best ideas are the simplest and here is a prime example'
Expert Witness Institute, EWIN Vol 13, No 1

Last year, experts in the *Register* paid £15 + P&P for their copy of the book. But its popularity is such that we have decided that from January we will make a copy of the *Expert Witness Year Book 2010* available *free of charge* to all experts who renew their *Register* entry! That's right, when you renew your entry in the *Register* we will send the revised and expanded 2010 *Expert Witness Year Book* to you for free!

If you have been with the *UK Register of Expert Witnesses* for a year or two you may have seen that our approach is different from other publishers. We aren't out to make a fast buck. Instead, we want to build lasting relationships with experts and help where we can to ensure expert evidence is used effectively in the pursuit of justice. Giving away this valuable *aide memoire* is just one more example of our approach to business. Merry Christmas!
Dr Chris Pamplin

Expert witness survey 2009

Respondent rate boosted by MoJ attack on fees

There was a great response to the questionnaire enclosed with our September 2009 issue of *Your Witness*. By the end of October, 511 forms had been submitted, accounting for some 20% of the readership. A big 'thank you' to all who took the trouble to complete them. Their data have contributed to the eighth survey of its kind in 14 years.

The survey's timing could not have been better because it coincided with the Ministry of Justice (MoJ) publishing proposals to cap expert witness fees (see pages 4–6) in publicly funded cases. The data we have gathered through these biannual surveys have enabled us to demonstrate not only that fee inflation over the past decade has been modest, but also that the level of the caps being proposed would equate to a halving of the current fees for many expert witnesses. It may take a bit of time to contribute to these surveys, but I hope you will agree the value we gain through the exercise is well worth it.

The experts

Of the 511 experts who returned questionnaires by the end of October, 226 were medical practitioners. Of the remaining 285 experts, 65 were engineers, 49 were in professions ancillary to medicine, 28 were accountants or bankers, 32 had scientific, veterinary or agricultural qualifications, 19 were surveyors or valuers and 31 were architects or building experts. The substantial 'others' category totalled 61.

Work status and workload

Of the respondents, 265 (52% of the total) work full time and 192 (38%) work part time. Only 9% describe themselves as retired. These figures have now been fairly stable since 2003.

Overall, expert witness work accounts, on average, for 46% of their workload, a figure essentially unchanged since 2001. Clearly, these individuals are much involved in expert witness work but have an even more extensive commitment to their professions – which is, of course, exactly as it should be.

Experience and outlook

Report rate grows steadily as SJE rate levels off

We also asked respondents to say for how long they had been doing expert witness work. From their answers it is apparent that they are a very experienced lot indeed. Of those who replied, 95.7% had been practising as expert witnesses for at least 5 years, and 83.5% had been undertaking this sort of work for more than 10 years. Just half of the respondents (51%) saw expert witness work as an expanding part of their workload, similar to the view expressed since 2003.

	2001	2003	2005	2007	2009
Full reports	41	45	54	54	57
Advisory reports	12	11	13	17	19
SJE instructions	12	14	15	14	15

Table 1. Average number of full, advisory and SJE reports per expert over time.

Their work

Reports

In all eight of our surveys we have asked those taking part to estimate the number of expert reports they have written during the preceding 12 months. The averages for the last five surveys are given in Table 1.

Single joint experts

Statistics relating to the use of single joint experts (SJEs) have levelled off since their dramatic rise between 1999 and 2001 (a jump from 3 to 12 instructions a year) brought on by the Woolf reforms. Now, 66% of experts have been instructed as SJEs, and on average each expert receives 15 such instructions in the year. It is possible that this levelling off in the use of SJEs is why the Civil Procedure Rules Committee has introduced specific guidance into CPR Part 35 on when an SJE appointment would be appropriate.

Court appearances

Another change over the years that many experts will find more welcome is the reduction in the number of cases for which they are required to give their evidence in court. It is now altogether exceptional for experts to have to appear in court in 'fast track' cases, and it is becoming less and less likely in those on the 'multi-track'. In 1997 we recorded that the average frequency of court appearances was 5 times a year; some 4 years later this had dropped to 3.8; it now stands at 2.9.

Variation by specialism

These averages, however, hide a lot of variation by specialism (see Table 2). For example, the reporting rate for medics is much greater than in all other specialisms. Furthermore, SJE appointments are much more common in medical cases than in the other specialisms.

Professional group *(n = number of respondents)*	**Reports**	**Court appearances**	**Advisory reports**	**SJE instructions**
Medicine *(n = 226)*	92.5	2.5	29.1	23.5
Paramedicine *(n = 49)*	62.3	3.6	11.3	16.5
Engineering *(n = 65)*	20.1	2.6	6.8	3.0
Accountancy *(n = 28)*	7.4	0.9	9.4	2.1
Science *(n = 32)*	24.9	5.1	23.6	2.8
Surveying *(n = 19)*	23.2	1.0	14.1	11.5
Building *(n = 31)*	14.0	0.7	9.0	2.9
Others *(n = 61)*	30.9	5.6	13.5	12.0
Aggregate averages	*56.8*	*2.9*	*19.3*	*14.6*

Table 2. Average number of reports, court appearances, advisory reports and SJE instructions by specialism.

Numbers of court appearances are similar in all areas except the sciences, where the use of forensic science in the criminal caseload pushes up the average.

Their fees

Which brings us to the detail everyone wants to know. How much are fellow experts charging for their expert witness services? This information is summarised in Table 3.

For each professional group the table gives average hourly rates for writing reports and full-day rates for attendance in court, with the 2007 data for ease of comparison.

Given the small size of some of the groups, it would be unwise to read too much into the changes revealed by these pairs of figures.

It was this part of the data set that allowed us to provide a time series on expert witness fees to the MoJ showing that, of the 59% increase in fee rates since 1999, 35% was accounted for by compound inflation. Furthermore, we could show that medical doctors, for example, had only increased their fees by 9% in real terms over the decade.

Cancellation fees

The issue of fees that become due as a result of cancelled trials continues to be a source of friction between expert witnesses and those who instruct them. The average percentage of the normal fee experts charge is generally controlled by the amount of notice they receive of the cancellation. In this survey, the percentages are 6.2% if notice is given at least 28 days before the trial was due, 18.4% if 14 days, 39.5% if 7 days and 78.6% if just 1 day's notice is given.

The right to cancellation fees is one that has to arise from the contract between the expert and the lawyer, although the MoJ has made claiming them very difficult in publicly funded cases from April 2010. This ought to act as yet another spur to all experts to put in place clear, written terms of engagement.

Speed of payment

In this survey, 85% of experts reported that the promptness with which invoices are paid had not deteriorated – but that really means matters couldn't get much worse! One measure of the problems experts have in securing prompt payment is the number of bills settled on time. In this survey, the number of experts reporting their bills were being paid on time *in even half of their cases* is only 40.5% (the same as in 2003 but down by 8 points since 2007). Clearly, the situation remains grim.

Against this background, it is depressing to note that whilst 85% of experts say they stipulate terms, still fewer than 50% use a written form of contract. Without a solid contractual basis, experts are making their credit control much more complex than it need be. The *Civil Procedure Rules Experts Protocol* requires (at 7.2) that terms be agreed at the outset. Clearly, the hope we often express – that the imposition of this official obligation would help to persuade more experts to adopt written terms – is falling on deaf ears!

Professional group (*n = number of respondents*)	Average rate (£)			
	Writing reports (per hour)		Court appearances (per day)	
	2009	2007	2009	2007
Medicine (*n = 226*)	192	170	1,252	1,163
Paramedicine (*n = 49*)	153	118	1,067	827
Engineering (*n = 65*)	118	112	836	876
Accountancy (*n = 28*)	192	174	1,246	1,105
Science (*n = 32*)	114	107	811	720
Surveying (*n = 19*)	162	142	1,140	938
Building (*n = 31*)	118	102	860	835
Others (*n = 61*)	120	121	760	811
Totals	*160*	*143*	*1,069*	*991*

Table 3. Average charging rates for report writing and court appearances by specialism (2007 and 2009).

As every lawyer knows, setting out clear terms for any contract, at the outset, is essential if subsequent problems are to be avoided. The contract between expert and instructing lawyer should be no different. As an expert listed in the *UK Register of Expert Witnesses* you have access to *Factsheet 15* dealing specifically with terms of engagement (all factsheets are freely available at *www.jspubs.com*), and our *Little Book* on *Expert Witness Fees*[1] makes creating a set of terms even easier. Or why not go to the *Terminator* section of our website where you can create personalised sets of terms of engagement based on the framework set out in our *Little Book* on *Expert Witness Fees*[1]? So now you have no excuse. Use our free member resources to set down a firm contractual base and better secure your position with your instructing solicitor.

The ultimate solution?

If all else fails, experts can sue for their fees – or at least threaten as much. Obviously this should be the option of last resort, if only because it is likely to lose the expert a client.

Of those who took part in our 1999 survey, 24% claimed to have sued for their fees on at least one occasion. That figure has risen to 29% in this survey. If you are considering suing for your fees, our *Little Book* on *Expert Witness Fees*[1] has a whole chapter dedicated to getting paid. But it is important to recognise that the basis for any such suit is in contract. If you have not built the instruction upon a firm contractual footing, winning in court may well be more tricky.

Chris Pamplin

Fee data crucial in fending off the MoJ capping proposals

Reference

[1] Pamplin, C.F. [2007] *Expert Witness Fees.* J S Publications ISBN 1-905926-01-4 Order line (01638) 561590

MoJ fee capping – the proposals

MoJ proposes swingeing cuts to expert fees...

The Ministry of Justice (MoJ) proposes to cap the fee rates it will pay to expert witnesses out of public funds, with only limited exceptions being allowed through prior authority. It is discouraging to note that the current proposals are almost identical to those put forward by the Legal Services Commission (LSC) back in 2004. According to information provided by Simon Morgans, that consultation generated a large body of responses hostile to the capping proposals. The MoJ states it is 'familiar with concerns raised in previous discussions about the cost, quality and supply issues with expert witnesses'. So it is regrettable that such familiarity does not appear to have led to the development of a new approach to dealing with the perceived problem of expert fee inflation.

The proposals split experts into various categories with different capping rates. The MoJ sees no reason for the higher charging rate in civil cases compared with criminal cases, and thinks they should be the same. It also thinks that defence and prosecution experts in criminal cases should be subject to the same rates. Accordingly, it proposes to harmonise the capping rates to the lower crime levels contained in the guidance the MoJ currently provides to determining officers when paying expert witnesses who give evidence in criminal trials. The MoJ believes that this approach will 'increase transparency, ensure consistency and control the unsustainable rising costs of expert's fees'. Ultimately, the MoJ would like to move to fixed fees for expert witnesses. We consider each element of the proposals in turn.[1]

Capping fees

The proposal is to introduce caps to the hourly rates expert witnesses will be paid in publicly funded work as a way of controlling the LSC spend on expert witnesses. Leaving to one side the trite point that fixing one variable (fee rate) without the other (number of hours) cannot possibly control total spend, we think such a move has to be justified by reference to a proper cost-benefit analysis and impact assessment.

But the LSC, 5 years after it first conceded the point, still does not have the necessary data to undertake a proper cost-benefit analysis. We have provided data from our own survey work that shows modest increases in the charging rates of the majority of expert witnesses over the past decade[2]. We have also catalogued a number of factors that put inflationary pressures on expert witness fees.[3] Based on these data, fee rate caps at the level proposed would mean that most expert witnesses would see a fall in their fee rate. And medical expert witnesses, the largest group, would see on average their fee rates halved!

... for a second time!

We asked expert witnesses listed in the *UK Register of Expert Witnesses* whether they have recently stopped undertaking publicly funded cases. Of the 410 experts who responded, 8% said they had, and the reasons given related primarily to the *current* level of fees the LSC is paying! When we asked would you stop doing publicly funded cases if the proposals as set out go ahead, only 39% said that they would continue to take on such work.

The MoJ acknowledges that there are already serious pressures on the supply of experts of sufficient quality who are prepared to undertake expert witness work. It seems to us that a further reduction of 60% in the number of experts willing to undertake LSC-funded cases would create a supply problem that would bring the publicly funded legal system to a grinding halt.

In part, the MoJ justifies its capping approach to controlling expert witness fees on the grounds that it worked with solicitors and barristers. But expert witnesses are not like solicitors and barrister in some crucial ways. The key one here is that very few expert witnesses *need* to undertake forensic work. Indeed, for many of the most experienced expert witnesses, who are busy in professional practice, the disruption caused by cancelled court hearings, seemingly hugely inefficient legal practices, and the need to fit the forensic work in during evenings and weekends, already contributes to the pressures on supply. Cut their fee rates by half and it's clear that many of these experts (i.e. those on whom the market places higher value) will simply walk away.

Different rates across categories of law

The usual way to determine the proper rate for a commodity is to permit the market to set the fees. This is what happens in the civil arena. With many different people commissioning expert witness reports in civil cases, the market sets the rates. In contrast, in the publicly funded arena the LSC operates as the monopoly purchaser. We show[4] that this results in the LSC currently obtaining an average discount of ~16% on the market rate set in the civil arena.

Far from being unable to show it obtains good value for public funds, these data show that the LSC is currently obtaining excellent value for money!

Harmonising down

If fee bands linked to those currently set in the criminal arena are introduced in civil cases, then, for example, based on our own data, on average medical expert witnesses would lose roughly half of their current fee income in such cases.[5]

There is already considerable concern within expert witness and judicial circles about the low level of expert fees in criminal cases. Consider, for example, the following written by Auld LJ[6]:

> *'The second matter that has been the subject of considerable complaint by defence solicitors and experts is the low level of publicly funded experts' fees. I have had a look at the current scales, and, without going into detail on the figures, they are*

meagre for professional men in any discipline. I am not surprised that solicitors complain that they have often had difficulty in finding experts of good calibre who are prepared to accept instructions for such poor return. The best expert witness in most cases is likely to be one who practices, as well as giving expert evidence, in his discipline, rather than the 'professional' expert witness – one who does little else. Justice is best served by attracting persons of a high level of competence and experience to this work. If we expect them to acknowledge an overriding duty to the court and to develop and maintain high standards of accreditation, they should be properly paid for the job. '

As the MoJ Consultation Paper notes, the LSC is currently paying above the scale rates considered by LJ Auld. To propose imposing such 'meagre' fee scales across the board for expert witnesses in publicly funded cases seems calculated to increase the problems associated with attracting suitable expert witnesses into publicly funded work.

Transparency, consistency and control

If the LSC wants transparency and consistency in what it spends on expert witnesses, it need only collect the data it requires from solicitors to permit it to know what it spends. We fail to understand how it can still not gather these data – after all, every expert paid has to present an invoice. Armed with the data, the LSC would then be well placed to deliver transparency about what it pays experts. It could even be sophisticated about how it analyses data between the civil, criminal and family divisions, between defence and prosecution, across specialisms and even, for a given expert witness, between cases. We live in an information age, and with information comes power. Power to ensure consistency, control and objective measurement of best value for public money.

Fixed fees

For high-volume work of minimal complexity that, ideally, is not central to the case, it may be possible to develop a fixed-fee regime. An example of such work is in the high-volume low-value motor accident claims market where the parasitical medical reporting organisations (MRO) have flourished. This area of work is dominated by negotiations between insurers about where the level of compensation should lie. It has scant relevance to the types of case that receive public funding.

Summary

It is clear that we feel the proposals as set out are not fit for purpose. They cannot achieve the end results for which the MoJ hopes. Worse still, they would, based on our data, decimate the supply of experienced expert witnesses so necessary for the operation of publicly funded litigation.

How we tackled these proposals

We are deeply concerned by the MoJ proposals. But rather than just say as much, we felt that greater value would come from trying to inform the MoJ about the real position with respect to expert witness fee inflation, to identify sources of inflationary pressures on expert witness fees and to make some constructive proposals for ways the MoJ might tackle some of the causes of increasing expert witness fees without risking the negative supply and competition effects the current proposals would likely cause.

Scale of the fee inflation problem

We have drawn the MoJ's attention to the results of our biannual surveys (1999–2009). These show that the real-terms increase in, e.g. medical expert witness fees, is just 9% over 10 years. We also conducted a consultation-specific fee survey to help provide data on the different categories of law.

Inflationary factors affecting fees

We have identified eight key inflationary pressures, including the need under the various procedural rules for all expert reports to be 'gold plated', even if the chances of the case coming to court were negligible and the report was merely a negotiating tool. A more recent development is the post-Meadow effect, which has led to a much tighter definition of an expert's area of expertise. There is also more rigorous quality assurance, the effect of endemic late payment, increased sanctions against expert witnesses, the existing supply problems, a switch in burden from the prosecution to the defence and the effect of the parasitical MROs.

Save money without damaging supply

Having identified these inflationary factors, we have made a number of specific proposals for changes to the litigation process that could well save far more money than the 1% of the Legal Aid budget which is the target of the current proposals... and all without risking the very damaging effects we predict the current proposals would bring.

We have proposed a change under CPR to introduce preliminary reports and to allow for staged instructions. We have asked why the lawyers' 'doors-of-the-court' brinkmanship should be allowed to waste so much time and money. We have pointed out how much money can be saved in some cases by the early involvement of experienced experts and have recommended a system of monitoring value for money in the use of experts. We have also asked for better instructions for prosecution experts, suggested that the LSC pays experts directly to reduce the late payment problem and urged transparency in the fees paid to MROs. We predict that all these procedural changes would save money and maybe even enhance the supply of experts willing to undertake forensic work.

The full text of our response can be read at *http://www.jspubs.com/ surveys/MoJ0908*, although the Executive Summary of the response is reproduced in the next article.

The* Register *puts constructive proposals forward

References

[1] See our full response at *www.jspubs.com/ surveys/MoJ0908*

[2] Ibid page 9

[3] Ibid page 13

[4] Ibid Table 4 page 12

[5] Ibid Table 2 page 12

[6] *A Review of the Criminal Courts of England and Wales*, September 2001

Our response to the MoJ

600+ expert witnesses inform our response to the MoJ

The *UK Register of Expert Witnesses* submitted a full response to Part 3 of the 'Legal Aid: Funding Reforms' Consultation Paper 18/09 issued by the Ministry of Justice (MoJ) on 20 August 2009. The first draft of that response was posted on the *Register* website in October 2009. It incorporated feedback from over 660 expert witnesses. 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 lending their support to, or recording their rejection of, the views contained in our initial response through an on-line polling system.

We reproduce here the Executive Summary from our final response to the MoJ, the full text of which is at *www.jspubs.com/ surveys/MoJ0908*.

The Executive Summary

The proposals – based, as they are, on guesswork – fail to deliver a convincing analysis of the current position. From such poor groundwork, the MoJ has arrived at proposals that carry with them a significant danger of reducing the pool, and overall quality, of experts willing to work in publicly funded cases. This is a view supported by 98% of our expert witness contributors.

We provide evidence from our own survey work that, for example, the expert witness fees of medical consultants have increased by just 9% above the rate of inflation since 1999. Furthermore, based on our data, fee rate caps at the level proposed would mean that most expert witnesses would see a fall in their fee rate; medical expert witnesses, the largest group in our survey, would see on average their fee rates halved.

Some 94% of our expert witness contributors agree that the disparity between the rates paid to expert witnesses in the civil and crime arenas arises from the fact that the LSC is a monopoly purchaser in the publicly funded arena. As such, it currently achieves a discount on its purchase of expert witness services of around 16% compared with the rates set by the free market operating in the civil arena.

The MoJ proposals are based on the flawed assumption that expert witnesses are equivalent to the solicitors and barristers involved in publicly funded cases. It is implicit in these proposals that the MoJ thinks expert witnesses will react in the same way as the lawyers have to the unsophisticated application of arbitrary banding and capping of fee rates. We think they will not, for they need not, and 96% of our expert witness contributors agree with us.

Lawyers are part of the legal system, but expert witnesses are simply guests in it. Whilst the MoJ pays lip-service to the fact that expert witnesses have a vital role as guests in the system, these proposals take no account of the reality of the disruption that forensic work can cause to professional people's working lives.

We identify a number of inflationary pressures on expert witness fee rates, including the effect of the CPR, post-Meadow effects, more rigorous quality assurance, endemic late payment and sanctions against expert witnesses. The MoJ proposals do not address any of these issues.

We offer suggestions as to how the MoJ could make changes to the litigation process, such as staged instructions, setting new brink points and involving experts earlier in the assessment of cases. These changes could foreseeably save far more money than could the current proposals, and might even release some of the pressure on the supply of expert witnesses.

The MoJ complains that the expert witness community is hard to reach because, unlike lawyers, experts do not have a small number of representative bodies. This is because, for good reasons, we do not have a professional class of 'the expert witness' in this country. The courts need experienced (and often busy) professionals to visit the legal system to assist as necessary on technical matters. If implemented, these proposals would run a very great risk of restricting the supply of experts to those who, for whatever reason, *have* to accept the 'meagre' rates on offer – experts who presumably couldn't earn more elsewhere. Over 96% of our expert witness respondents agree with us that this would be a major step in the creation of the professional class of expert witness we should all be working to prevent.

Ultimately, we conclude that the MoJ has not identified the inflationary drivers on expert witness fees. The MoJ has failed to produce cost-saving proposals that are sufficiently targeted, or neutral in terms of supply and competition, as to be capable of being broadly accepted by expert witnesses. The nature of the proposals leaves little doubt that the driving force behind the consultation paper is financial. If these budgetary factors force the MoJ to adopt these proposals, we anticipate that quality, competition and supply will all be adversely affected and will reduce access to justice for the most vulnerable in Society.

Conclusion

Will any of this make a difference or will the MoJ press ahead regardless? Well, last time this approach was tried, back in 2004, the LSC told me that it received a 'huge' response and it was overwhelmingly negative. This is perhaps why the proposals were quietly put to one side.

I know from the person heading up this current consultation that once again they have received a large number of responses. I can see no reason why these should be any less opposed to the proposals second time around. We must hope that, having tried the same approach twice, the MoJ and the LSC will finally start to engage in the constructive dialogue necessary to allow the effective use of expert evidence to drive down litigation costs. Time will tell!

Dr Chris Pamplin

Survey Statistics

438 experts provided details on fee rates

410 experts provided feedback on alternative ways of saving money

110 experts rated the initial response

83 experts sent written responses

At least 660 individuals gave 1,076 responses through these surveys

Admissibility of fresh evidence

Fresh expert evidence as a grounds for appeal in criminal proceedings has always been a tricky issue. The statutory provisions governing appeals are contained in the Criminal Appeal Act 1968. But the rules on the receipt of fresh evidence found in s.23(2) do not relate to expert evidence, rather to factual evidence. Therein lies the difficulty faced by a party seeking to introduce fresh expert evidence.

In the interests of justice

In *R -v- Jones*[1], the defendant had appealed against his conviction for the murder of his wife (hitting her head with a hammer and then making it appear that she had died in a road accident). He sought to adduce fresh expert medical evidence on appeal.

The Court of Appeal held that it had to consider what was best in the interests of justice when deciding whether to receive fresh evidence. Although failure by a defendant to adduce evidence at his trial did not prevent it from being accepted on appeal, the Court should take that failure into account. The Court observed that s.23(2) did not specifically cover the question of fresh expert evidence and had been framed to deal more particularly with new factual evidence. Consequently, the court considered that an explanation for failure to adduce expert evidence at the trial which related to *availability* carried less weight than in the case of a factual witness. Experts, said the Court, were interchangeable to a certain extent. Even if there was only one expert capable of establishing a particular defence and he was unavailable at the time of the trial, the trial could be postponed. There was, said the Court, no strong argument for allowing fresh expert evidence at appeal.

Mental incapacity and fresh evidence

The judgment in *Jones* was applied in the Sally Clark case and was followed in *R -v- Gilbert*[2].

In *Gilbert*, there was an appeal against a murder conviction. The appellant had stabbed his partner to death and had given evidence at trial that voices in his head had made him kill her. But no medical evidence had been produced at trial, at which only the defence of provocation had been raised. Reports were prepared by a psychiatrist for the Criminal Cases Review Commission. He believed that the appellant was seriously mentally ill before, during and after the offence, the illness was not caused just by his alcohol dependence and it was very likely that his condition was such as to have enabled him to satisfy a court that his responsibility was diminished. This was corroborated by statements from the appellant's daughters, who said that their father had suffered a range of symptoms suggestive of mental illness. Material within the appellant's probation records also recorded a number of incidences of the appellant hearing voices in his head.

The Crown argued that there was no reasonable explanation for the failure to adduce evidence to support the plea of diminished responsibility at trial. Following the judgment in *Jones*, the Court of Appeal allowed the application to adduce the expert evidence on the grounds that, in accordance with s.23(1) of the 1968 Act, it was expedient in the interests of justice to do so. The Court held that there was a reasonable explanation for not advancing a defence of diminished responsibility at trial because there was a chance that the true facts were not disclosed by the appellant because of his illness.

A change of experts does not count

In 2009 the question came before the court again.

In *R -v- Meachen*[3], there was an appeal, by way of a reference from the Criminal Cases Review Commission, against a conviction for causing grievous bodily harm with intent. The doctor who had treated the victim's injuries gave expert evidence for the Crown, stating that the defendant's explanation that the injuries had been caused accidentally during consensual sex was not credible. Given the severity of the injuries, these would have involved severe pain and could not have been caused unless the victim had been anaesthetised. The medical expert for the defendant agreed on the pain point but disagreed about the cause of the injuries.

On appeal, Meachen sought to adduce fresh evidence from another expert. He contended that at trial the issue of the amount of pain involved and the level of the victim's consciousness had not been addressed. So he sought to bring evidence relating to the level of intoxication and how insensible the victim had been. He also sought to introduce expert evidence as to the cause of the injuries.

Dismissing the appeal, the Court considered the case of *Jones* in relation to the request to adduce fresh expert evidence. It was held that this was not a case where the bringing of fresh evidence should be permitted. Just as it would subvert the trial process if a defendant was free to mount on appeal an expert case which could have been advanced before the jury, so it would subvert the trial process if a defendant was free to mount on appeal the same expert case as was advanced at trial with a different or additional expert. If the expert evidence could have been led at trial, then it is not fresh evidence.

Conclusion

The courts have now made it clear that fresh expert evidence will only be a grounds for appeal in the limited circumstances permitted by *Jones* where the interests of justice will not be served if it is excluded. Evidence that is essentially the same as was presented in the original trial, but is adduced by a different expert, is not fresh evidence. The appeal process is *not* to be used as a means of presenting an alternative expert opinion.

Fresh expert evidence only admissible when justice requires it

References

[1] *R -v- Jones* [1997] 1 *Cr App R* 86 CA (Crim Div).

[2] *R -v- Gilbert* [2003] *EWCA Crim* 2385.

[3] *R -v- Meachen* [2009] *EWCA Crim* 1701.

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