

Newsletter

CRIME NEWS SPRING 2011



Welcome to the first Crime Team newsletter of 2011. In this edition we bring you a roundup of team news from the past year, and we profile new tenant Charles Thomas and Peter Blair QC's recent Supreme Court case. Sam Jones summarises three recent developments in the law including the latest Court of Appeal decision on defence statements. The lead article comes from Kerry Barker who calls on recent experience to provide a useful guide on instructing and using expert witnesses.

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If you have any feedback or questions with regards to this newsletter please address these to Mary Cowe at mary.cowe@guildhallchambers.co.uk.

James Bennett, Editor

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Team news

2010 proved to be another busy and significant year for the Crime Team. Members were involved in many high-profile cases which received national recognition and awards. Twelve team members retained their positions as leading silks (3) and leading juniors (9) in crime by the independent law guides Chambers UK and the Legal 500. Nicolas Gerasimidis, Brendon Moorhouse, Anna Vigars and Rupert Lowe all debut this year taking the total to fifteen ranked team members – more than any other crime team on the circuit.

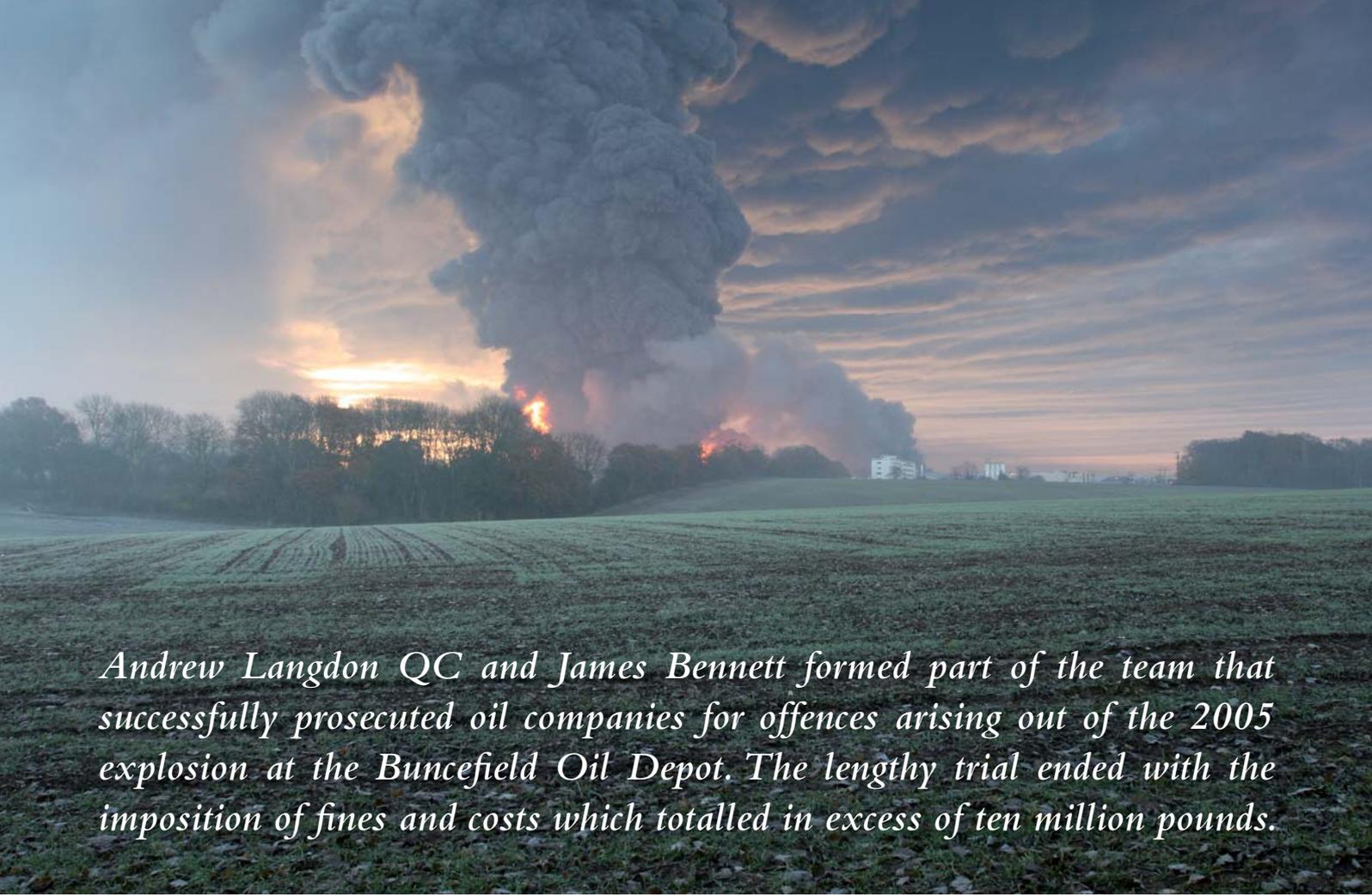
Four team members were also ranked as leading silks (Andrew Langdon QC and Peter Blair QC) and leading juniors (Ian Dixey and James Bennett) in the field of criminal health, safety and regulatory work – more than any other set outside of London. Further recognition of Chambers' strength in this specialist field came in the form of Andrew Langdon

QC and James Bennett (together with Richard Matthews QC and Bond Pearce Solicitors led by Partner Jon Cooper) winning the Attorney General's Team of the Year Award 2010. They formed the team that successfully prosecuted oil companies for offences arising out of the 2005 explosion at the Buncefield Oil Depot. *Continued on page 2...*

CHARLES THOMAS

Charles, formerly of One Paper Buildings, London, is our newest tenant. Charles was called in 1990 and has extensive experience in the most serious of criminal cases including murder, rape and serious frauds. He recently appeared as a leading junior in a trial alleging repeated rapes, false imprisonment and wounding with intent to cause grievous bodily harm. The case involved allegations of bigamy and issues of law concerning the validity of a wedding under Sharia law. Charles also adds considerable strength to our cricket team. You have been warned!





Andrew Langdon QC and James Bennett formed part of the team that successfully prosecuted oil companies for offences arising out of the 2005 explosion at the Buncefield Oil Depot. The lengthy trial ended with the imposition of fines and costs which totalled in excess of ten million pounds.

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Andrew Langdon QC was also one of three silks shortlisted for the title of Health & Safety Silk of the Year at the annual Chambers Bar Awards 2010.

Peter Blair QC and Anna Vigers were appointed to the list of Defence Counsel for the UN Special Tribunal to Lebanon. The tribunal sits in the Hague and will be dealing with alleged offences arising out of the explosion which killed former Lebanese Prime Minister Rafic Hariri and twenty-one others in Beirut on 14th February 2005. The prosecution settled indictments on 17th January 2011; the political ramifications are expected to be far reaching.

“The group has a strong following for serious and complex crime and fraud”

Legal 500 2010, Crime

Back in Bristol, significant cases in the year gone by include Nicolas Gerasimidis defending Little Ted's nursery worker Vanessa George, charged with making indecent images of children. George was the first person to be prosecuted for offences connected to the man described by the Crown as the 'ringleader' defendant, Colin Blanchard. Other cases in which members were involved which generated a great deal of public interest were Andrew Langdon QC defending former CPS barrister Saf Ibrahim in an unprecedented prosecution alleging that Ibrahim accepted a bribe to 'drop' a fictitious prosecution following an elaborate undercover police operation; and Richard Smith QC defending care-home manager Rachel Baker on charges of murdering elderly patients at Parkfields Residential Care Home.

Over in Swansea, James Bennett and James Haskell (with Nicholas Dean QC) are prosecuting fourteen people including twelve police officers, with Andrew

Langdon QC defending, for offences arising out of the alleged wrongful conviction of the Cardiff three for the murder of Lynette White in 1988. This follows Bennett and Haskell successfully prosecuting the 'eye-witnesses' for perjury in an earlier trial – believed to be the first convictions in British legal history arising out of one of the celebrated miscarriage of justice cases investigated by one of the old Serious Crime Squads. Another case likely to be of legal significance in the future is Kerry Barker's prosecution of the first person to be convicted twice under the controversial Hunting Act 2004 which included evidence gathered by the League Against Cruel Sports. This followed Kerry's role as lead counsel for the DPP in the leading case on the Act – *DPP v Wright* [2009] EWHC 105 (Admin).

Moving up to the north of the circuit, Christopher Quinlan and the prosecution team won a Gloucestershire Criminal Justice Award 2009/2010. Christopher led the prosecution in a high profile sexual offences case involving seven victims at Bristol Crown Court resulting in a sentence of 19 years imprisonment. The Court of Appeal subsequently upheld the conviction for rape based upon the hearsay evidence of one of the seven victims who died before the trial.

James Patrick was appointed to the Circuit Bench and will be sorely missed. James is sitting in crime on the South Eastern Circuit but we hope will be coming back to Bristol from time to time.

Further afield (no pun intended) Kerry Barker's race horses won the Price-WaterhouseCooper's chase at Limerick (Cornas) and the John Hills Memorial Novice Chase at Taunton (Clouseau), and finished second in the Queen's Cup, Melbourne (CapeCover). Footage and tips are available from Kerry.

“Guildhall Chambers houses ‘an impressively strong range of barristers at all levels’”

Chambers UK 2011, Crime



SFO COURT VICTORY OVER MABEY AND JOHNSON KICKBACKS TO THE IRAQI GOVERNMENT

Peter Blair QC, working for the Serious Fraud Office, appeared before the Supreme Court on the 6th December 2010 in successfully resisting a Defence attack on the validity of the law under which he is prosecuting companies and individuals for paying back-handers/kickbacks to the former Iraqi Government of Saddam Hussein. The Supreme Court dismissed the attempt to declare ultra vires an Order in Council passed under the United Nations Act 1946 and, after a 4 week trial at Southwark Crown Court, both Defendants were convicted.

Recent key developments



Murder

Coroners and Justice Act 2009 (Commencement No 4, Transitional and Saving Provisions) Order 2010 (SI 816 of 2010)

On 4th October 2010, sections 52 and 54 to 56 of the Coroners and Justice Act 2009 were brought into force amending the Homicide Act 1957. In respect of the partial defence to murder of diminished responsibility, section 52 expresses the law in more medically acceptable language, replacing the words 'abnormality of mind' with 'abnormality of mental functioning' and the phrase 'recognised medical condition' replaces the now outdated list of reasons for the abnormality. Sections 54 to 56 replace the common law partial defence to murder of provocation with the new partial defence of loss of control, shifting the emphasis away from retaliatory violence and towards a fear of serious violence. The new provisions will apply to any murder which occurs on or after the commencement date.

Defence statement

G [2010] EWCA Crim 1928

The Court of Appeal has given helpful guidance about the contents of defence statements setting out a series of general propositions to assist those dealing with what 'may sometimes be difficult marginal situations'.

- Where there is no defence statement or the defence statement is lacking important information, the court cannot punish failure to comply as contempt. The sanction for non-compliance is for an adverse inference to be drawn at trial.
- What a Defendant is required to disclose in a defence statement are the material points of what his defence will be at trial. He is not required to disclose his confidential discussions with his advocate, nor is he obliged to incriminate himself.

- The obligation to file a defence statement is a statutory obligation on the Defendant. A lawyer cannot properly advise a defendant not to file one.
- The lawyer's duty is to explain the statutory obligation and to explain the consequences which follow from disobedience of it.

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In the difficult cases where a Defendant has no positive case but refuses to plead, the defence statement must say that the Defendant does not admit the offence or the relevant part of it, and call for the Crown to prove it. However, it must also say that he advances no positive case because if he is going to advance a positive case that must appear in the defence statement, and notice of it must be given.

Crediting periods on bail subject to qualifying curfew

R v Boutell and Ricketts [2010] Crim 2054

This Court of Appeal decision illustrates the practical problems generated by the Criminal Justice Act 2003 section 240A. At sentence, where a judge has used words encompassing custody on remand but has not expressly mentioned qualifying curfew, the words used can be understood to encompass the period on curfew. The presumption is that the judge, if giving credit for time on remand, would, if he had been aware of it, have given credit for days spent on a qualifying curfew. In contrast, where nothing at all is said about time on remand in custody, the Crown Court has no power to deal with the matter and the Court of Appeal must make the appropriate adjustment.

Sam Jones

Expert evidence in criminal proceedings



1 "In matters of science or trade, the opinion of an expert, or person intimately acquainted with it, is admissible to furnish the court with information which is likely to be outside the experience and knowledge of a judge or jury. If, on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary: *R v Turner (T)* [1975] QB 834, 60 Cr. App. R 80" (Archbold 2011 para 10-64, p 1360).

2 The Criminal Procedure Rules 2010 provide:

PART 33 EXPERT EVIDENCE

Contents of this Part

Reference to expert.....	rule 33.1
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Note. For the use of an expert report as evidence, see section 30 of the Criminal Justice Act 1988.

Reference to expert

33.1 A reference to an 'expert' in this Part is a reference to a person who is required to give or prepare expert evidence for the purpose of criminal proceedings, including evidence required to determine fitness to plead or for the purpose of sentencing.

Expert's duty to the court

- 33.2 (1) An expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise.
- (2) This duty overrides any obligation to the person from whom he receives instructions or by whom he is paid.
- (3) This duty includes an obligation to inform all parties and the court if the expert's opinion changes from that contained in a report served as evidence or given in a statement.

Content of expert's report

- 33.3 (1) An expert's report must:
- (a) give details of the expert's qualifications, relevant experience and accreditation;

- (b) give details of any literature or other information which the expert has relied on in making the report;
- (c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;
- (d) make clear which of the facts stated in the report are within the expert's own knowledge;
- (e) say who carried out any examination, measurement, test or experiment which the expert has used for the report and:
- (i) give the qualifications, relevant experience and accreditation of that person;
- (ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision; and
- (iii) summarise the findings on which the expert relies.
- (f) where there is a range of opinion on the matters dealt with in the report:
- (i) summarise the range of opinion; and
- (ii) give reasons for his own opinion.
- (g) if the expert is not able to give his opinion without qualification, state the qualification;
- (h) contain a summary of the conclusions reached;
- (i) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty; and
- (j) contain the same declaration of truth as a witness statement.

- (2) Only sub-paragraphs (i) and (j) of rule 33.3(1) apply to a summary by an expert of his conclusions served in advance of that expert's report.

Note. Part 27 contains rules about witness statements. Declarations of truth in witness statements are required by section 9 of the Criminal Justice Act 1967 and section 5B of the Magistrates' Courts Act 1980. A party who accepts another party's expert's conclusions may admit them as facts under section 10 of the Criminal Justice Act 1967. Evidence of examinations etc on which an expert relies may be admissible under section 127 of the Criminal Justice Act 2003.

Service of expert evidence

- 33.4 (1) A party who wants to introduce expert evidence must:
- (a) serve it on:
- (i) the court officer, and
- (ii) each other party;

- (b) serve it:
 - (i) as soon as practicable, and in any event; and
 - (ii) with any application in support of which that party relies on that evidence.
- (c) if another party so requires, give that party a copy of, or a reasonable opportunity to inspect:
 - (i) a record of any examination, measurement, test or experiment on which the expert's findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and
 - (ii) anything on which any such examination, measurement, test or experiment was carried out.
- (2) A party may not introduce expert evidence if that party has not complied with this rule, unless:
 - (a) every other party agrees; or
 - (b) the court gives permission.

Expert to be informed of service of report

33.5 A party who serves on another party or on the court a report by an expert must, at once, inform that expert of that fact.

Pre-hearing discussion of expert evidence

- 33.6 (1) This rule applies where more than one party wants to introduce expert evidence.
- (2) The court may direct the experts to:
- (a) discuss the expert issues in the proceedings; and
 - (b) prepare a statement for the court of the matters on which they agree and disagree, giving their reasons.
- (3) Except for that statement, the content of that discussion must not be referred to without the court's permission.
- (4) A party may not introduce expert evidence without the court's permission if the expert has not complied with a direction under this rule.

Note. At a pre-trial hearing, a court may make binding rulings about the admissibility of evidence and about questions of law under section 7 of the Criminal Justice Act 1987; sections 31 and 40 of the Criminal Procedure and Investigations Act 1996; and section 45 of the Courts Act 2003.

Court's power to direct that evidence is to be given by a single joint expert

- 33.7 (1) Where more than one Defendant wants to introduce expert evidence on an issue at trial, the court may direct that the evidence on that issue is to be given by one expert only.
- (2) Where the co-defendants cannot agree who should be the expert, the court may:
- (a) select the expert from a list prepared or identified by them; or
 - (b) direct that the expert be selected in another way.

Instructions to a single joint expert

- 33.8 (1) Where the court gives a direction under rule 33.7 for a single joint expert to be used, each of the co-defendants may give instructions to the expert.
- (2) When a co-defendant gives instructions to the expert he must, at the same time, send a copy of the instructions to the other co-defendant(s).
- (3) The court may give directions about:
- (a) the payment of the expert's fees and expenses; and
 - (b) any examination, measurement, test or experiment which the expert wishes to carry out.
- (4) The court may, before an expert is instructed, limit the amount that can be paid by way of fees and expenses to the expert.
- (5) Unless the court otherwise directs, the instructing co-defendants are jointly and severally liable for the payment of the expert's fees and expenses.

Court's power to vary requirements under this Part

- 33.9 (1) The court may:
- (a) extend (even after it has expired) a time limit under this Part; and
 - (b) allow the introduction of expert evidence which omits a detail required by this Part.
- (2) A party who wants an extension of time must:
- (a) apply when serving the expert evidence for which it is required; and
 - (b) explain the delay.

3 In addition to those rules there is now a significant body of case law to be found in the various divisions of the Court of Appeal and High Court in England and Wales over the past few years.

4 The most important cases are:

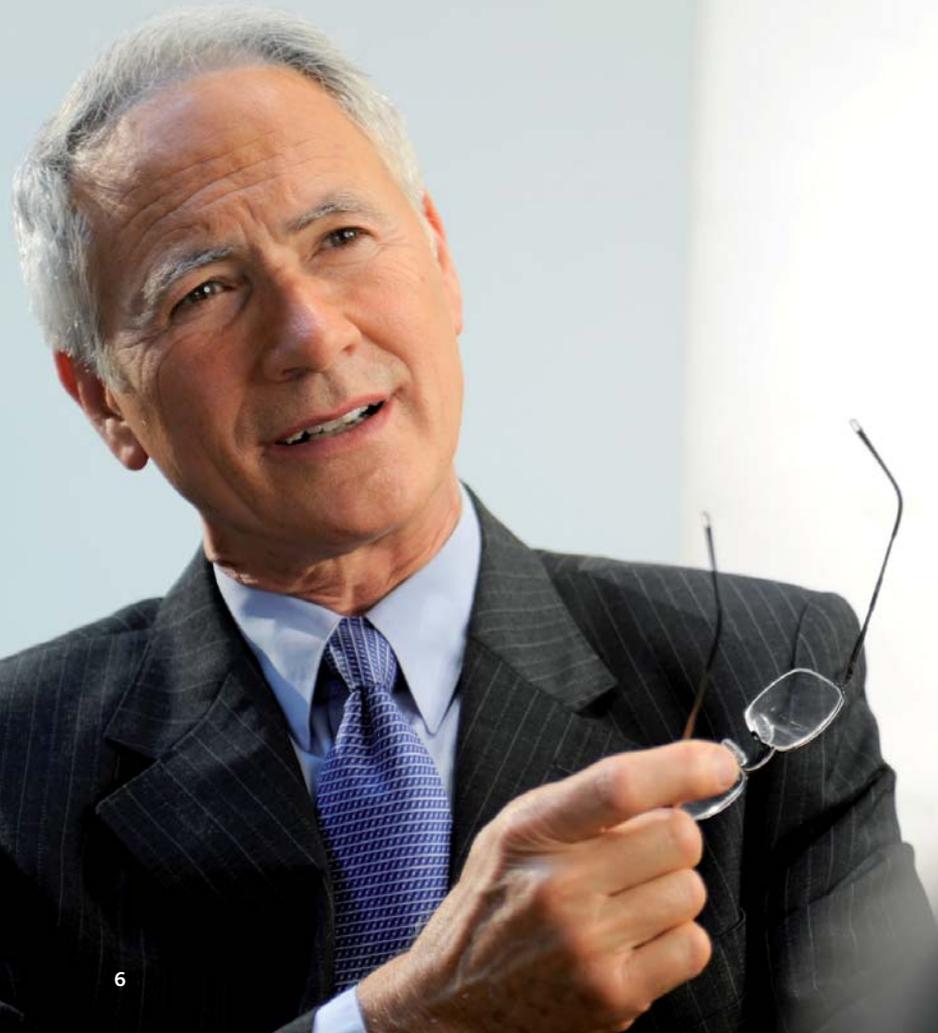
- 1 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* (No.1) [1993] 2 Lloyd's Rep. 68 (QBD (Comm)).
- 2 *Re R (A Minor)(Experts' Evidence)* [1991] 1 FLR 291
- 3 *R v Harris (Lorraine)* [2005] EWCA Crim 1980; [2006] 1 Cr. App. R. 5 (CA (Crim Div)).
- 4 *A County Council v K, D and L* [2005] EWHC 144 (Fam), [2005] 1 FLR 851.
- 5 *R v B* [2006] EWCA Crim 417; [2006] 2 Cr. App. R. 3 (CA (Crim Div)).
- 6 *Oldham Metropolitan Borough Council v GW, PW, KPW (A Child by His Guardian)* and Forbes (Intervener) [2007] EWHC 136 (Fam), [2007] 2 FLR 597.

5 The starting point in considering the duties of experts was the well known observation of Tomlin J in *Graigola Merthyr Co Ltd v Swansea Corporation* [1928] 1 Ch 31 at page 38 that:

"long cases produce evils ... In every case of this kind there are generally many "irreducible and stubborn facts" upon which agreement between experts should be possible and in my judgment the expert advisers of the parties, whether legal or scientific, are under a special duty to the court in the preparation of such a case to limit in every possible way the contentious matters of fact to be dealt with at the hearing. That is a duty which exists notwithstanding that it may not always be easy to discharge."

- 6 The most important event in recent legal times was the distillation of the principles governing expert evidence by Cresswell J in the *Ikarian Reefer* case. They were:
 - 1 An expert witness should at all stages in the procedure, on the basis of the evidence as he understands it, provide independent assistance to the court and the parties by way of objective unbiased opinion in relation to matters within his expertise. This applies as much to the initial meeting of experts as to evidence at trial. An expert witness should never assume the role of an advocate.
 - 2 The expert's evidence should normally be confined to technical matters on which the court will be assisted by receiving an explanation, or to evidence of common professional practice. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.
 - 3 He should cooperate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending without prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely arrears of disagreement to be set out in the joint statement of experts ordered by the court.
 - 4 The expert evidence presented to the court should be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.
- 5 An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
- 6 An expert witness should make it clear when a particular question or issue falls outside his expertise.
- 7 Where an expert is of the opinion that his conclusions are based on inadequate factual information he should say so explicitly.
- 8 An expert should be ready to reconsider his opinion, and if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity.
- 7 Cresswell J's distillation was approved by the Court of Appeal [1995] 1 Lloyd's Rep 455.
- 8 Both the Civil Procedure Rules and the Criminal Procedure rules underlined those duties.
- 9 From the later cases the following additional principles can be set out (for 'him' also read 'her'):
 - 1 **In a report for the court the expert must include:**
 - (a) As well as details of the expert's academic record, professional qualifications and range of experience, the expert must also set out the limitations, if any, on his expertise.

An expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise.



- (b) The substance of the instructions received, the questions upon which an opinion was sought, the materials provided and considered, and the information or assumptions that were material to the opinions expressed.
- (c) Information about who carried out measurements and tests, the methodology and whether they were supervised by the expert.
- (d) Where there was a range of opinion in the matters dealt with in the report, a summary of the range of opinion and the reasons for the opinion given.
- (e) In relation to the expert's opinion any material facts or matters that detracted from the expert's opinion and any points that should fairly be made against any opinions expressed should be set out.
- (f) Relevant extracts of literature or other material that might assist the court.
- (g) A statement that the expert has complied with his duty to the court to provide independent assistance by way of objective unbiased opinion and an acknowledgement that the expert would inform all parties and where appropriate the court if his opinion changed on any material issue.
- (h) Great care has to be exercised when placing reliance on materials that had not been produced either as "original medical (or other professional) records" or in response to an instruction from a party, as those materials might contain assumptions as to the standard of proof, the admissibility of evidence and other procedural questions.
- (i) Once instructed experts should conform to the best practice of their clinical training and, in particular, should describe their own professional risk assessment process and/or the process of differential diagnosis that had been undertaken, highlighting factual assumptions, deductions therefrom and unusual features of the case.
- (j) An expert should set out contradictory or inconsistent features. He should identify the range of opinion on the question to be answered, giving reasons for the opinion held. He should highlight whether a proposition was a hypothesis or an opinion deduced in accordance with peer reviewed and tested technique, research and experience accepted as a consensus.
- (k) An expert should highlight and analyse an "unknown cause".
- (l) The use of a balance sheet approach to the factors that supported or undermined an opinion could be of great assistance.
- (m) If an expert considers that insufficient data is available to allow him to come to a final conclusion this must be stated with an indication that the opinion is a provisional one.
- (n) If, after an exchange of reports, an expert witness changes his view on a material matter {having read the other expert(s)' report(s)}, such a change of view must be reported to the parties without delay.

2 Instructions

- (a) Information provided to an expert witness is not "legally privileged" and, if material, must be included in the expert's report.
- (b) 'Instructions' comprise not only written instructions but also anything said to an expert prior to sending formal instructions or following his receipt of those instructions. So careful records must be kept of all conversations with expert witnesses. Conferences with expert witnesses must be carefully recorded. In most cases things discussed at such conferences will become part of the instructions given to the expert.
- (c) The instructions should make it clear to the expert that he is not the decision maker and it will be for the court to determine

whether or not a matter is proved to either the criminal or civil standard of proof. So for example, when dealing with the death of or injuries to a person, the expert should not be asked to express a view as to the cause of death, injuries or harm on a balance of probabilities or beyond reasonable doubt but should be asked to:

- (i) identify possible causes of the relevant death, injuries or harm, setting out in respect of each the reasons why it might be a cause and thus why it should be considered;
 - (ii) state his view as to the likelihood of each possibility being the cause of the relevant death, injuries or harm and the reasons why he includes or rejects it as a reasonable (as opposed to fanciful or merely theoretical) possible cause;
 - (iii) compare the likelihood of the cause (or causes) identified as reasonable possibilities being the actual cause or the relevant death, injuries or harm;
 - (iv) state whether he considers that a cause (or causes) is (are) the most likely cause (or causes) of the relevant death, injuries or harm and their reasons for that view; and
 - (v) state whether they consider that a cause (or causes) is (are) more likely than not to be the cause (or causes) of the relevant death, injuries or harm and his reasons for that view.
- (d) An expert should be asked at the earliest stage and in any event should volunteer whether another expert was required to bring a skill or expertise not possessed by those already involved or in the rare case a second opinion to a key issue that had been identified, and if possible what the question was that should be asked of that expert.

3 Disclosure

- (a) It is likely that all information provided to an expert (including verbal conversations) will be disclosable, especially if taken into account by the expert in reaching a conclusion.
 - (b) Great care must be taken, therefore, not to provide privileged information (for example advice given to the police by the Crown Prosecution Service or advice given to a client by a solicitor) to the expert witness. Once provided it will be disclosable.
 - (c) The same considerations apply to discussions or conferences with expert witnesses.
 - (d) In relation to a defence expert there is an equal duty of disclosure if that expert is to be relied upon in court.
- 10** Especial care is needed if the expert to be relied upon is part of the investigating authority, for example an experienced traffic officer or a member of the Health and Safety Executive. It is better practice to formally instruct such an expert who has not been involved in the initial investigations rather than to use an officer who has undertaken such duties. If that expert is part of the investigating or prosecuting authority steps should be taken to enable the independence of the expert to be established with strict rules as to instructions and communications.
- 11** The fact that a witness is employed by the prosecutor and was involved in the investigation of the case goes to the weight of his evidence rather than its admissibility. (See, for example, *R v Paul Matthew Stubbs* [2006] EWCA Crim 2312 where the Court of Appeal upheld the admission of the evidence of an employee of a bank as to the operation of the bank's security and computer systems which evidence provided the framework to the prosecution's case. The position held by the employee and the importance to the bank of the security of its computer systems were matters that went to the weight to be afforded to the witness' evidence rather than its admissibility.)
- 12** Whilst this note is intended to be helpful to its readers it cannot replace a careful study of each of the authorities.

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