Factsheet 2: Expert Evidence

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Experts and expert witnesses

An **expert** can be anyone with knowledge or experience of a particular field or discipline beyond that to be expected of a layman. An **expert witness** is an expert who makes this knowledge and experience available to a court[1] to help it understand the issues of a case and thereby reach a sound and just decision. This distinction implies a further one, between advising clients and helping the court, which we will explore later. In the meantime we will concentrate on the role and duties of an expert *witness* in giving or preparing *evidence* for the purpose of *court proceedings*.

What is expert evidence?

The fundamental characteristic of expert evidence is that it is opinion evidence. Generally speaking, lay witnesses may give only one form of evidence, namely evidence of fact. They may not say, for example, that a vehicle was being driven recklessly, only that it ended up in the ditch. It is the function of the court (whether judge or jury) to decide the cause of the accident based on the evidence placed before it – and it is the task of the expert witness (an accident investigator, say) to assist the court in reaching its decision with technical analysis and opinion inferred from factual evidence of, for example, skid marks. For this reason, expert witnesses are not just allowed to express opinions on the matters referred to them, they are expected to do so.

To be truly of assistance to a court, though, expert evidence must also provide as much detail as is necessary to convince the judge that the expert's opinions are well founded. It follows, then, that it will often include:

- factual evidence obtained by the witness which requires expertise in its interpretation and presentation
- factual evidence which, while it may not require expertise for its comprehension, is inextricably linked to evidence that does
- explanations of technical terms or topics
- hearsay evidence of a specialist nature, e.g. as to the consensus of medical opinion on the causation of particular symptoms or conditions

as well as

- opinions based on facts adduced in the case.

When is expert evidence needed?

Expert evidence is sought most obviously in disputes requiring detailed scientific or technical knowledge. There is, however, nothing in the Civil Procedure Rules that prevents expert evidence being called on any factual issue in dispute that is deemed to be outside the knowledge or experience of either judge or jury – providing, that is, that the court deems it admissible.

Admissibility of expert evidence

Generally speaking, expert evidence is admissible whenever there are matters at issue which require expertise for their observation, analysis or description. Moreover, the courts have customarily afforded litigants wide latitude in adducing such evidence. One reason for this is that until the evidence has been heard, the judge has little else to go on in assessing the competence of the expert or the weight to be attached to his evidence.

Recently, though, there has been some hardening of judicial attitudes on this topic, particularly where unnecessary use of expert witnesses has resulted in delays in the hearing of cases or contributed excessively to their cost. The solution proposed by Lord Woolf in the Final Report of his inquiry into the civil justice system in England and Wales was that the calling of expert evidence should be under the complete control of the court. The Civil Procedure Rules, which came into force on 26 April 1999, give effect to this as well as many other of Lord Woolf's proposals. The reform of the criminal justice system – heralded by the introduction of the Criminal Procedure Rules in April 2005 – is seeing the two jurisdictions becoming increasingly aligned in their handling of expert evidence.

Courts now have the power to exclude expert evidence, even though it would otherwise be admissible. On the face of it, this conflicts with the right of individual litigants to present their case under conditions that do not place them at a disadvantage *vis-a-vis* their opponents, a right secured to them by the Human Rights Act 1998. Thus far, however, attempts to challenge, on human rights grounds, a court's refusal to allow parties to call the evidence they wish have met with no success.[2] It is interesting to note, however, that the Criminal Procedure Rules (2005) contain a specific recognition of the rights of a defendant under Article 6 of the European Convention on Human Rights. This right is said to be fundamental in defining whether the case is dealt with 'justly', as required by the Criminal Procedure Rules's overriding objective. This could lead to some interesting arguments should attempts be made to limit the availability or choice of experts in criminal trials.

When might expert evidence not be admissible?

- if the judge considers that the expert's qualifications or experience are not sufficiently relevant to the issues
- if, on the proven facts of the case, the judge and jury can form their own conclusions without its help
- when it deals with matters that are for the judge or jury to decide
- when the parties themselves – as witnesses of fact – are capable of giving the evidence themselves
- when it is not produced in time to enable parties to exchange reports within the timescale set by the court
- when the expert providing it fails to observe the requirements laid down by rules of court or practice directions as to the form the report should take.

The court also has the power, of course, to *reject* evidence that is otherwise admissible, if it should form an unfavourable view as to the impartiality of the expert providing it.

During the consultation process for reforming the criminal justice system a further category of admissibility was considered – that of accreditation. The possibility was that no expert evidence would be permissible in criminal cases (at least in specific areas of expertise) unless that expert had

been accredited and appeared on a centrally maintained register. However, that proposed reform was roundly rejected.

Duties of an expert witness

The primary duty of an expert witness is to the court – to be truthful as to fact, thorough in technical reasoning, honest as to opinion and complete in coverage of relevant matters. This applies to written reports as much as oral evidence, and regardless of whether the witness is on oath.

At the same time, when accepting instructions the expert assumes a responsibility to the client to exercise due care with regard to the investigations he carries out and to provide opinion evidence that is soundly based. This necessitates that the expert undertakes only those tasks he is competent to carry out and gives only those opinions he is competent to provide.

To fulfil these duties adequately it is, of course, vital that the expert should also have kept up to date with current thinking and developments in his field.

In addition, the expert must treat as confidential the identity of the client and any information about him or her acquired in the course of investigations, unless their disclosure is required by law or has been authorised by the client.

Finally, anyone accepting instructions to act as an expert witness should ensure that he is familiar with the provisions of Part 35 of the Civil Procedure Rules and the associated Practice Direction, and the CJC *Experts Protocol*. An expert should be ever-mindful of the potential consequences for the client of a failure on the expert's part to observe their requirements. The provisions governing experts in criminal cases are contained in Part 33 of the Criminal Procedure Rules.

Qualities required of an expert witness

Expert evidence should be – and should be seen to be – independent, objective and unbiased. In particular, an expert witness must not be biased towards the party responsible for paying his fee. The evidence should be the same whoever is paying for it.[3]

Clearly, too, an expert witness should have:

- a sound knowledge of the subject matter in dispute, and, usually, practical experience of it
- the powers of analytical reasoning required to fulfil his assignment
- the ability to communicate findings and opinions clearly, concisely and in terms adapted to the tribunal before which evidence is being given
- the flexibility of mind to modify opinions in the light of fresh evidence or counter-arguments
- the ability to 'think on one's feet', so necessary in coping with cross-examination, and
- a demeanour that is likely to inspire confidence, particularly in court appearances.

Ethical considerations

The duties an expert witness owes to the court may sometimes run counter to those he owes to the client. This will be most obviously so when the expert's conclusions contradict the client's case as set out in the pleadings. In such circumstances the expert witness may come under pressure to alter his report or suppress the damaging opinion. To do either would be tantamount to committing perjury, while not to do so might well undermine the client's case.

There are only two ways in which such an issue can be resolved: either the statement of case is amended or the expert witness must resign his appointment.

An expert witness can never afford to ignore information damaging to his client's case once it comes to light, if only because there is always the risk that the other side will become aware of it, too. In any case, the expert's duty to the court requires that his evidence is complete in its coverage of relevant matters. Indeed, one of the recommendations made by Lord Woolf in his Final Report is that an expert's report should end with a declaration that in it the expert has drawn to the attention of the court any matter that affects the validity of the opinions he has expressed therein.

Lastly, an expert should be wary of expressing any opinion on allegations of negligence on the part of anyone, professional or otherwise, who may be involved in a dispute. The opinions given should relate solely to the facts of the case: it is for others to apportion blame.

Conflicts of interest

Expert witnesses have a duty to the court to be independent and objective in the evidence they provide. Judges may, in the exercise of their discretion, reject altogether evidence tendered by experts whom they know to have – or suspect of having – a financial stake in the outcome of the litigation. This is the principal reason why experts should **never** accept instructions to act as an expert witness on a 'no-win, no-fee' basis.

For much the same reason, personal, professional or financial links with parties to a dispute, or with businesses in competition with them, would normally debar an expert from acting as an expert witness in any litigation in which those parties are engaged.

Expert witnesses need to be particularly mindful of the risks involved in acting in cases involving former clients, lest this should prompt the allegation that knowledge or information gained while working for the former client is being used to this client's disadvantage. Whenever there is a conflict of interest of this kind, or it appears that there may be one, the expert concerned should seek to obtain the informed consent of both the old and the new client before agreeing to act for the latter.

This may not be as straightforward as it sounds. It will involve – at the very least – disclosing to each client the other's name and the nature of the assignment completed or envisaged. As a first step, then, it would be necessary for the expert to clear with each client what he proposes to tell the other. In securing the former client's consent, it may help if the expert has returned all the papers relating to the case or cases in which evidence was given on behalf of the former client. If that client's consent should not be forthcoming, however, the expert ought to decline to be instructed in the new case.

How to handle a potential conflict of interest

The Court of Appeal – in *Toth -v- Jarman*[4] – has given guidance on how expert witnesses should handle potential conflicts of interest.

This was an appeal by a claimant in a clinical negligence claim. The defendant was a general practitioner who treated

the claimant's son. Despite treatment, the son died and the claimant sought damages for psychiatric injury based on the defendant's alleged negligence. The Medical Defence Union (MDU) was acting for the defendant and instructed an expert to report. The expert's evidence was favourable to the defendant, and at trial it was preferred by the judge to the claimant's expert's evidence. However, on appeal, the claimant said there had been material non-disclosure by the expert of a conflict of interest arising out of the fact that the expert was a member of the Cases Committee of the MDU at the time the report was written. The Cases Committee is the part of the MDU that takes decisions on whether to defend any given action.

The Court of Appeal said that a conflict of interest does not automatically disqualify an expert from giving evidence. The key is whether the expert's opinion is independent of the parties and the pressures of the litigation. A party that wishes to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible so that the other party and the court can properly assess the conflict of interest. It was not enough for the defence to say the claimant hadn't asked about the expert's relationship with the MDU. If there was a conflict of interest that was 'not obviously immaterial', it should have been disclosed by the expert to her instructing solicitors and from them to the claimant's solicitors.

However, in rejecting the appeal, the Court of Appeal said the practice of the Cases Committee of the MDU to exclude an expert involved in the litigation from discussions about the case meant that membership of the Committee would not automatically disqualify that expert from being an expert witness. Furthermore, the expert had, in fact, ceased to be a member of the Committee 6 months before the trial. In the circumstances, even if the expert's conflict of interest had been a disqualifying interest initially, it had then become 'immaterial', and so there was no basis for interfering with the judge's decision.

Guidance for experts

The Court of Appeal then went on to consider what should happen in any similar future situation.

'The expert should not leave undisclosed any conflict of interest which might bring into question the suitability of his evidence as the basis for the court's decision. The conflict of interest could be of any kind, including a financial interest, a personal connection, or an obligation, for example, as a member or officer of some other body. But ultimately, the question of what conflicts of interest fall within this description is a question for the court, taking into account all the circumstances of the case.

'Without wishing to be over-prescriptive or to limit consideration by the Civil Procedure Rules Committee, we are of the view that consideration should be given to requiring an expert to make a statement at the end of his report on the following lines:
(a) that he has no conflict of interest of any kind, other than any which he has disclosed in his report;
(b) that he does not consider that any interest which he has disclosed affects his suitability as an expert witness on any issue on which he has given evidence;
(c) that he will advise the party by whom he is instructed if, between the date of his report and the trial, there is any change in circumstances which affects his answers to (a) or (b) above.

'As we see it, a form of declaration to this effect should assist in reminding both the expert and the party calling him of the need to inform the other parties and the court of any possible conflict of interest.'

However, there appears to be an inconsistency in what the Court of Appeal has said about a party not needing to notify the court or the opposition of an 'obviously immaterial' conflict of interest, when the proposed expert's declaration contains no such qualification. Hopefully the Civil Procedure Rules Committee will refine the wording of the declaration on its passage into the Rules. For now, though, experts ought to adopt the form of words suggested by the Court of Appeal.

Expert witness as adviser

The great majority of civil cases are settled before they reach court, and with many of them the role of an expert may go no further than investigating the circumstances and providing the instructing solicitor with an interim report or assessment of the technical strength of the client's case.

This essentially advisory role is enormously extended if it should be decided to proceed to trial. The expert may then be expected to advise on:

- the technical matters adduced in the statement of case
- the technical content of requests for further particulars (or the responses to such requests)
- the technical significance of documents disclosed by the opposing side.

as well as to produce his own report for use in court.

Furthermore, after reports have been exchanged, the expert will probably be asked for an assessment of the report prepared by the expert for the opposing side. He may also be required, then or earlier, to attend meetings of experts with a view to narrowing issues still in dispute.

During the hearing of a case on the multi-track an expert will not only have to face cross-examination on his own evidence, but be on hand to advise counsel about weaknesses to be probed in that of the opposing side's expert. Finally, the expert may be required to provide further technical support should the case go to appeal.

It can be seen from this that an expert can have several distinct roles to play in litigation, that these roles will overlap in time and that they may extend over the duration of a case, from inception to appeal. Being an expert witness is not just a case of writing reports– it can involve much else besides.

Liability in negligence

Expert witnesses currently enjoy the same immunity from suit as others who give evidence in court, the object being to secure proper and truthful evidence from witnesses without fear of subsequent proceedings.

In recent years, however, there have been calls for this whole question of immunity to be reviewed. Of particular concern to experts will be the argument advanced by Jonathan Selby (*The Times*, 11 February 2003, Law 5), that an expert's immunity from suit should be removed in some cases where experts have failed in their duty to the Court. He points to the case of *J S Hall & Co. -v- Simons* (2002 1 AC 615 HL) which led to the removal of immunity for barristers, and suggests that, in the wake of the very public and high-profile

case of *R -v- Sally Clark*[5] (amongst others), the time has come for experts to be held accountable for their negligent acts. In cases where experts are thought to have breached the protocols, there have already been instances where the trial judge has been instrumental in placing a report before the expert's professional body[6]. There have been hints from the judiciary, too, that consideration should be given to applying costs sanctions to experts who are negligent or have signally failed in their duty to the court.

Indeed, this question was considered in the case of *Phillips & Others -v- Symes & Others* (2004 *EWHC* 1887 (Ch)) in 2004. In that case, Mr Justice Peter Smith gave a useful summary of the sanctions available to the courts as they currently stand:

- Firstly, an expert can be said to be in contempt of court, or even guilty of perjury, depending on the extent of their dereliction.
- Secondly, it might be possible, in an appropriate case, to order that the expert's costs be disallowed. In this context the costs can be either those between the expert's 'client' and another party to the litigation, or those between the client and the expert.
- Thirdly, the behaviour of the expert can be a matter for referral to the expert's professional body (if there is one). This was the course taken by Judge Jacobs in *Gareth Pierce -v- Ove Arup*. (NB Sir Roy Meadow, too, found himself before the GMC following criticism of his expert evidence in the case of Sally Clark.)

It has been argued that none of these provide a sanction that would compensate the true 'victim' of the expert's breach of duty, namely the other parties. It has also been submitted that the position of experts is analogous to that of advocates, who have long been subject to sanctions as regards wasted costs orders. In his ruling, Mr Justice Peter Smith pointed out that the immunity enjoyed previously by advocates flows from the more general immunity of witnesses. Those immunities, he said, have now diverged and, since the decision in *Arthur J S Hall* (see above), there is no longer any immunity from suit for advocates in respect of things done in court or in close proximity to the court. The rule in relation to immunity of witnesses depends upon the proposition that, without it, witnesses would be more reluctant to assist the court.

In *Stanton -v- Callaghan* (2000 *QB* 75) the Court of Appeal held that an expert witness could not be sued for agreeing to a joint experts statement in terms the client considered to be detrimental to his or her interests. This was postulated on the general principle of witness immunity: that the administration of justice would be adversely affected if witnesses felt unable to give their evidence freely and without fear. The courts have agreed that, whilst there is a need for witnesses to give their evidence freely, this right is paramount but not absolute. Indeed, blanket immunity has been discouraged by the European Court of Human Rights since the *Osman* decision (29 *EHRR* 245). Each case must now be considered on its own merits. The courts have made it clear that, whatever the existing position with regard to expert witness immunity:

- there will be no further extension of that privilege, and
- no immunity should be permitted to interfere with the rights of others to a legal remedy where this would run counter to public policy.

Such was the view taken by the Court of Appeal in 2006 in the case of *GMC -v- Meadow.* The Master of the Rolls, citing the case of *Mann -v- O'Neill* [1997] 71 *ALJR* 903, said that:

- extension of absolute privilege should be resisted in all cases unless clear necessity is demonstrated and
- nothing should be done that would conflict with the doctrine that no wrong should be without a remedy (*Darker -v- Chief Constable of West Midlands* [2001] 1 *AC* 435 at 464B).

If witnesses tell lies, they can be prosecuted for perjury; if they sign a false declaration of truth to a witness statement, they can also be said to be in contempt of court. An expert who signs a false declaration is equally open to contempt proceedings.

If an expert witness has done something that calls into question his fitness to practice as a professional, he can be censured by his controlling professional body. As the Court of Appeal pointed out, 'fitness to practice proceedings' are not 'civil proceedings' within the accepted definition of the term, and the court will not intermeddle in a professional body's right to review the competency or otherwise of its own members.

This can, particularly in the case of medics, make the expert's immunity from suit a somewhat pyric protection. What is currently prohibited is litigation seeking damages or other remedy arising out of the evidence itself. The expert witness chooses to be a witness and in this they differ from the lay witness. Unlike lay witnesses, experts are paid, professional and uncompellable. Why, then, should immunity be regarded as a necessary corollary of independence?

However, if the expert is not to be held liable for professional negligence if incompetence is displayed or there is a failure in duty to the court, should there be a compromise remedy in the shape of a wasted costs order? This would, at least, give the expert who has been criticised an opportunity to defend his actions before a judge at a proper hearing. The current view taken by the courts appears to be that, having regard to the clearly defined duties enshrined in CPR 35 and its Practice Direction, it would be wrong for the court to remove from itself the power to make a costs order against an expert who, by his evidence, causes significant expense to be incurred and does so 'in flagrant, reckless disregard of his duties to the Court'.

So far as expert witness immunity from suit is concerned, an expert's current immunity extends to work that is preliminary to the giving of evidence in court, such as on a report that is to be disclosed to the other side. It does **not** extend, though, to advice given by the expert on the merits of the client's case or the strength of the opposing side's expert evidence, or to a failure on the expert's part to warn the client that he was not properly qualified to advise at all.[7]

It follows that an expert acting in an advisory role is as liable as any professional for negligence in these respects, and that experts providing litigation support should take special care to ensure they have adequate insurance cover for the risks they run. It is only human nature that litigants who lose their cases should seek to pin the blame for this on someone else, and who better than their professional advisers, experts as well as lawyers? Any expert whose existing professional indemnity insurance does not cover them for litigation work would be well advised to take out a stand-alone policy that

does just that – as, of course, should anyone who has no PI cover at all.[8]

Footnotes

[1]Or other judicial and quasi-judicial bodies, e.g. tribunals, arbitrations, adjudications, select committees, official inquiries.
[2]For an overview of the Woolf reforms see Factsheet 34, and for the text of that part of the Civil Procedure Rules which deals with expert evidence, see Factsheet 35. The full text of the Rules, and that of their associated practice directions and pre-action protocols, may be consulted on the Ministry of Justice's web site at http://www.justice.gov.uk, but downloading them from there can be a tedious business. A more convenient source is the Rules Lexicon (RuLex) software produced by J S Publications (a small Windows program providing the text of many of the rules of expert practice and procedure plus the ability to search through them simply and quickly). For more information contact J S Publications on (01638) 561590.
[3]The classic statement of the principles of expert evidence is that laid down by Mr Justice Cresswell in his judgment in the shipping case known as *The Ikarian Reefer*. For further details and a discussion of the 'Cresswell' principles see Factsheet 4 in this series.
[4]*Toth -v- Jarman* (2006) *EWCA Civ* 1028.
[5]2003 *EWCA Crim* 1020.
[6]*Gareth Pearce -v- Ove Arup Partnership* (2001) Lawtel.
[7]For a fuller account of expert witness immunity and its limitations see Factsheet 28.
[8]For further discussion of the need expert witnesses have for professional indemnity cover see Factsheet 14.

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