WORKSHOP ANSWERS

MAKING EXPERTS WORK FOR YOU
DISCUSSION ONE

Gabriel Farmer, Robert Sowersby & Daniel Neill, Guildhall Chambers

Q1 - Is there anything in that opinion you can legitimately challenge?

(a) You can, of course, challenge Item 1 (Rivera's refusal to look at relevant records) – you can challenge the refusal to look at the physiotherapy records, and even more so the x-rays and MRI report. It would be useful to point him to Para. 4.5 of the Protocol for the Instruction of Experts, which states that '*experts should take into account all material facts before them*'.

(b) You can challenge his assertion that Homer was wearing a seatbelt on the basis that there were no recorded seatbelt injuries.

If you did challenge the way this issue has been tackled you could refer to Para.13.11 of the Protocol, which states '*where there are material facts in dispute experts should express separate opinions on each hypothesis put forward. They should not express a view in favour of one or other disputed version of events unless, as a result of particular expertise and experience, they consider one set of facts as being improbable or less probable...*' (emphasis added).

(c) You can challenge Item 3 on the basis that these conclusions have been reached on an incomplete review of the Claimant's medical records (see (a), above). For instance, it may be that Homer's ongoing problems are constitutional, but there is no way of knowing without consulting the records. You can also challenge Item 3 on the basis that he hasn't given any reasons for the dramatic change of opinion: he simply states 'it is therefore clear that', as if every whiplash injury lasting more than 12 months is bound to last indefinitely.

You could ask Rivera whether there would, in his view, be room for a range of expert opinion on the issues at Items 3. Under Para.13.12 of the Protocol he should do this with reference to relevant literature where possible, or in the absence of such literature he should *'express opinions on what [he] believes to be the range which other experts would arrive at if asked*'. He should also explain the basis for his own judgment (which seems to be based purely on experience).

(d) It is difficult to challenge Item 4 in terms, and often there is no reference to such literature in claims of this nature. Obviously though it doesn't reflect well on Rivera if he simply refuses to make such reference without any more sensible explanation than that given.

Q2 - Should you pose questions to Rivera?

Probably.

As a single expert his evidence is likely to be accepted on a number of key issues (particularly Items 3 & 4). If you wish to challenge that evidence you should put questions to him on those points at the very least.

It is also important to ask questions because if you are ultimately working towards an application for your own expert, then you will find it easier to get permission if you have in the first instance tried to clear up any controversial issues by asking questions (the Court of Appeal suggested that this would be appropriate in certain cases in *Daniels v Walker* [2000] 1 WLR 1382).

(It is worth noting though that questions should be asked only for the purpose of 'clarification of the report' (CPR 35.6(2)(c)) unless the other side agrees or the court directs otherwise).

Q3 - Should you make an application for a further report?

Yes.

Q4 - Will you succeed and if so, why?

You may well in the circumstances of this case (i.e., where the existing expert is a buffoon). The case law is not *entirely* consistent but it indicates that in general terms a party should be allowed to instruct its own expert in such circumstances where their reasons for wanting to make such an instruction are not entirely fanciful – at least where the parties had agreed joint instructions to the original expert, and especially where a substantial sum was involved (*Daniels v Walker*). A slightly stiffer test was described in *Peet v Mid Kent Healthcare NHS Trust* [2001] EWCA Civ 1703, CA, which indicated (perhaps unsurprisingly) that 'good reasons' were needed if a party was to be given permission to rely on its own expert evidence.

Cosgrove v Pattison [2001] The Times, February 13 (HC) gives a non-exhaustive list of factors to be taken into account in such applications: (i) the nature of the issue or issues; (ii) the number of issues between the parties; (iii) the reason for requiring the new *expert*; (iv) the amount at stake or the nature of the issues at stake and their importance; (v) the effect of permitting one party to call further *expert* evidence on the conduct of the trial; (vi) any delay caused in the proceedings; (vii) any other special features; (viii) the overall justice to the parties in the context of the litigation.

Q5 - What happens / should happen to Rivera's evidence?

If you do not obtain permission to rely on an additional expert you should at least try to have Rivera called to give oral evidence. At such a hearing you will be entitled to cross examine him, albeit whilst mindful of his status as a joint expert.

If you do manage to obtain permission for your own expert evidence the court should allow the experts to meet before considering how to deal with their evidence at trial. If there is substantial disagreement between the experts then it would be sensible to have them both attend court so that the judge can decide whose evidence s/he prefers.

MAKING EXPERTS WORK FOR YOU
DISCUSSION TWO

Q1 – Does the Claimant need permission to rely on Mr Smart's report?

Yes – r.35.4.

Q2 – Does he have to disclose Mr Dumb's report? Why?

In these circumstances, probably, yes.

Privilege is not waived simply by the fact that reference has been made to the report's existence (see *Lucas v Barking, Havering & Redbridge Hospitals NHS Trust* [2003] EWCA Civ 1102, in which D sought immediate disclosure of various documents which had been referred to in Expert A's report, including an earlier medico-legal report from Expert B. The Court found that the mere mention of a privileged document in an expert's report does not necessarily waive privilege in the earlier report. (The principle was extended to cover mention of privileged documents in correspondence in *Expandable Ltd v Rubin* [2008] EWCA Civ 59, and in *Nyiry v Intercontinental Hotels* LTL 2/5/2006 – a County Court decision – the judge held that a Claimant who had provided a copy of his first expert's first report, but without in any way seeking to rely on it, was not obliged to disclose the same expert's second report, which remained privileged).

However, the position here is different since C had initially sought to *rely* on Mr Dumb's report and now wants permission to rely on a different expert - in such circumstances it would be a condition of granting any such application that C would, after the application was granted, have to disclose Mr Dumb's report: *Beck v MoD* [2003] EWCA Civ 1043. *Beck* in fact stipulates the same position for Claimants and Defendants, but because Defendants often instruct experts much later, they are more likely to be caught by the 'automatic disclosure' stipulation. In *Edwards-Tubb v JD Wetherspoon* [2011] EWCA Civ 136, the Court of Appeal extended this principle so that courts can compel disclosure of an earlier report where experts are changed *pre-issue*.

(The rule, in summary, is as follows (from *Ramage v BHS Ltd*, a County Court decision) (i) that where a party obtained a medical report for the purposes of litigation it would be privileged; (ii) that party did not need to disclose the report if he did not want to use it; (iii) however, if he had to seek leave of the court to make use of another expert, the court might, as a condition of leave, require him to disclose the earlier report; (iv) that would require the party to decide whether or not he wanted to pay the price for using a second report of waiving privilege in relation to the first; (v) since expert shopping was to be discouraged, the court would normally make a conditional order of that type.

Q3 – Would your opinion be different if Mr Dumb had made an error-strewn review of her medical records?

No, unless those factors were the reason for not using Mr Dumb's report, in which case C *might* simply wish to disclose it (to establish that the report had not been shelved because it was un-favourable to the Claimant's case).

Qs 4 and 5 – How likely are you to get permission to rely on Mr Razor? Why? Will you have to disclose Mr Dumber's report?

Assuming that you have no good reason for rejecting Mr Dumber's report, other than that you don't like his conclusions, permission is touch and go, since the courts strongly discourage expert-shopping.

If you do succeed in obtaining permission to rely on a report from Mr Razor, then you will almost certainly have to disclose Mr Dumber's report (as per *Beck*, above).

Qs 6 and 7 – Assuming Mr Razor does see the Claimant, and then produces a report which includes an insulting reference to her weight: will this make any difference to your right to rely on him? Will it affect the weight the court gives the report? What if Mr Razor's report contains an error-strewn review of the Claimant's medical records?

The Court of Appeal has permitted a change in expert where the Claimant had a genuine sense of grievance at the way the Judge dealt with the application at first instance ("I have back pain, too – so what?"). It is unlikely, however, that this would extend to the professionalism / objectivity of the expert. So, no, it shouldn't make any difference to your right to rely on Razor and it shouldn't affect the weight the court gives the report. However, if Razor's report contained an error-strewn review of the Claimant's medical records then this may well affect the weight the court gave to the report. Rather than seeking to change experts (again!) the best course would probably be to write back to Razor pointing out his errors and asking him to 'reconsider' that part of his report.

Gabriel Farmer
Robert Sowersby
Daniel Neill
Guildhall Chambers
June 2011