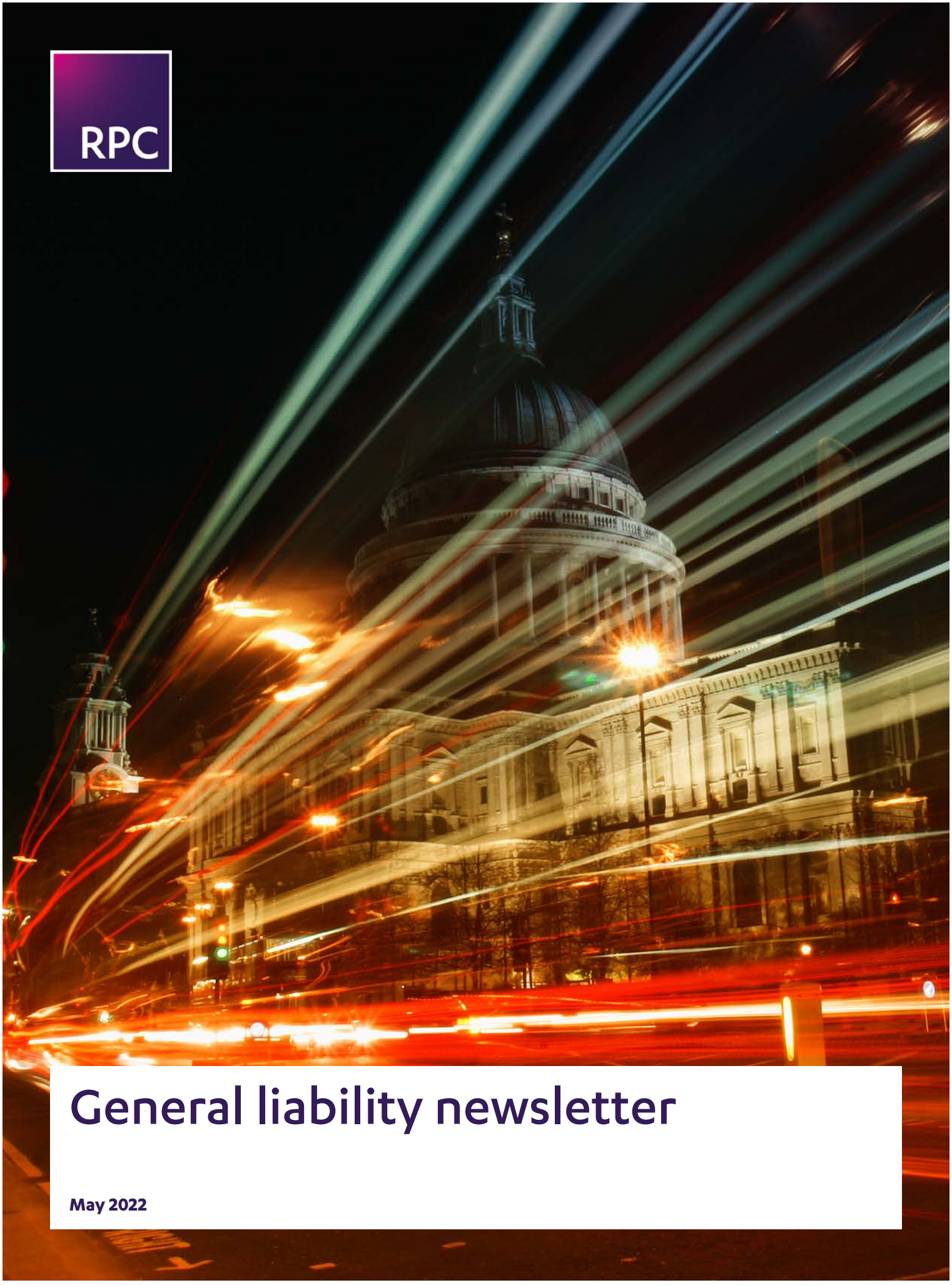

General liability newsletter

May 2022

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Introduction

Welcome to the latest edition of our general liability newsletter. In this edition we look at the way the courts have approached contentious points arising from expert witness evidence. We hope you enjoy this update.

Expert evidence – your expert is not 'your' expert

Whilst the courts seek to keep the use of expert evidence in litigation to a minimum, the use of expert evidence in some types of litigation is a prerequisite for bringing a claim. For example, the Practice Direction to CPR 16 requires a Claimant to serve a medical report with the Particulars of Claim if the Claimant wants to rely upon medical evidence. In claims for soft tissue injury, a medical report is mandatory. It would be impractical for historic disease claims to be brought without supporting medical and other expert evidence relating to the level of exposure to the alleged cause of the injury.

Because issues of causation and the extent of injury are essential elements to all injury claims, there is a close connection between the role of the expert instructed by the legal representatives of both Claimants and Defendants. There is usually significant cost associated with instructing an expert. An adverse report by an expert can hinder a claim being brought or being defended. Such factors might tempt an expert to provide a report favourable to the instructing party, but this might be counterbalanced by the reputational damage arising from exposure as an expert willing to provide a partisan report.

This article considers various scenarios where the court has considered what it regards as expert evidence; where it has been asked to decide the extent to which expert evidence may be challenged or excluded; and how to approach the situation where one party is dissatisfied with the opinion of an opponent's expert and wishes to challenge it.

Can lay witness evidence ever be regarded as expert evidence?

It has long been established that the evidence of a factual witness must be restricted to facts and must not include opinion evidence. Opinion evidence falls within the scope of expert evidence which the court might allow to be relied upon to help the judge reach an informed conclusion of the evidence as a whole.

The court has considered two cases to determine whether reconstruction evidence from a factual witness fell into the category of factual or expert evidence.

In *Cherian v Cambridge University Hospitals NHS Foundation Trust* [2020] EWHC 3601 (QB) (25 November 2020) the Claimant was refused permission to rely upon expert evidence. A witness statement was later served on behalf of the Claimant which included evidence about the type of stool involved in the accident, together with evidence about another type of stool, and video evidence to support the contention that the stool used by the Defendant was unsafe. The Defendant objected to this evidence, saying that it was expert opinion evidence. At first instance the judge agreed with the Defendant but the judge hearing the Appeal allowed the Claimant to rely upon some of the evidence.

The Appeal judge was referred to the 2012 High Court decision of *Blair-Ford v CRS Adventures Ltd* [2012] EWHC 1886. This is the famous "welly-wanging" case in which the Claimant was seriously injured when he fell forwards whilst throwing a wellington boot backwards between his legs in a contest. In that case the Claimant had been allowed to adduce factual evidence of various alternative (and allegedly safer) ways in which the boot could be thrown.

The judge in the *Blair-Ford* case was guided by the decision in a previous criminal case which had decided that information about tests and experiments carried out by witness of fact could be admitted as factual evidence provided the evidence was confined to the tests that had been performed and the results of those tests.

The Appeal judge in the *Cherian* case followed the same principle and allowed the Claimant's witness to include evidence about the stool, provided the evidence was limited to observational facts.

The judge ordered that those parts of the statement which strayed into opinion evidence should be omitted.

It follows that reconstruction evidence may be included in a statement given by a factual witness. However, the judge pointed out that at trial the quality of the reconstruction evidence was open to challenge and it was for the trial judge to decide whether the evidence was relevant and potentially helpful to determine liability.

A medical expert is not obliged – and should not attempt – to protect a litigant's credibility

The credibility of a party in relation to expert evidence was considered in *Radia v Marks* [2022] EWHC 145 (QB) (26 January 2022). After dismissing the Claimant's claim for disability discrimination against his former employer, the court dismissed his Appeal against the consequential costs order against him and then assessed the Defendant's costs at £600,672.66.

The claim had been dismissed largely because the court found the Claimant to be an unreliable witness. The Claimant then brought a new action for negligence against Professor Marks, who had been instructed on a joint basis in the initial litigation, alleging he had failed to notice discrepancies between what the Claimant had told him and the information provided in his medical records. At the trial of the claim against his employer, these discrepancies had been considered, along with other evidence, to justify dismissing the claim.

The claim against Professor Marks, which sought to recover the Claimant's costs liability, was dismissed. The judge considered that whilst the Professor would probably have noticed the discrepancies if he had considered the medical records more carefully, the Professor's oversight was partly caused by late provision of medical records in a disorganised state, and that if the discrepancies had been noticed, the likely outcome would simply have been earlier discovery of the discrepancies. The judge commented that the Claimant's solicitors had the same opportunity to identify the discrepancies as the Professor (but had not done so) and that the Professor's failure to notice this was not a breach of duty.

The judge also decided that in any event any negligence by the Professor would have had no causative effect on the outcome of the Claimant's original claim, which would have been dismissed anyway.

Some important practice points come from the judgment.

The question of whether a Claimant is a reliable witness is not something that an expert is competent to address. Such considerations fall outside the area of expertise of an expert witness, and the credibility of the Claimant is a matter solely for the court.

Therefore, comments by experts such as "Mr X appeared to be a straightforward claimant. He gave a clear history" and "as there is no reason to disbelieve Mr X it would be reasonable to suggest in my opinion that ...." should properly not be found in medical reports, though they commonly are.

Where a medical expert identifies discrepancies between the account given by a Claimant at examination and the medical records, the expert must not contact the Claimant to discuss this, or omit the Claimant's account, but should state the differing accounts in the medical report. Doing otherwise is inconsistent with the expert's overriding duty to the court.

In summary, an expert's duty does not extend to correcting or ignoring inconsistencies with the Claimant's evidence or advising Claimants or their solicitors on any issue of credibility.

Abandoning an expert instructed on a joint basis

What is one to do if a joint expert expresses an opinion adverse to your case? Can you instruct your own expert? That depends upon the circumstances of the case. The principles set out in *Bulic v Harwoods* [2012] EWHC 3657 were approved and followed by the High Court in *Hinson v Hare Realizations Ltd (2)* [2020] EWHC 2386 which was a Noise Induced Hearing Loss claim. However, the result was different in each case.

In *Bulic* there was a dispute about the cause of engine seizure in a Jaguar car. An engineer was instructed on a joint basis but after the report was prepared, the Claimant considered that the expert had provided an inadequate analysis of the engine failure. He had no confidence in the engineer's expertise, and was concerned about his potential bias, having been subsequently instructed by Jaguar Land Rover.

Shortly before trial, the Claimant applied for permission to instruct his own engineer. The application was dismissed but allowed upon Appeal to the High Court. The Appeal judge decided that expert evidence was central to the main issue between the parties and that the court was likely to derive more assistance from comparing two experts on technical matters; that the concerns about the expert's expertise were sufficient to justify allowing the Claimant to rely upon evidence from another expert; and that the value of a claim should not alone determine whether a party should be allowed to adduce further evidence where the evidence was technical and central to the claim.

In *Hinson* the expert instructed on a joint basis believed the Claimant was not exposed to noise likely to cause injury to the Claimant. After the trial had been adjourned twice because of listing problems, the Claimant's solicitors became aware through expert opinion in another claim that the analysis of the joint expert had not considered noise factors which indicated that the Claimant might have been exposed to higher noise levels than those calculated. The Claimant's application, shortly before trial, for permission to rely upon new expert evidence was dismissed.

In dismissing the Claimant's application, the Recorder:

- Gave effect to the overriding objective of dealing with cases justly and at proportionate cost. Regarding this, the judge thought that Part 35 questions could have been put to the joint expert so that answers could have been provided in time not to jeopardise the trial date.
- Decided that the low value of the claim was relevant but not conclusive.
- Accepted that the Claimant had lost confidence in the joint expert with good reason but thought that in this case the joint expert had not displayed lack of cogency or analysis or impartiality, and that the trial judge might anyway prefer the evidence of the joint expert.
- Thought that the decision in *Bulic* did not establish a precedent that compelled the court to adjourn a trial however late the application was made, solely because the joint expert's report was essential to the case and of a technical nature, and a party had good reason to lose confidence in the expert.
- Considered the balance of interests between the parties in the alternative circumstances of not adjourning the trial or adjourning the trial and allowing the new expert's evidence.
- Took everything into account and then exercised discretion not to adjourn the trial and not to allow further expert evidence.

The Appeal from that decision was also dismissed.
The Appeal judge:

- Agreed that the *Bulic* case set out the correct approach to applications to abandon a single joint expert.
- Agreed with Lord Woolf's statement in *Daniels v Walker* (Practice Note) [2000] 1 WLR 1382 which was referred to in *Bulic*, that the fact a party has agreed to a joint expert report does not prevent that party being allowed to obtain a report from another expert or to rely on the evidence of another expert, if appropriate and subject to the discretion of the court.
- Referred to the significance of the overriding objective, the overall justice to the parties, and to the assessment of justice to the parties being fact-sensitive to each case.
- Thought that the approach of the Recorder had been impeccable.

These cases indicate that the court is willing to allow a party unhappy with the opinion of a joint expert to rely upon further expert evidence under certain circumstances.

The need for further expert opinion must be central to an issue in dispute and must be justified by identifying specific and significant shortcomings in the joint expert's analysis such that there is a significant risk that the expert's opinion is unreliable.

The expert opinion being challenged should probably be technical in nature and central to the case, such that the court would benefit from another opinion.

The later the application to rely upon further expert evidence, and particularly if permission to rely upon further expert evidence would lead to a trial being vacated, the more importance the court will likely attach to the overriding objective in connection with allocation of court resources and the increased costs burden on the opposing party. The claim value is likely to be a factor, but not a determining one.

Challenging your opponent's expert's opinion if it is the only opinion – Identifying flaws in an expert's analysis is essential for the court to permit alternative evidence to be relied upon

In low value claims the court commonly restricts expert evidence to that obtained by the Claimant and restricts the Defendant to putting questions to the Claimant's expert. Where a Claimant obtains a medical report before sending a Letter of Claim, the disease pre-action Protocol allows the Defendant to rely upon evidence from another expert, though judges can be reluctant to permit this.

If, for whatever reason, the only expert evidence the court permits is that of the expert instructed by the Claimant, what can a Defendant do if unhappy with that opinion? Trial by expert is something that courts have always sought to avoid. Expert opinion should just inform the judge, so that it can be considered with all the other evidence.

The usual approach, which is incorporated in standard Directions, is to allow an opponent to put questions to the expert. However, the questions permitted under CPR Part 35 are limited to seeking clarification of the expert's opinion. When experts consider that questions put to them are not properly confined to clarification, they are encouraged to discuss this with their instructing solicitors and resolve the issue before applying to the court for guidance. Questions which challenge an expert's approach or analysis are likely to be regarded as akin to cross-examination rather than clarification, and the instructing solicitors might encourage the expert to ask the court for guidance rather than encourage the expert to answer the question.

In *Griffiths v Tui* (a holiday sickness claim) the Defendant had put questions relating to causation to the Claimant's expert who provided answers which did not directly address the points being asked. The expert was not called to give evidence at trial and therefore was not cross-examined. The Defendant's closing argument included submissions that the inadequacies in the Claimant's medical evidence meant that the Claimant had failed to discharge the burden of proof regarding causation. At first instance the Court agreed and dismissed the claim. The decision was reversed in the High Court which decided that a medical report which substantially complied with CPR 35 would be accepted unless challenged by evidence.

However, on further Appeal the Court of Appeal on 7 October 2021 decided by majority of two to one that a Defendant could challenge the opinion of an opponent's expert at trial despite the expert not being cross examined. In reaching this decision it was the view of the court that it was the unsatisfactory nature of the expert's replies that led to the trial judge deciding that the Claimant had failed to meet the burden of proof in relation to causation. The dissenting judge considered this to amount to trial by ambush.

The circumstances in *Griffiths v Tui* were unusual in that the circumstances had arisen when the Defendant had failed to serve its own medical evidence on time and was barred from relying upon it. Usually the claim proceeds based upon the Claimant's report alone. So, what to do in the usual circumstances?

This kind of issue was explored in *Taylor v Tui* on 22 January 2021 by the County Court at Newcastle upon Tyne. The Defendant put written questions to the Claimant's expert. The expert answered the questions, but the Defendant wanted to cross-examine the Claimant's expert at trial and applied to the court to do so. Permission was refused because the Defendant had not identified any flaw in the report that indicated the expert's conclusions could not be sustained. The judge considered that a Defendant had to identify specific matters upon which it was proposed the expert should be cross-examined.

Probably the best time to raise issues about the reliability (or lack of it) of an expert's opinion is in the pleadings. This can then be used as the basis for seeking Directions to rely upon other expert opinion. This approach is supported by CPR 16 Practice Direction 12.1 which says that where the claim is for personal injuries and the Claimant has attached a medical report in respect of his alleged injuries, then if the Defendant disputes any part of the medical report, the reasons for doing so should be stated in the Defence.

If the Directions issued by the court limit an opponent to Part 35 questions, then the points made in the Defence or other pleading can be put directly to the expert who will have the opportunity to provide further information to either justify or modify the original opinion. If the answers are unsatisfactory then there will be further opportunity to apply to the court for permission to obtain further expert opinion or cross-examine the expert.

Experts who fail to demonstrate independence may have their evidence excluded

In *Patricia Andrews & Ors v Kronospan Limited* (7 March 2022 EWHC 479 (QB)) the litigation had proceeded to the point where the parties' experts were required to discuss the issues and provide a joint statement.

During discussions and preparation of the joint expert statement, the Claimants' expert sent drafts of the joint statement to his instructing solicitors who responded by making comments and suggestions. The expert also informed the Claimants' solicitors of the progress and some of the content of the joint discussions. The Defendant's solicitors became aware of the correspondence and applied to the court, objecting to the Claimants' expert.

The judge's main concern was that the communications and the approach of the Claimants' expert suggested that the expert regarded himself as an advocate for the Claimants, rather than as an independent expert whose primary obligation is to the court. The judge concluded that the serious transgressions by the Claimants' solicitors and the expert were such that the court had no confidence in the expert's ability to act in accordance with his obligations as an expert witness, and revoked permission for the Claimants to rely upon him. Because of the nature of the claim (which was for nuisance) the judge permitted the Claimants to instruct another expert.

Whilst this case concerned correspondence between an expert and his instructing solicitors at the joint experts' statement stage of proceedings, the same principles relating to the independence of an expert witness arguably applies at the time when the initial report is being prepared (an example being the case of *Radia v Marks*, discussed above). An expert who provides a draft report to the instructing solicitors for comment before a final report is prepared risks the evidence being excluded if the correspondence indicates a lack of independence by the expert.

Summary

Where expert evidence is relied upon to support a claim, the courts will be slow to allow alternative expert evidence to be adduced or to allow cross examination of an expert at trial unless an opponent can demonstrate that it is against the interests of justice to limit the trial judge's access to expert opinion to that of the current expert alone. For practical purposes this means that an opponent must be able to refer the court to inadequacy in the approach or analysis by the expert, or otherwise demonstrate that the expert's opinion is unreliable.

In some cases, this can be identified easily. For example, failure to seek or consider medical records before giving an opinion on causation brings a medical opinion into question. An assertion that a review of medical records is not necessary because doing so would not alter an opinion is an indicator of inadequate analysis and potential bias.

A follow-up report dealing with points not considered in an initial report might be (but is not necessarily) an indication of discussion of the content of the initial report between the expert and instructing solicitors which might be evidence of expert bias. A long period between the date when a Claimant is examined, and the date of the report might also indicate that the report has been modified following representations to the expert.

These issues should be addressed when proceedings are served because they can then be identified and brought to the Court's attention in pleadings and then by Part 35 questions if necessary, which will more smoothly facilitate the conduct of the claim to settlement or trial.

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