

# Evaluating Expert Witness Psychological Reports: Exploring Quality

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## Summary report February 2012

### Acknowledgements

Research conducted with funds from the Family Justice Council (an independent body, funded by the Ministry of Justice), provided to the University of Central Lancashire. The views expressed in this report are those of the author and not the Family Justice Council or the University of Central Lancashire. This also represents a summary report and is not the final write up for publication in an academic journal. Thanks are expressed in particular to the Courts that supported data collection.

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## Summary

The current research represents a preliminary study applying guidance given in the *Civil Procedure Rules Practice Direction* (UK) to assess the quality of expert psychological assessments presented in Family Courts. It also aims to draw upon admissibility criteria for expert evidence which has been developed in other jurisdictions, but is likely to have increasing influence in the UK, such as the US developed *Daubert* criteria. The current study examined 126 expert psychological reports submitted in family court proceedings. They covered both adult and child assessments and were obtained from three courts. There were four independent raters. Using a largely qualitative approach, the study indicated concerns regarding both the qualification of a small section of experts and regarding the quality of the reports produced. Over three-quarters of experts were qualified, of which over three quarters clinical psychologists, around a tenth educational psychologists, and a tenth forensic psychologists<sup>1</sup>. Each report was rated with regards to its consistency with the expected content of expert reports as indicated by the Civil Procedure Rules (2005, 2010), the extent to which the psychometrics used fulfilled recognised rules for the admissibility of expert evidence (i.e. *Daubert* criteria<sup>2</sup>), coupled with an overall assessment of the quality of the report with regards to process. Results indicated wide variability in report quality with evidence of unqualified experts being instructed to provide psychological opinion. One fifth of instructed psychologists were not deemed qualified on the basis of their submitted Curriculum Vitae, even on the most basic of applied criteria. Only around one tenth of instructed experts maintained clinical practice external to the provision of expert witness work. Two thirds of the reports reviewed were rated as ‘poor’ or ‘very poor’, with one third between good and excellent. This preliminary study concludes with suggestions for ensuring good quality reports are produced for use by courts in family proceedings and how the instruction of appropriate experts can be enhanced.

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<sup>1</sup> Some experts reported to be dual qualified, e.g. clinical and educational.

<sup>2</sup> *Daubert v Merrell Dow Pharmaceuticals* [1993] 509 US 579

## Background

Research assessing the quality of expert psychological reports presented within courts has not been conducted to date. There are broader concerns regarding the term 'psychologist' not being legally protected, with only the adjunct titles protected (i.e. forensic psychologist, educational psychologist, counselling psychologist, clinical psychologist, sports and exercise psychologist and health psychologist). This has failed to protect against those who are not qualified using a variety of terms (e.g. child psychologist, consultant psychologist, principle psychologist) to suggest qualification. Such a system has promoted confusion among those wishing to instruct an expert psychologist. Further difficulties are encountered in ensuring instruction is of a psychologist who remains in treatment or assessment practice outside the sole provision of expert reports. These are issues that have been recognised and over the last few years a number of experienced Clinical, Forensic and Educational psychologists working for the British Psychological Society's Regulatory Committee, the body that looked at complaints against psychologists, agreed that a number of psychological reports they had seen in connection with complaints made by the public, concerning reports presented in Family Courts, were of questionable quality for a variety of reasons. What could not be determined was whether or not such reports were confined to the few cases seen or were representative of a larger number of reports.

The Rt Hon Lord Justice Wall and Ian Hamilton (2007) also raised concerns in relation to the use of psychometric testing and the inappropriateness of psychologists becoming involved in the testing of the reliability of any party to the case, since this falls within the remit of the presiding Judge. Lord Justice Wall went on to quote the Court of Appeal in saying that if psychometric tests are used, it would be necessary to enquire into the validity of the test employed. This collectively highlights the need to explore the content and ultimate quality of psychological reports in more detail. Indeed, the British Psychological Society has recently extended the remit of its working party on expert witnesses to capture such issues, making report quality high on its agenda.

Currently courts are left to judge the quality of a report that essentially falls outside their content specialism. Although the quality of the process can be assessed

using the Civil Procedure Rules (2005, 2010<sup>3</sup>) as a guide (e.g. presentation of the report; evidence of facts underlying opinion), the specialist content cannot. This is particularly true of family court where proceedings are private and access to subject specialist reports is not routinely permissible. This restricts the peer review of such reports. This is not true of other legal proceedings, specifically quasi-court (e.g. tribunals, parole board hearings), where subject specialists are routinely requested to comment on the quality of an expert submission.

Admissibility criteria for expert evidence is also currently limited in the UK and restricted to the *Turner rule*<sup>4</sup>, namely is the evidence outside typical knowledge and thus admissible on the grounds of *helpfulness*. Such criteria does not allow for direct testing of evidence content. *Daubert* is a more detailed test of quality developed in the US and is an update of the US 1923 *Frye* criteria<sup>5</sup> which deemed testimony could only be admitted if generally accepted in the field. In *Daubert v Merrell Dow Pharmaceuticals*, it was ruled that the 1975 *Federal Rules of Evidence* took precedence. This led to the development of detailed admissibility criteria which have been applied widely in the US and have been considered for inclusion in the UK system, albeit with amendments<sup>6</sup>. The core elements of this were that the evidence had to be based on a testable theory or technique; that it had been subject to peer review; has a known error rate with standards in place to control its use; and was based on generally accepted science. Criteria of this nature, although applying more strictly to psychometric tests used by psychological experts, do assist with beginning the process of exploring the quality of report content. It has been applied to both scientific and non-scientific testimony (e.g. *Kumho Tire Co v Carmichael*<sup>7</sup>).

There is an overall need to review how evidence is being admitted and in particular how expert psychological evidence is being employed. There have been a range of recent UK cases involving other types of expert evidence (e.g. *Clark [Sally]*<sup>8</sup>, *Cannings*<sup>9</sup>,

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<sup>3</sup> Civil Procedure Rules. Department for Constitutional Affairs, *Practice Direction –Experts and Assessors*. [www.dca.gov.uk](http://www.dca.gov.uk)

<sup>4</sup> [1975] QB 834 841

<sup>5</sup> *Frye v. United States* [1993] 293 F 1013

<sup>6</sup> The Law Commission Consultation Paper No 190. *The admissibility of expert evidence in criminal proceedings in England and Wales: A new approach to the determination of evidentiary reliability: A consultation paper*. 2009.

<sup>7</sup> [1999] 526 US 137; a US case.

<sup>8</sup> [2003] EWCA Crim 1020

<sup>9</sup> [2004] 2 Cr App R 7. *Cannings* is often cited alongside *Clark* owing to similarities of issues.

*Dallagher*<sup>10</sup>) which have questioned the admissibility of poor expert testimony. This supports the need for continued review across expert work (Ireland, 2008<sup>11</sup>; Omerod & Roberts, 2006<sup>12</sup>). Although the early use of experts focused on medical testimony, the advent of concepts such as ‘psychological injury’ and ‘psychological risk assessment’ have led to increasing scope for ‘psychological experts’ to be called upon to provide evidence<sup>13</sup>. The history of the psychological expert, as with the use of other experts, has met difficulty. Research has identified a range of criticisms of psychological reports in general. These include occasions where:

- Psychological evidence has been presented as scientific fact when in fact it is speculation and conjecture (Hagan, 1997<sup>14</sup>);
- There has been an absence of psychological theory;
- Evidence has been provided concerning concepts which are not accepted within the field and have not been demonstrated empirically. At times this has had a negative impact on the outcomes of proceedings (e.g. with one of the most heavily criticized concepts being that of ‘recovered memory’<sup>15</sup>);
- There has been a failure to provide evidence which is outside the knowledge of the typical judge or juror (i.e. being inconsistent with the *Turner* rule<sup>16</sup>);
- Psychometric evidence has been submitted as scientific fact when it does not meet the criteria for this (e.g. *Daubert* criterion). Rather the evidence has represented specialised knowledge at most, with some submitted psychometric evidence based on research and not clinical assessment tools<sup>17</sup>;

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<sup>10</sup> [2002] EWCA Crim 1903

<sup>11</sup> J. L. Ireland (2008). Psychologists as Witnesses: Background and Good Practice in the Delivery of Evidence. *Educational Psychology in Practice*, 24 (2) 115 - 127.

<sup>12</sup> D Omerod & A Roberts. (2006). Expert evidence: Where now? Where next? *Archbold*, 5, June, 5- 9.

<sup>13</sup> (n 11)

<sup>14</sup> Hagan, M.A. (1997). *Whores of the Court: The Fraud of Psychiatric Testimony and the Rape of American Justice*. New York: Harper-Collins, US. A book focusing on challenges with both psychological and psychiatric expert evidence in the US which first raised the issue of problematic expert evidence.

<sup>15</sup> (n 14, 11)

<sup>16</sup> (n 12)

<sup>17</sup> (n 11)

- An over-use of psychometrics, not all of which are applicable to the case being assessed. Over-use of jargon and speculation, with poor content and style and a failure to include the data from where inferences are drawn (Weiner, 1999<sup>18</sup>);
- The credibility of the source has not been included, with no attempt made to evaluate the reliability and validity of the methods used to collect data<sup>19</sup>;
- Psychological risk assessments have focused on first and second generation approaches (e.g. unstructured clinical and actuarial) as opposed to the more reliable and valid third generation approaches (structured clinical, with or without actuarial anchoring) (Boer et al, 1997<sup>20</sup>; Grove et al, 2000<sup>21</sup>; Hart, Michie & Cooke, 2007<sup>22</sup>; Walters, 2006<sup>23</sup>; Yang, Wong, & Coid, 2010<sup>24</sup>);
- Allegations have been reported as facts<sup>25</sup>;
- Emotive terms have been applied where these could prejudice a decision (Goodman-Delahunty, 1997<sup>26</sup>).

There has been no research conducted to date within family proceedings that has considered the quality of psychological reports by subject specialists (i.e. by other psychologists who act as expert witnesses). Assessing the quality of such reports would allow for ‘quality criteria’ to be developed that would assist courts in their judgment of the extent to which the psychological opinion can be submitted and the weight that should be placed upon it. Considering the quality of current reports in terms of process and style would serve to assist with making improvements to the Family Justice System by allowing

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<sup>18</sup> I. B. Weiner (1999) ‘Writing Forensic Reports’ in A.K. Hess and I.B. Weiner (1999) *The Handbook of Forensic Psychology*. John Wiley & Sons, Inc: Chichester.

<sup>19</sup> (n 18)

<sup>20</sup> D. P. Boer, S. D. Hart, R. Kropp, and C. D. Webster (1997). *Sexual Violence Risk Scale – 20*. The Mental Health Law and Policy Institute, Simon Fraser University.

<sup>21</sup> W. M. Grove, D. H. Zald, B. S. Lebow, B. E. Snitz, & C Nelson (2000). Clinical versus mechanical prediction: A meta-analysis. *Psychological Assessment*, 12, 19-30.

<sup>22</sup> S Hart, C Michie, D Cooke. (2007). Precision of actuarial risk assessment instruments: Evaluating the margins of error of group v. individual predictions of violence. *British Journal of Psychiatry*, 109 (supplement 49), s60 – s65.

<sup>23</sup> G Walters (2006). Risk-Appraisal Versus Self-Report in the Prediction of Criminal Justice Outcomes: A Meta-Analysis. *Criminal Justice and Behavior*, 33(3): 279 - 304.

<sup>24</sup> M Yang, S Wong and J Coid (2010). The efficacy of violence prediction: A meta-analytic comparison of nine risk assessment tools. *Psychological Bulletin*, 136, 740 – 767.

<sup>25</sup> (n 8)

<sup>26</sup> J Goodman-Delahunty. (1997). Forensic psychological expertise in the wake of Daubert. *Law and Human Behavior*, 21 (2), 121 - 140.

transparency in the evaluation of expert [psychological] reports, in improving the quality of admissible evidence, and in assisting courts with what evidence they use in final judgments.

The aims and objectives of the current study are as follows:

1. Given the lack of research evidence in England and Wales on this issue, a small, largely qualitative study was undertaken to explore the quality of expert psychological reports submitted as part of family proceedings in a range of courts. This would seem to represent an essential first step in exploring this important area;
2. Using recognised experts in the field, the study aimed to judge quality by considering the qualifications of the experts and developing and applying a framework of quality measures drawn from the acknowledged *Daubert Criterion* and the guidance given in the *Civil Procedure Rules Practice Direction – Experts and Assessors*, to conclude if there was any cause for concern.
3. In light of its findings, the study aimed to make recommendations on how to ensure good quality reports are produced for use by the courts in family proceedings.

## **Method**

### Sample

One hundred and twenty-six reports were assessed. Of these, around two thirds (n= 87) were reports completed on adults and one third (n = 39) on children. These reports were located across 180 court bundles.

### Procedure:

#### *Raters*

Four raters took part. One was a registered clinical psychologist and three were registered forensic psychologists. All raters had between 12 and 34 years experience as qualified psychologists (average years service = 21 years), had worked as experts for family courts, with experience of working with both adults and children. All had received training in the CPR (Civil Procedure Rules) and were familiar with *Daubert*.

All raters were trained on the completion of the proforma used to rate reports. This consisted of a one hour period of explanation, including examples of what each criterion would relate to, with their first completed report assessed for consistency. In addition, the author of the proforma was present for all periods of rating to answer queries, with a further 10 percent of reports double-rated to check for reliability. This led to overall agreement of 87.2%. Each report that was double-rated was used as a means of revisiting the proforma to ensure continued consistency.

#### *Selection of courts*

Courts were chosen by the Family Justice Council, with DAP approval allowing access to three identified courts. The courts were selected on the basis that they engaged in a considerable amount of family court work and would allow for a wide geographical area to be covered. Courts from the North, Midlands, and South were consequently selected.

The chosen courts provided access to court bundles. Raters were provided with all court bundles from 2009 to 2011 which were thought to include expert reports<sup>27</sup>. Only bundles relating to public proceedings were accessed. One hundred and eighty bundles were consequently considered. This produced 126 expert psychological reports. Psychological reports were rated on site using the pre-determined proforma. No identifying details concerning the case or the psychologist were retained or removed from the sites. All quotes used from reports were anonymised.

#### *Acknowledged limitations of sample and procedure*

There are limitations to the study regarding sample size and methodology. This will be addressed in the results section. It is important to note, however, that the study was seeking to sample a range of reports submitted in family proceedings across the UK and was working within a system where expert *psychological* reports were not itemised or logged on court systems. This led unavoidably to some limitations in selection which the study sought to counter by focusing on content analysis as opposed to more quantitative analysis, and by including attention to inter-rater reliability. It is worth also noting that this is the first study of its kind in the UK and thus it serves as a preliminary study for future work, including reflection on how its chosen methods can be refined. It cannot therefore be concluded that the findings are either representative or not.

#### *Measure employed*

A specific ‘quality scale’ was developed to assess each report. There is no currently accepted means of assessing the quality of expert reports. As a result the proforma was based on the measurable *expectations* of report *content* from the Civil Procedure Rules and the elements taken from *Daubert*. It considered the areas of fact and opinion, method, process, qualification, and overall quality rating.

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<sup>27</sup> There is no system by which courts document whether or not a particular case included an expert. This information is not retained with systems logging court bundles. The courts reported that complex cases would most likely contain expert evidence. The Courts therefore provided raters with bundles from what they considered to be complex cases.

- 1) With regards to fact and opinion, on a scale of 1 to 5 (1 = not at all and 5 = completely), the raters assessed whether:
  - a. The report included the data from which inferences were drawn;
  - b. Each element of opinion could be linked back to a fact cited within the report;
  - c. The author had evaluated the quality of the evidence presented;
  - d. Theory was used to support clinical opinion;
  - e. Provisional opinion was included;
  - f. A range of opinion was included;
  - g. Allegations were reported as fact.
  
- 2) With regards to method, on a scale of 1 to 5 (1 = not at all and 5 = completely), the raters assessed the extent to which the psychometric evidence met Daubert for submission as scientific evidence. The extent to which they were relevant to the current case was also assessed, along with an outline of the methods used to determine risk (i.e. actuarial, clinical or structured-clinical) and the extent to which the method fitted with the instruction question.
  
- 3) Regarding process, on a scale of 1 to 5 (1 = not at all and 5 = completely) the extent to which emotive terms were used was assessed, along with the extent to which the report followed the structure of experts reports as dictated in the Civil Procedure Rules.
  
- 4) Regarding qualification, this was assessed on a scale of 1 to 5 (1 = not at all and 5 = completely) on the extent that:
  - a. The chosen expert had the required experience of mental health practice.
  - b. Based on their Curriculum Vitae, the extent to which they had the competence to complete the assessment and remain within their remit.

5) Finally, there was an overall quality rating based on a scale of 1 (very poor) to 5 (excellent).

## Results

The results are presented with regards to overall means (where appropriate) and using content analysis to identify the themes that could be ascertained from the reports considered<sup>28</sup>.

It must be acknowledged that although the research sought to control as many confounding variables as possible, that it is nonetheless a limited sample of expert psychological reports, using a new method of determining report quality.

It is also not possible to indicate how representative the sample of reports were; the courts chosen for involvement were identified by the Family Justice Council and the bundles chosen for consideration were selected by the courts themselves.

Steps were put in place to try and ensure the sample was as representative as possible. For example, the decision to sample reports from three geographical locations, to sample all available complex cases for a period of three years (2009 to 2011), and to employ checks for inter-rater reliability.

Despite expected methodological limitations, the themes identified from the assessed reports are useful in providing an initial view as to the quality of submitted expert psychological reports.

### Who completed the reports?

Of those experts completing the reports, over one fifth were unqualified and were not registered either with the Health Professionals Council (HPC) or the British Psychological Society (BPS). Of the qualified psychologists, over two thirds were clinical psychologists, with the remaining either educational or forensic psychologists. Just under one fifth of the sample referred to themselves as consulting psychologists<sup>29</sup>.

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<sup>28</sup> Concerns with regards to validity and reliability of the statistical analyses (i.e. tests of differences and regressions) conducted on the sample were raised as part of the peer review process. Concerns focused on the limited sample size and also the information adding little to the substance of the report. Consequently these analyses were removed and the results kept largely qualitative.

<sup>29</sup> The term 'psychologist' is not legally protected; only the adjunct titles are, i.e. forensic psychologist, clinical psychologist, educational psychologist, health psychologist, sport and exercise psychologist, counselling psychologist. Use of terms such as 'consultant psychologist', 'principle psychologist', 'child psychologist', 'criminal psychologist' etc, does not confirm the individual is a psychologist and/or is qualified to practice in an applied field.

Nine tenths of experts did not report a current assessment or treatment practice, with expert assessments their primary work.

From 2011 HPC registration to practice<sup>30</sup> and full membership of an applied division of the British Psychological Society (e.g. clinical, counselling, forensic etc) is a good indicator of qualification to practise and to provide court assessments. The current data suggests that one fifth of instructed psychologists were not qualified and did not meet the lowest benchmark for assessing this.

*Content: Fact and opinion*

Table 1 presents mean ratings across each content aspect, in rank order. Higher scores indicate more positive ratings. Ratings were calculated on a scale of 1 (not at all) to 5 (completely). These are presented overall and across those psychologists reporting to be a full member of a division (i.e. clinical, forensic and/or educational) versus those who did not appear qualified. The former group is thus described as ‘qualified applied psychologists’ and the latter as ‘unqualified applied psychologists’.

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<sup>30</sup> It is expected that all psychologists providing a service to the general public, of which expert work would form part, have to be registered with the Health Professionals Council (HPC). The HPC is now the regulatory body for psychologists. Any practicing psychologist providing a public service should be registered as a HPC practitioner.

Table 1: Mean ratings across fact and opinion content. Results shown overall and across psychologist type.

<b>Criteria (rank)</b>	<b>Overall</b>	<b>Qualified applied psychologists</b>	<b>Unqualified applied psychologists</b>
	Mean (sd/n)	Mean (sd/n)	Mean (sd/n)
The extent to which the report included the data from which it draws its opinion (1).	3.3 (1.31/ 126)	3.1 (1.3/100)	2.7 (1.23/26)
The extent to which the final opinion is linked back to the main body of the report (2).	2.9 (1.1/ 126)	2.9 (1.1/100)	2.7 (1.2/26)
The extent to which fact and opinion is clearly separated in the main body and the opinion (conclusion) section (3).	2.8 (1.3/ 126)	2.9 (1.2/100)	2.5 (1.4/26)
The extent to which the expert reports allegations as fact (4).	2.0 (1.2/126)	2.1 (1.2/100)	1.8 (1.2/26)
The extent to which they evaluate the quality of the evidence they present (5).	1.9 (1.3/ 126)	1.9 (1.4/100)	1.5 (.99/26)
The extent to which theory is used to support clinical opinion (6).	1.5 (.93/ 126)	1.6 (.95/100)	1.3 (.78/26)
The extent to which provisional opinion is included (7).	1.3 (.87/ 126)	1.3 (.90/100)	1.2 (.71/26)
The extent to which a range of opinion is included (8).	1.2 (.72/126)	1.2 (.78/100)	1.1 (.39/26)

Also examined were the qualitative responses provided for some of the questions indicated, namely the extent to which the report included the data from which it draws its opinion, and the extent to which the final opinion was linked back to the main body of the report. With regards to each:

*The extent to which reports included the data for their opinions.*

Raters were requested to indicate, for those reports which were assessed to have problems in the area of data-inclusion, what the specific difficulties were. This led to sixty-two

individual sets of comments from raters. These were content-analysed and resulted in eight distinct categories. These are presented in Table 2, in rank order.

Table 2: Problems in categories identified in the inclusion of data within the report (Proportions shown in rank order).

<b>Criteria (rank)</b>	<b>Overall % (n)</b>
Insufficient facts, goes straight to opinion (1).	29.0 (18)
Specific data missing but opinion still expressed (e.g. risk assessment, psychometric scores) (2).	22.6 (14)
Data not explained, unclear, or in the wrong place (3).	14.5 (9)
Limited opinion (4).	9.7 (6)
Considerable opinion not linked to data at all (5).	8.1 (5)
Unclear links/inappropriately referenced data (5).	8.1 (5)
Some opinion, not linked to data (7).	3.2 (2)
No opinion (8).	1.6 (1)

To illustrate examples concerning missing data, these are as follows:

- Reports on more than one child which failed to include the data on all children but still cited an opinion on all the children;
- Reports drawing conclusions which have not been mentioned in the report, as noted by one reviewer: “Indicates in conclusion that any individuals assessing this client should be knowledgeable of Aspergers type characteristics and the impact of this on parenting. This was never mentioned in the report, or assessed, and appeared as the last sentence” [rater comment].
- Reports where opinions are presented where data was completely absent, i.e. “Comments on self-esteem, emotional loneliness, perspective taking, sexual risk, but include no data” [rater comment].
- Reports where the data is completely missed, “Does not include fact section – goes straight to opinion” or “cites psychometrics but no scores” [rater comment].

- Report citing opinion without conducting a formal assessment, “stated that client presented as being of average intelligence without deficits in comprehension or expression, formal intelligence testing was not undertaken” [rater comment]. Further examples were: “he seemed, at times, to be quite a jumpy person with arousal levels higher than an average baseline. No assessment completed of this” and “did not assess for personality and yet draws opinion on it”.
- Refers to the opinion of another as their opinion, “Refers to someone else’s report in response to an instructed question” [rater comment].

*Extent to which the final opinion is linked back to the main body of the report*

Fifty-three reports were indicated to have problems in linking the final opinion to the body of the report. Raters were asked to provide observations, which were content-analysed and resulted in eight distinct categories. These are illustrated in Table 3, in rank order.

Table 3: Categories identified concerning problems with opinion being linked back to facts (Proportions shown in rank order).

<b>Criteria (rank)</b>	<b>Overall % (n)</b>
Specific background missing/unclear (1).	34.0 (18)
Limited opinion (2).	17.0 (9)
Opinion confused or not clearly explained (3)	17.0 (9)
No background, just opinion (4)	9.4 (5)
Some opinions, not linked to factors (4)	9.4 (5)
Opinions not substantiated (6)	7.5 (4)
Questions not answered (7).	3.8 (2)
No opinion (8).	1.9 (1)

To illustrate examples concerning problematic opinions, comments from raters on the assessed reports included:

- “No backed up opinion, one paragraph for each instruction question”;
- “Very little opinion; Thirteen lines of opinion and does not address the questions”;
- “Three pages of psychological assessment only”;
- “Poor, just has no opinion and refers to facts so readers can make their own mind up”;
- “Opinion very weak, report mainly a description of an interview that has little focus”;
- “Fails to answer any of the instruction questions”;
- “Huge assumptions expressed in the final opinion, not linked to facts e.g. sexual assault [unproven] may have led to angry acting out of Mrs X emotional turmoil”;
- “Psychometrics used but not referred to”.
- “Bases opinion on personality using the wrong measure”.

*Methods: Type of methods and relevance*

The results indicated that psychologists were using a wide range of tests to compile their reports. Over three quarters ( $n = 97$ ) of reports included some form of psychometric assessment. It was possible with these reports to rate how relevant the psychometrics were on the basis that they assisted the instruction question. Of these, one fifth were considered not relevant, two fifths ‘somewhat’ relevant and two fifths as ‘greatly’ or ‘completely’ relevant.

The average number of tests used were 2.6 (1.9 sd), with a range between one and 11. Across the 126 reports rated, there were 90 *different* sets of tests employed. This included research-focused tests, clinical tests, and some unidentified methods which appear to have been self-generated by the expert but presented as a ‘test’ (e.g. the ‘Life Snake Test’, ‘Buttons Test’, and ‘Time Machine’). Of all the tests used, only the cognitive tests (e.g. Weschler Scales), those used for assessing clinical psychopathy (Psychopathy Checklist and its associated scales) and some clinical scales (e.g.

Minnesota Multiphasic Personality Test) would perform well against *Daubert*. This was a difficult area to assess within the reports, however, since experts routinely failed to provide sufficient information concerning test nature and quality. There was also insufficient information provided to allow a court to judge if the test/approach would meet *Daubert* (e.g. no mention of error rates etc).

Raters made a number of comments on the reports rated as poor concerning the relevance of the psychometrics observed. Illustrative examples of comments taken from raters include:

- “Uses out of date psychometrics”.
- “Psychometrics used do not fit this population”.
- “Out of date intelligence tests used”<sup>31</sup>.
- “Uses a schema measure to assess personality, incorrect”.

With regards to psychological risk assessments, for general violence, 37 reports were asked to provide an assessment of violence risk. Of these, only three reports used a structured-clinical assessment<sup>32</sup>, with the remaining using clinical judgment alone. For sexual violence, 32 reports were asked to provide an assessment of sexual violence and of these only three completed a structured clinical assessment, less than three reports used actuarial, with the remaining assessments based on unstructured clinical judgment. For relationship violence, 41 reports were instructed to complete a risk assessment. Three of these reports used a structured clinical assessment with the remainder focused on unstructured clinical judgment alone. Those using structured-clinical assessment were all qualified applied psychologists.

Raters also assessed the extent to which the methods chosen were appropriate to the instruction questions. A third were considered either ‘not at all’ or ‘not much’. A third as ‘somewhat’ and the remaining third as ‘greatly’ or ‘completely’. Raters were asked to

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<sup>31</sup> Most comments focused on the use of the WAIS-R intelligence test, developed over 30 years ago but replaced in 1997 with the WAIS-III and later the WAIS-IV (2010). The WAIS-IV is the current method. Some experts were using the original WAIS which was developed in the 1950s and has been redundant since 1981.

<sup>32</sup> Structured clinical are recognised as the most reliable methods by which to conduct a risk assessment. They are routinely used in forensic and forensic-clinical practice and involve methods such as the HCR-20 for general violence, the SVR-20 for sexual violence, and the B-SAFER for relationship violence. Clinical judgement alone is intrinsically flawed and unreliable, with this recognised as such for over a decade (see n 20 – 24).

comment on the poorer reports. Presented next are some of the comments made by raters about the appropriateness of the methods chosen by the experts in these poorer reports:

- “Basically does not assess, just says significant learning disability”;
- “No interview conducted”;
- “Uses assistants to collect information and to complete the reading, just comments on their summarising”;
- “Does not conduct a sexual violence risk assessment. Says did actuarial but did not even do this, terrible”;
- “Uses the wrong test for this population”;
- “Out of date intelligence test”;
- “Out of date measures”;
- “Did not assess for personality properly”.

*Process: Use of language and CPR report structure adherence*

The use of language in the reports was rated with regards to the extent to which emotive terms were used, including the use of terms that could prejudice a case in the absence of fact (e.g. such as referring to an *alleged* victim of rape as a ‘victim of rape’ in the absence of fact). Three quarters of the reports were rated as not using such language (i.e. ‘not at all’ or ‘not much’). There were nonetheless some interesting examples of emotive language which included non-motivational expressions likely to disengage clients from the process of assessment. Examples included comments in the report from the experts themselves, such as:

- “Self centred young woman”;
- “He is dishonest”;
- “Over-familiar, conspiratorial manner”;
- “She is inadequate”;
- “He seemed grumpy”;
- “Petulant”;
- “Uncouth child”;

- “Extremely mischievous and vicious”;
- “She is a very needy adult”;
- “Her tone of voice was often childlike”;
- “Moaned, sulking, oppositional”;
- “Huffed and puffed”;
- “He tells lies”;
- “Mrs [X] is very self-centred....the quality of the interaction somewhat bizarre”.

Adherence to the Civil Procedure Rules (CPR) were examined in terms of the structure and expected content of expert reports. The CPR rules make recommendations regarding how reports should be formatted and presented. For example, the rules require the use of glossaries, reference sections, chronologies, numbered paragraphs, summary sections and detail on the qualification of experts and/or those assisting the expert. Just over two fifths of the reports were thought not to adhere to these rules (i.e. ‘not at all’ or ‘not much’), with the remainder equally split between ‘somewhat’ or ‘greatly’.

When this was explored in more detail using the qualitative comments made by the raters, there were 83 reports where raters had identified problems. Their comments were content-analysed and resulted in four distinct categories. These are illustrated in Table 4, in rank order.

Table 4: Categories identified concerning missing elements from the CPR (Proportions shown in rank order).

<b>Criteria (rank)</b>	<b>Overall % (n)</b>
Some content but missed sections (1).	60.0 (50)
No element of CPR was followed (2).	19.3 (16)
Poor formatting and missing sections (3)	14.5 (12)
Poor formatting only (4)	6 (5)

To illustrate examples concerning the CPR not being followed, comments made by raters which captured the core problems were;

- “None of it was followed – no element of CPR – just a general introduction”;
- “No appendices (e.g. glossary etc). All it had was numbered paragraphs, includes declaration but it is the wrong one”;
- “No footer, fact and opinion not separated”;
- “No numbered paragraphs, no glossary, nothing”;
- “Very chaotic structure, report all over the place, numbers paragraphs and includes CV but that is it”;
- “Written like a letter”;
- “Includes document list at the start, no paragraph numbers, does not follow the CPR until the conclusion where paragraph numbers appear”.
- “Nothing followed, paragraphs are numbered using a peculiar system e.g. A.a; A.aa; A.aaa; A.aaaa; A.aaaaa; A.aaaaa etc”.
- “Everything is bullet-pointed, not numbered. No background/chronology. No paragraphs in opinion section”;
- “CV included and double-spaced but nothing else. Says trained and report is CPR consistent but it is clearly not”.
- “Simply hopelessly confused and too much repetition of others reports”;

*Qualification: Reported experience, competence and remaining within remit*

Raters further assessed whether the expert’s CV included evidence of completing mental health assessments. Around one third of experts were deemed not to have experience of completing mental health assessments based on their CV.

In terms of competence to complete the instructed assessment, raters evaluated this by considering the instruction questions and the CV provided by the expert. Just over one fifth of experts were deemed not to have the competence to complete the instructed assessment, with a fifth felt to ‘somewhat’ have the competence and the remainder had their competence rated between “greatly” or “completely”.

Comments made by raters on the submitted expert CVs concerning competence and experience included:

- “Not completed any postgraduate level of qualification”;
- “...no specific forensic experience noted for what is a forensic assessment”;
- “States he had been employed as a clinical psychologist. Has not done clinical training, is an educational psychologist”;
- “No mental health experience or adult assessment experience”.
- “Psychotherapist asked to complete a psychological assessment”;
- “Assessed an adult but only indicated experience in children and adolescents”;
- “Not a qualified applied psychologist, no qualified experience, academic, assessing children”;
- “No child experience apart from a six month placement”.

Regarding whether or not the expert remained within their remit, raters again evaluated this by considering the instruction questions, opinion indicated and the CV provided by the expert. One fifth of experts were deemed to have strayed out of their remit as psychologists, either by commenting on non-psychological issues or issues within the remit of the Judge, with another fifth felt to ‘somewhat’ have stayed within remit. The remainder were judged to have remained within remit “greatly” or “completely”. Excerpts from the expert reports which illustrated occasions where experts commented outside of their area of expertise included;

Straying into medical opinion:

- “Even smoking cigarettes will have a serious impact on his health given the present condition of Mr X’s lungs”;
- “Given the symptoms, I think this child is suffering from diarrhoea”.

Straying into the remit of the Judge:

- “I am unable to recommend that X returns to the care of his mother.....I have little confidence in her ability to provide him with the quality of care and parenting he requires”.
- “I am of the view that these children have all suffered significant harm”;

- “I am not of the view that it would be appropriate for X and X to be cared for by their mother.....I am of the opinion that these children would have their needs best met by being placed for adoption”;
- “I would recommend that Mr X be allowed to return to the family home”.

Straying into the remit of Social Work:

- “The birthday preparations for X are evidence of her ability to prioritise her money for her children”;
- “The back garden was of moderate size and contained a swing”;
- “The carpeted lounge area looked in need of vacuuming”.

Straying outside of the instructed report:

- “Comments on mother and provides opinion when report and assessment was on the children [rater comment]”;
- “The dog X was extremely well behaved and extremely patient despite considerable teasing by the children”;
- “X, the dog often competed with X for a ball, an object the dog clearly valued”.
- “It would also seem evident that the children are missing Mr X [note the children were not assessed by the expert – rater comment]”.

### Overall quality rating of reports

Raters provided an overall quality rating for each report. Two thirds of the reports were rated as ‘very poor’ or ‘poor’, with one third between good and excellent.

### Additional comments

Raters were asked to provide comments on any aspects of the reports they felt had not already been covered. Raters did comment on the use of ‘expert witness companies’ being used to locate experts, with a substantial number of reports completed via these

companies. In one of the courts utilised *all* of the reports assessed were via a larger private company<sup>33</sup> which essentially located experts for the courts on request and took a commission. The quality of the reports did not appear at all protected by such a system.

Regarding reports rated as ‘very poor’ or ‘poor’ (two thirds of the sample), raters made a number of observations of poor practice. These are as follows:

- Use of graduate or assistant psychologists to read and compile the background and in some cases to interview parents, with the ‘experts’ then basing their opinion on this. At the worst there were examples where the expert had not read the background but had relied on an unqualified assistant/graduate psychologist to do this, e.g.
  - “has an assistant completing background and psychometrics; report reads as bullet points in places” [rater comment].
- Overuse of psychometrics, e.g.
  - “Death by psychometric” [rater comment];
  - “Lots of psychometrics, little else” [rater comment].
- Absence of support for opinion e.g.
  - “Talks of the client having no psychiatric disorder but has not actually assessed for this” [rater comment];
  - “Does not conduct an assessment herself but uses the results of others” [rater comment];
  - “Concludes he has advanced cognitive ability but this has not been assessed” [rater comment].
- Making uninformed psychological statements, e.g.
  - “His sense of the distance from her was evident in his drawing in which his mother was portrayed as a small, silent figure” [expert quote];

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<sup>33</sup> The extent to which these companies are used is currently unknown, with no register of such providers.

- “I watched his hand gestures, muscle tensions around his neck and throat, fist and feet movements, looking for signs of enthusiasm, boredom, distress or for frustration” [expert quote];
  - “Repeatedly refers to anxiety as a personality disorder, even when they have clearly used an Axis 1 [mental health] scale and not Axis 2 [personality], concludes anxiety is a personality disorder” [rater comment].
  - “Does not understand what mental illness and personality disorder is” [rater comment];
  - “States he does not have a personality disorder and not assessed it and then says he does have a personality disorder” [rater comment].
- Failing to address instruction questions, e.g.
- “Was asked to undertake an assessment of intelligence, did not do this but indicated client ‘presented as average intelligence’ and felt therefore no assessment was required” [rater comment];
  - “Does not answer instruction question, just refers readers to the report narrative” [rater comment].
- States an excessive amount of expert work conducted in their CV, e.g.
- “Reports completes 200 reports a year” [rater comment];
  - “Reports has completed over 1000 reports in last few years” [rater comment].
- Absence of psychological content e.g.
- “The report could have been largely written by a social worker, not psychological enough” [rater comment].
- Knowingly using psychological measures that are not appropriate e.g.
- “I have carried out this test with X although it does not apply as it is only normed for individuals 18 and above” [rater comment].

- Misleading communication of qualifications e.g.
  - “States they are a member of the Division of Forensic Psychology but does not indicate what type of member [e.g. full] and is not a forensic psychologist. Also uses a ‘colleague’ to assist but no information on this colleague is given” [rater comment].
  
- Limited opinion and overall content, e.g.
  - “Six page report in total. One page is a CV, two pages interview and 2 pages the questions” [rater comment];
  - “One paragraph for the psychological assessment of five children” [rater comment];
  - “One short paragraph for each question” [rater comment];
  - “Ten instruction questions, report is 82 pages long but three pages dedicate to opinion, stating for one question ‘This has been assessed as relevant throughout the report’” [rater comment];
  - “Six page report provided of which one page is the instructed questions. Does not even answer one of the questions on attachment as stated it is irrelevant” [rater comment].
  
- Misunderstanding their role, boundaries and ethical issues, e.g.
  - “At one point the psychologist suggests ringing the employer of the parent to see how much experience they have and when the parent becomes upset at this they are described as “cross” and the psychologist describes this as a ‘complex interaction’. The same psychologist then goes on to discuss the possibility of adoption of the children with her in detail and seemed unclear as to why the parent was becoming upset, attributing her response to a learning disability” [rater comment];
  - “Completed an assessment on the mother without actually seeing her” [rater comment];
  - “Completed an assessment in a room in a general visit area with no door, assessment was on sexual disorder” [rater comment];

- “Client was informed that the Police were on their way to arrest him and question him over the sexual abuse allegations. He was anxious but the Police did not arrive during our assessment” [expert quote]. Same report, which is 13 pages long, concludes by stating “there is no evidence to indicate that Mr X is responsible for the sexual abuse of his daughter, or that he poses any sort of risk to Ms X’s children” [expert quote];
  - “Views contact sessions when assessing parent but clearly has no experience of being able to do this” [rater comment].
- Inappropriate and/or irrelevant comments taken direct from expert reports, e.g.
- “She was dressed appropriately for her age and weather, certainly demure”;
  - “She was dressed in a low cut pink dress”;
  - “She had long auburn coloured hair, which I think has been streaked and coloured in the current fashion”;
  - “He likes spaghetti bolognese and puts his pots away”;
  - “Miss X is an attractive mum and lovely personality, she can be fun to be with”;
  - “Father was very good, he was soft, he had a glass eye”;
  - “She was wearing a neck brace and had a tattoo on her neck”;
  - “She has probably realistic expectations, she intends to study hairdressing but in the long term would like to be a barrister”;
  - “She was sitting by a computer console slightly away from where I was sitting. Mr X stood by the sink, a position he frequently adopted”.
- Poor use of language and/or poor style taken direct from expert reports, e.g.
- “raison d’etre” ;
  - “He would usually stay at a mate’s house”;
  - “Written in note form” [rater comment];
  - “Cuts and pastes ‘essays’ on attachment in the discussion, with references. The same essay appears in other reports” [rater comment];

- “Includes large quotes from other reports.....mixes two adults reports together, very confusing” [rater comment];
  - “Hard to interpret, states phrases such as ‘has very loose and fragmented conceptual structures” [rater comment];
  - “Client is indicated to have a ‘high level disorder’ – what is this?” [rater comment];
  - “Poor language throughout, e.g. lad, dad, pretty even mood” [rater comment].
- Comments that seem more in keeping with a fictional narrative; e.g.
- “When I am talking about foster carers and prospective adopters, I often use the story of Pinocchio as an example of such a struggle.....at present in school, Ms X is like the child’s Jiminy Cricket and that feedback that Pinocchio obtains from extending his nose is the system of rewards and sanctions that are so effectively maintained within the special provision that has been made for X” [expert quote].
- Unusual writing style and observations, e.g.
- “Bonding is like superglue – it either works or doesn’t and we know very soon whether it has succeeded. Then attachment is like Velcro; it is strong when it has to be and allows repositioning and growth” [expert quote];
  - “If I had seen a video of how X began to eat his lunch, I would have suspected it was a role play by a child asked to caricature how an uncouth child might behave. He stabbed his sausage with a knife dagger style and grabbed some baked beans with his fingers” [expert quote].
  - “He [the child] knows the correct channel for playboy since I took this instruction to be a very important one” [expert quote].

## **Conclusion**

The results provide an indication of where practice can be improved and highlights a need for additional research into this area. The preliminary nature of the study, coupled with its largely qualitative approach, limits the extent to which the current findings can be generalised. Nevertheless, the findings do raise cause for concern focusing on the qualification of experts and report quality. Key findings focus on the fifth of psychologists who, by any agreed standards, were not qualified to provide a psychological opinion, coupled with nearly all expert witnesses not maintaining a clinical practice but seeming to have become full time ‘professional’ expert witnesses. This poses challenges for courts instructing experts in the belief that they are in current practice and thus able to provide commentary on the current availabilities of required treatments, assessments and clinical best practice, when in fact their profession has moved to that solely of an expert witness as opposed to an expert psychologist able to provide expert opinions to the court. Equally, issues are raised over report quality including general writing ability and the methods used to assess. An over-reliance on psychometrics, use of defunct assessments, and using assessments with no validity are all areas noted in the study that require further examination. The under-use of recognised methods to assess risk in cases involving domestic violence, general violence and sexual violence, coupled with a proportion of experts commenting on mental health and yet having no indicated background in that area, are further significant areas worthy of further research using a larger sample of reports. What the current study has demonstrated is the value of such research and the importance of not just restricting this research to psychological reports, but extending it to all other disciplines that provide expert evidence to the courts.

## **Recommendations**

Although the study is preliminary and based on largely qualitative data it is still possible to make suggestions for sustaining good practice and for improving report quality. The report certainly identified this as an area worthy of further investigation via empirical study. Some preliminary suggestions that can be made are as follows:

- That instruction of experts should be restricted to those that are registered to practice with the Health Professionals Council and who have full membership of an applied division of the British Psychological Society (i.e. clinical, forensic, educational, health, counseling). Increased education for the Judiciary and the instructing parties would be of assistance, coupled with increased use of professional bodies, such as The British Psychological Society, to check on qualifications. It does not appear that the CV of the expert is always clear on what their qualification is, certainly to individuals unfamiliar with the qualification routes for psychology.
- Not relying on the use of expert witness commissioning companies as a marker of potential good quality reports. The use of such companies may be driven more by their increased availability of experts and by pressure to keep within court timetables, as opposed to ensuring good quality reports.
- That the competence of experts to complete specific aspects of reports be more thoroughly assessed. These reports included experts with a six month placement with children and no other evidence of completing expert child assessments, those with no adult assessment experience assessing parents, or those with no mental health experience completing mental health assessments and diagnoses. This information was taken from the provided CVs included with submitted expert reports. The current research indicated that unqualified psychologists were clearly evidenced by their provided CVs as lacking the required competence.

- That instruction of experts should be restricted to those currently engaged in practice which is not solely limited to the provision of court reports. Only approximately one tenth of the instructed experts were engaged in practice outside of court work. This is not in keeping with the expectation of an ‘expert’ as a senior professional engaged in current practice, suggesting that courts are accessing those whose profession is now solely as an ‘expert witness’. There should be an expectation that psychologists providing court reports should continue to hold contracts with relevant health, government or educational bodies (e.g. NHS, Private Health, Prison Service, Local Authority etc) or demonstrate continued practice within the areas that they are assessing (e.g. treatment provision). This is a means of ensuring they remain up to date in their practice, are engaging in work other than assessment, and are receiving supervision for their wider work as psychologists. Connected to this, courts should be wary of experts claiming to complete excessive amounts of independent expert work.
  
- That the instruction is clearly for the expert to conduct all aspects of the work and not graduate psychologists or assistants. Such individuals are not qualified with the term ‘graduate psychologist’ used to describe those who have completed approximately one third of the required training (e.g. an undergraduate degree in psychology and nothing more). There was evidence of their over-use by experts, who were relying on them in some instances to review collateral information and interview clients. Courts should only be paying for the expert witness to complete all aspects of the report.
  
- The judiciary could consider periodically reviewing the quality of the expert reports that are being submitted and extending this review to other disciplines. There is value in working with professional bodies to eradicate any poor practice and enhance good practice. Poor practice should be reported to the Health Professions Council (HPC).

- A broadening of instructions to relevant divisions, not just a focus on clinical psychology. Of the three-quarters of psychologists claiming to be full members of a division of The British Psychological Society, over three quarters of these claimed to be clinical psychologists. The limited use of educational and forensic psychologists in the sample was surprising considering the need for child and forensic risk assessments respectively.
- Care should be taken with the use of psychometrics and these should not unduly influence final judgments. The current research indicated a wide range of such assessments being used and not all relevant or up to date. If tests are utilised then experts should be providing courts with sufficient information to allow them to judge their quality. Using the *Daubert* criteria as a reference for this would assist with the quality of this information (e.g. provision of error rates, evidence of the theory or method the test was based on), and assist courts to judge how it should be admitted as evidence.
- A need for psychologists to provide provisional opinion and alternative opinions. The data from which opinions are drawn needs to be clearly indicated to the court.
- The use of tested and/or generally accepted psychological theory to support core findings. Courts are paying for *psychological* assessments and this should be evidenced to distinguish the opinions from those provided by other disciplines.
- Experts reporting allegations more carefully as such and not reporting them as facts.
- The peer review of expert psychological reports by other psychologists should be considered a routine part of good practice. Consideration for this being built into instructions should be given. Due to the private nature of family proceedings, permission needs to be sought. It should represent an independent process of review and an expectation for all experts to note that they have engaged in such a

- process and responded to the feedback. Professional bodies may have a role in such a process, particularly those without a vested interest in the future instruction of that expert (e.g. private commissioning companies).
- That risk assessments, when requested, should conform to the expected standards. This includes the use of third generation tools such as the HCR-20 (general violence), B-SAFER (partner violence) and SVR-20 (sexual violence). Only experts qualified in these areas should be commenting on forensic risk issues and Courts should not accept opinion based solely on unstructured clinical opinion or other less-accepted methods, such as actuarial methods (i.e. numerical/purely statistical) (e.g. Grove et al, 2000; Hart, Michie & Cooke, 2007; Walters, 2006; Yang, Wong, & Coid, 2010).
  - Courts should not be paying for reports that do not meet the required standard. This point may seem obvious, but reports that do not fulfill CPR and fail to attend to the instruction questions should have their costs reviewed accordingly. An example would be an instruction requesting an assessment of cognitive functioning or intelligence which the expert accepts and then fails to conduct any recognised tests to assess it.
  - Training for experts both on *content* (e.g. continued and evidenced CPD within the domains of provided expert opinion) and process (e.g. CPR rules) is vital. Ideally such training should be to a formal qualification standard where there has been some element of practice assessment (i.e. not just academic training).
  - Training for the judiciary on what to expect from psychological assessments and what to request for specifically. For example, for risk assessments instructions should specifically request that this is assessed using a structured clinical approach such as the HCR-20, SVR-20 or B-SAFER.

- Experts should receive feedback on the quality of their reports, as part of final transcripts. Currently final transcripts are rarely sent to experts and the commentary tends to focus on oral testimony. If a report is felt not fit for purpose then the expert should be informed of this as opposed to a tendency not to instruct them again; this is simply moving the problem onto other cases.
- Only one quarter of the sample in the current study adhered fully to the CPR rules for report content and presentation. Means of enforcing these rules with experts and those instructing them appear significant.

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