

# The expert witness: a brief evolutionary history

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## SUMMARY

In legal parlance, a ‘witness’ must have personal knowledge of the facts that form the basis of their inference or opinion. However, unlike an ordinary or a professional witness, an expert witness can provide opinion evidence, an exception to this doctrine. The evolution of the role of an expert witness or a skilled witness (in Scotland) is outlined in this clinical reflection.

## KEYWORDS

Expert witness; court; evidence; history; opinion.

## Admissibility of opinion evidence

In *Folkes v Chadd* (1782), the key question was whether or not the decay of a harbour was due to the demolition of a sea-bank built to prevent invasion of sea water into adjoining fields. Mr Thomas Smeaton, an eminent engineer, provided opinion evidence in this case. However, the defendants objected to Mr Smeaton’s evidence on the basis that he did not have personal knowledge of the facts (e.g. What did you see? What did you hear?).

Lord Mansfield, presiding over the case, ruled:

‘It is objected that Mr. Smeaton is going to speak, not to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed; the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all these facts is that, mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbours, the causes of their destruction and how remedied [ ... ]. The cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, such men as Mr. Smeaton alone can judge. Therefore, we are of the opinion that his judgement, formed on facts, was proper evidence.’

The ruling in this case forms an important basis for admissibility of expert opinion evidence in court: ‘The opinion of scientific men upon proven facts may be given by men of science within their own science’ (*Folkes v Chadd* (1782)).

## Peritus in the field

It is for the court to decide whether or not a witness is an expert. Academic or professional qualifications are

not a prerequisite and practical experience and the relevance of the expert’s evidence to the issues of the case may count for much more.

Next it was established that an important attribute of an expert witness was they needed to be peritus or skilled in their science, notwithstanding how the skills were acquired.

Lord Justice Russell, in a case where handwriting was the issue, said:

‘It is true that the witness who is called to give evidence is peritus; he must be skilled in doing so; but we cannot say that he must have become peritus in the way of his business or in a definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge?’ (*R v Silverlock* [1894]).

In a Canadian case, the Court of Appeal ruled determining whether a police officer (and not necessarily a doctor) be allowed to give evidence on the physiological effects of alcohol:

‘The test of expertness, so far as the law of evidence is concerned, is skill and skill alone [ ... ]. I adopt as a working definition of the term “skilled person” one who has by dint of training and practice, acquired a good knowledge of the science or art concerning which his opinion is sought [ ... ]. It is not necessary, for a person to give opinion evidence of a question of human physiology, that he be a doctor of medicine’ (*R v Bunnis* (1964)).

More recently, the *Pool* judgment (in *Kennedy v Cordia (Services) LLP* [2016]) laid out four considerations governing the admissibility of skilled evidence, thus defining who can be an expert:

- whether the proposed skilled evidence will assist the court in the task
- whether the witness has the necessary knowledge and experience
- whether the witness is impartial in his or her presentation and assessment of the evidence
- whether there is a reliable body of knowledge or experience underpinning the expert’s opinion.

## Independence and impartiality

Expert witness evidence needs to be independent, intelligible, logically and impartially deduced on the facts in evidence, for assisting the court, to decide on the ‘ultimate issue/question’.

Rix (1999) emphasised the independent and impartial nature of the evidence provided by an expert

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witness, also identifying unintended pitfalls of expert testimony. The jury may devalue their own views, taking up the expert's views in the belief that the expert knows best (even in matters expressed by the expert without having the relevant expertise). Expert evidence using medical jargon could potentially make the matters under consideration intricate, leading to protracted proceedings in court.

In *Davie v Magistrates of Edinburgh* [1953] it was recognised that the judge or jury may choose to accept or discard the expert opinion evidence, even if it is un-contraindicated.

The court has to reach its own conclusion and decide on the 'ultimate issue/question'.

### Importance of the role of an expert witness

'Medical experts are indispensable to the administration of justice as litigation ranges beyond what judges or juries comfortably deal with as facts of everyday life' (Charleton 2024).

The importance of the role of an expert witness and the responsibility carried is reflected in *M'Naghten's Case* (1843). Expert evidence was provided in this case by Dr Edward Monro (instructed by the defence), opining 'I consider the act of killing Mr Drummond to have been committed under a delusion; the act itself I look upon as the crowning act of the whole matter – as the climax – as a carrying out of the pre-existing idea which had haunted him for years'. Dr Forbes Winslow and Dr Phillips, who gave expert evidence for the Crown, agreed with the opinions of Dr Monro and his colleagues. The defence of insanity, requiring that a person does not know the nature and quality of their act or does not know that an action is legally or morally wrong, more commonly known as the M'Naghten Rules, came into existence. More recently a third clause was added that 'the person was unable to refrain from committing the act due to insane compulsion' (*R v Sullivan* [1984]).

### Categorisation

Hodgkinson & James (2014: paras 1–012) list five categories of evidence that an expert witness could be called on to provide to assist the court:

- '(i) expert evidence of opinion, upon facts adduced before the court,
- (ii) expert evidence to explain technical subjects or the meaning of technical words,
- (iii) evidence of fact, given by an expert, the observation, comprehension and description of which require expertise,
- (iv) evidence of fact given by an expert, which does not require expertise for its observation, comprehension and description, but which is a necessary preliminary to giving evidence in the other four categories,
- (v) admissible evidence of a hearsay nature.'

### Duties and responsibilities

The overriding duty of an expert witness is to the court, to assist it in the administration of justice.

On 12 April 1985 the *Ikarian Reefer* ran aground and was abandoned following a fire. The defendant insurance company resisted the claim by the vessel's owners, National Justice Compania Naviera SA, on the grounds that the vessel was deliberately run aground and set on fire by, or with the connivance of, those beneficially interested in the plaintiff.

In the course of his judgment, Justice Cresswell (*National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd 'Ikarian Reefer'* [1993]) stated seven duties and responsibilities of expert witnesses in civil cases which form the basis for subsequent iterations. For example, the Royal College of Psychiatrists' report CR193 (Rix 2023), a useful reference, lists the duties and responsibilities of an expert witness to the court. These include their duty to assist the justice process with accuracy and completeness and to testify in their field of expertise alone, honestly, impartially and objectively, outlining the limits of their knowledge and competence. The expert must also declare any actual or potential conflict of interest and state the substance and sources of all facts and instructions given, material to the opinions expressed in their report.

### Conclusion

Throughout their expert witness work, whether as a psychiatrist, a doctor or a mental health professional, the expert must adhere to the principles of medical ethics, including preserving dignity, fairness and respect for the individual concerned (autonomy), giving due regard to the person's welfare (beneficence), prevention of harm (non-maleficence) and maintaining confidentiality.

The role of the expert witness continues to evolve, as specialties expand and develop. This includes availability of a greater range of tools for specific assessments. Pathways for training and acquiring skills need to develop further to lead to accreditation as an expert witness.

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