

**Law Commission Consultation:  
Pre-trial assessment of the reliability  
of expert evidence**

Chris Pamplin PhD  
*Editor, UK Register of Expert Witnesses*

Society of Expert Witnesses  
24 April 2009

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**The Law Commission**

The aims of the Law Commission

- To ensure that the law is as fair, modern, simple and as cost-effective as possible.
- To conduct research and consultations in order to make systematic recommendations for consideration by Parliament.
- To codify the law, eliminate anomalies, repeal obsolete and unnecessary enactments and reduce the number of separate statutes

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**The consultation**

"Our main proposal sets out a clear admissibility test for expert evidence to replace the present application of the tests of 'relevance and reliability'. Under the test, expert evidence would be admissible only if it is sufficiently reliable to be considered by the fact-finding tribunal (that is, the jury in a Crown Court jury trial). To accompany this test we also set out proposed guidelines to assist Crown Court trial judges (and magistrates' courts) to determine whether proffered expert evidence is sufficiently reliable to be considered."

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## The consultation

"The parties in criminal trials are relying increasingly on the evidence of expert witnesses. Expert evidence, particularly scientific evidence, can have a very persuasive effect on juries. It is vital that such evidence should be used only if it provides a sound basis for determining a defendant's guilt or innocence. There have been miscarriages of justice in recent years where prosecution expert evidence of doubtful reliability has been placed before Crown Court juries. There may also have been unwarranted acquittals attributable to such evidence. We want to ensure that the criminal courts have the means to authenticate expert evidence and be satisfied that the information before them is sound. We have formulated some provisional proposals and questions, and would like to know what others, particularly scientists and other experts, think of them."

*Professor Jeremy Horder, Law Commissioner*

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## The scope

Just criminal courts...for now!

"The Commission proposes a new test for determining whether expert evidence should be admitted in a **criminal trial**. It also recommends new guidelines for **Crown Court judges** and **magistrates' courts** to help them determine whether expert evidence is sufficiently reliable to be admitted."

Restricted to England and Wales

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## The problem

- Steady stream of criminal appeals featuring criticism of the expert evidence
- Much of the criticism unfounded
- It often wasn't the expert opinion itself that was a root cause of a miscarriage...
- ...but the courts willingness to choose between the conflicting opinions of, often, eminent experts
- When this is done in a case that features little evidence other than the expert evidence there is a much-increased risk of a miscarriage of justice being perpetrated

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## Dangers in the system

- Liberal approach to the admission of expert evidence
- Providing the court is convinced that the proposed expert evidence is relevant to some issue in the case it will allow the evidence to be adduced
- It is for the parties to test the expert evidence through the adversarial process *at trial*
- For the court to determine what evidential weight ought to be applied
- Courts recognise opinion evidence is a special type of evidence. It deserves special handling if it is to inform, rather than mislead, the court

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## Admissibility

There are 4 factors that control admissibility of expert evidence in common law

1. the subject matter requires expertise to understand
2. **the subject matter is drawn from a body of work that is sufficiently well developed as to be 'reliable'**
3. the person giving the evidence is an expert in the subject matter, and
4. the expert must be capable of giving an impartial opinion.

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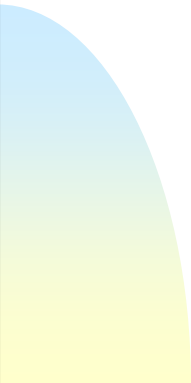
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## Types of gate-keeper

The Law Commission proposes creating a new "gate-keeper" function for the court.

- ◆ Frye test
- ◆ Daubert test
  - Theory has been tested
  - Peer review
  - Known rate of error
  - Widespread acceptance

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## Proposal 1 – The test

- 1) The opinion evidence of an expert witness is admissible only if the court is satisfied that it is sufficiently reliable to be admitted.
- 2) The opinion evidence of an expert witness is sufficiently reliable to be admitted if:–
  - a) the evidence is predicated on sound principles, techniques and assumptions;
  - b) those principles, techniques and assumptions have been properly applied to the facts of the case; and
  - c) the evidence is supported by those principles, techniques and assumptions as applied to the facts of the case.
- 3) It is for the party wishing to rely on the opinion evidence of an expert witness to show that it is sufficiently reliable to be admitted.

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## Proposal 1 - Science

In determining whether **scientific** (or purportedly scientific) expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors and any other factors considered to be relevant:

- a) whether the principles, techniques and assumptions relied on have been properly tested, and, if so, the extent to which the results of those tests demonstrate that they are sound;
- b) the margin of error associated with the application of, and conclusions drawn from, the principles, techniques and assumptions;

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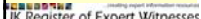
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## Proposal 1 - Science

In determining whether **scientific** (or purportedly scientific) expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors and any other factors considered to be relevant:

- c) whether there is a body of specialised literature relating to the field;
- d) the extent to which the principles, techniques and assumptions have been considered by other scientists – for example in peer-reviewed publications – and, if so, the extent to which they are regarded as sound in the scientific community;

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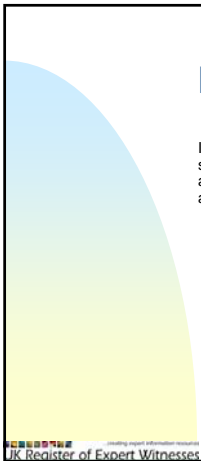
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### Proposal 1 - Science

In determining whether **scientific** (or purportedly scientific) expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors and any other factors considered to be relevant:

- e) the expert witness's relevant qualifications, experience and publications and his or her standing in the scientific community;
- f) the scientific validity of opposing views (if any) and the relevant qualifications and experience and professional standing in the scientific community of the scientists who hold those views; and

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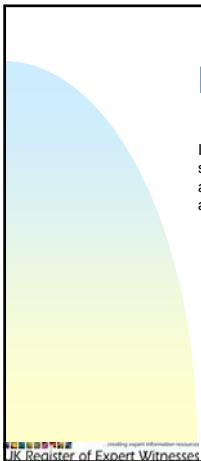
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### Proposal 1 - Science

In determining whether **scientific** (or purportedly scientific) expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors and any other factors considered to be relevant:

- g) whether there is evidence to suggest that the expert witness has failed to act in accordance with his or her overriding duty of impartiality.

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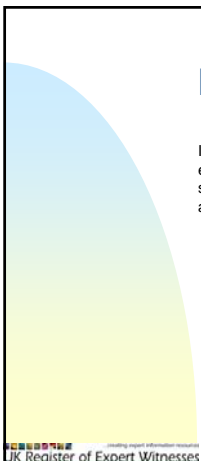
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### Proposal 1 - Experience

In determining whether **experience-based** expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors (where applicable) and any other factors considered to be relevant:

- a) the expert's qualifications, practical experience, training and publications and his or her standing in the professional or other expert community;

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### Proposal 1 - Experience

In determining whether **experience-based** expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors (where applicable) and any other factors considered to be relevant:

- b) the extent to which the basis and validity of the expert's opinion can be explained, with particular reference to:
  - i) the extent to which the basis of the opinion (for example, any assumption relied upon) has been verified or discredited;
  - ii) the specific instances which support the claim to experience-based expertise;
  - iii) the bearing those instances have on the matter(s) in issue; and
  - iv) whether the expert's methodology or reasoning has previously resulted in a demonstrably valid or erroneous opinion;

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### Proposal 1 - Experience

In determining whether **experience-based** expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors (where applicable) and any other factors considered to be relevant:

- c) whether there is a body of specialised literature relating to the field of expertise and, if so:
  - i) the extent to which it supports or undermines the expert's methodology and reasoning; and
  - ii) the extent to which the expert's methodology and reasoning are recognised as acceptable amongst his or her peers;

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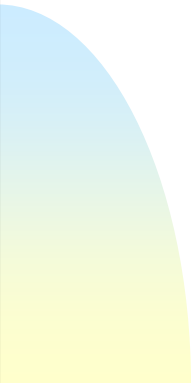
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## Proposal 2

The "onus of persuasion" falls on the party wishing to adduce evidence.

"The party tendering the evidence would need to demonstrate that the expert's hypothesis and methodology comprise a reliable basis for the expert testimony. In accordance with the Criminal Procedure Rules, the expert would have a duty to provide details of research findings which undermine the validity of his hypothesis or reasoning."

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## Court-appointed assessors

- Trial judge to provide a reasoned decision on admissibility
- Make reference to the criteria for assessing evidentiary reliability
- In exceptional cases, judge may call upon an independent assessor

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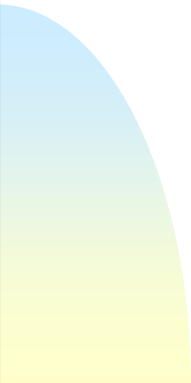
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## Judicial education

The Law Commission believe that judges (and criminal practitioners) should receive practical training on the methodology of science, the standards for determining the statistical significance of research findings and how to determine the reliability of experience-based expertise.

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## Accreditation of expert witnesses

Law Commission sees merit in a non-compulsory system of accreditation of expert witnesses

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## Important point

Importantly, at no stage of this inquiry into the reliability of the underpinning body of knowledge is it incumbent on the judge, the parties or the experts to show or determine if the opinion given by the expert is actually correct. The test is only whether the opinion is grounded in a body of knowledge that is itself deemed reliable.

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## Special type of evidence

Expert evidence may be

- ◆ Pretty much factual
- ◆ Based on experience
- ◆ Opinion

Court recognises opinion as a special type of evidence

- ◆ Not suited to traditional adversarial approach
- ◆ Unwillingness of juries to accept uncertainty
- ◆ Courts willing to accept majority verdicts

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### Adversarial challenge

What ought to happen is for

- ◆ the opinion evidence itself to be probed
- ◆ test and challenge its basis in science or experience

How often does the barrister turn from this difficult task and use familiar techniques to simply undermine the credibility of the expert?

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### Workable in practice?

In order to work, these proposals would require all experts to be able to demonstrate that their opinions are drawn from a sufficiently reliable body of knowledge. Is this practical? Would it tend to bar some categories of evidence that find such objective validation of their underpinning methodologies difficult to achieve?

What we would need is judges who are critical consumers of science, not judges who are scientists.

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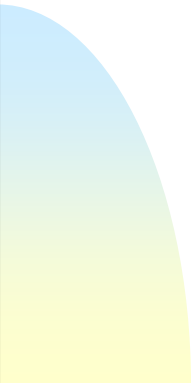
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### Testing against past cases

- Dallagher
- Clark
- Cunnings
- Harris

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## Do they go far enough?

A case for *Daubert* hearings

When the complexity of the expert evidence in a trial warrants it the court should have the ability to call a pre-trial hearing at which the judge, the lawyers and the expert witnesses come together to critically appraise the expert evidence.

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## Contact information

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e-mail: [chris@jspubs.com](mailto:chris@jspubs.com)

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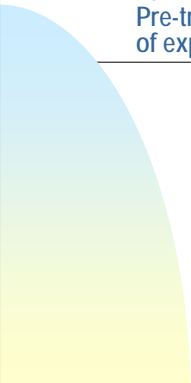
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## Law Commission Consultation: Pre-trial assessment of the reliability of expert evidence

Chris Pamplin PhD  
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24 April 2009

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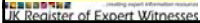
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## The consultation

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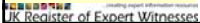
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## The scope

Just criminal courts...for now!  
Restricted to England and Wales  
Consultation period runs to 7 July 2009

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## The problem

Criminal appeals featuring criticism of expert evidence  
Much of the criticism unfounded  
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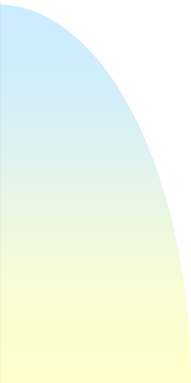
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## Dangers in the system

Liberal approach  
relevant to some issue in the case  
expert evidence tested through the adversarial process  
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For the court to determine what evidential weight ought to be applied

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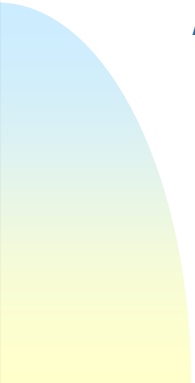
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## Admissibility

There are 4 factors that control admissibility of expert evidence in common law

- the subject matter requires expertise to understand
- the subject matter is drawn from a body of work that is sufficiently well developed as to be 'reliable'
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- the expert must be capable of giving an impartial opinion.

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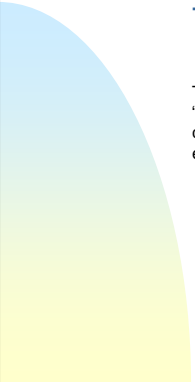
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## Types of gate-keeper

The Law Commission proposes creating a new "gate-keeper" function for the court to improve the court's determination of the evidentiary reliability of expert evidence.

Frye test  
Daubert test

- + Theory has been tested
- + Peer review
- + Known rate of error
- + Widespread acceptance

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## Proposal 1 – The test

- 1) The opinion evidence of an expert witness is admissible only if the court is satisfied that it is sufficiently reliable to be admitted.
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## Proposal 1 - Science

Determining whether **scientific** (or purportedly scientific) expert evidence is sufficiently reliable to be admitted.

- a) principles, techniques and assumptions tested and sound;
- b) margin of error;
- c) body of specialised literature;
- d) regarded as sound in the scientific community;
- e) expert's qualifications, experience and publications and standing in the scientific community;
- f) the scientific validity of opposing views and standing of people holding such views; and
- g) evidence the expert witness has not been impartial.

*See bottom right of page 17 in booklet*

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## Proposal 1 - Experience

determining whether **experience-based** expert evidence is sufficiently reliable to be admitted

- a) expert's qualifications, practical experience, training and publications and standing in the expert community;
- b) the soundness of the expert's opinion with particular reference to how the claim to expertise arises, its application to the current matter and the outcome of any previous use of the expert's approach;
- c) any body of specialised literature relating to the field of expertise
- d) peer acceptance of the expert's methodology and reasoning
- g) evidence the expert witness has not been impartial.

*See bottom left of page 18 in booklet*

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## Proposal 2

The "onus of persuasion" falls on the party wishing to adduce evidence.

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*Law Commission*

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### Court-appointed assessors

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### Judicial education

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### Accreditation of expert witnesses

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### Important point

Importunately, at no stage of this inquiry into the reliability of the underpinning body of knowledge is it incumbent on the judge, the parties or the experts to show or determine if the opinion given by the expert is actually correct. The test is only whether the opinion is grounded in a body of knowledge that is itself deemed reliable.

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### Special type of evidence

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Pretty much factual  
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Court recognises opinion as a special type of evidence  
Not suited to traditional adversarial approach  
Unwillingness of juries to accept uncertainty  
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### Adversarial challenge

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