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Expert evidence and the courts: 1. The history of expert evidence

Keith J. B. Rix

Recommendations by Lord Woolf for the reform of the civil justice system in England and Wales include proposals which are already beginning to influence the provision of expert evidence to the courts. Lord Woolf has himself been instrumental in the establishment of an Expert Witness Institute which has caused some controversy in medical circles. It is no coincidence that all of this is happening at a time when the courts are delivering judgments which are particularly critical of some expert witnesses.

Development of the role of the expert witness

It is a rule of law that a witness must have personal knowledge of the facts about which he or she draws inferences or gives an opinion. The expert is an exception to this rule and so the role of the expert is regarded as a privileged one in the courts. Privilege should, and does, carry responsibilities for the expert in relation to the courts. The present duties and responsibilities can be traced through a number of leading judgments in the courts.

Foundation in shifting sands

It is generally accepted that the role of today's expert witness can be traced back to the late 18th century when Lord Mansfield had to adjudicate in the case of Folkes *v.* Chadd (1782). A harbour had decayed, and the question was whether it had anything to do with the demolition of a sea-bank erected to prevent the sea overflowing into some meadows. The defendants objected to an eminent engineer, Thomas Smeaton, being called and Lord Mansfield dealt with the objection thus:

> "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 ... I have myself received the opinion of Mr Smeaton respecting mills, as a matter of science. 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 judgment, formed on facts, was proper evidence".

This provided the opportunity to give an important and still unchallenged judgment concerning the role of expert witnesses:

> "The opinion of scientific men upon proven facts may be given by men of science within their own science".

An old hand

The next milestone in the development of the role of the expert was in a case where handwriting was an issue (R *v.* Silverlock, 1894). It was established that skill was the important characteristic of the expert rather than how it had been acquired. The witness in this case was a solicitor whose knowledge of handwriting came from the study of old parish registers and wills. Lord Russell CJ said:

> "It is true that the witness who is called upon to give evidence must be peritus; he must be skilled in doing so; but we cannot say he must have become peritus

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in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence".

Steeped in drink

There was further refinement of this qualification of skill in a Canadian case in which there was an objection to the proposal that a police officer should give evidence on the physiological effects of alcohol (R *v.* Bunnis, 1964). The Court of Appeal ruled that:

> "The test of expertness, so far as the law of evidence is concerned, is skill, and skill alone, in the field of which it is sought to have the witness's opinion ... 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".

Scottish influence

A leading Scottish case in 1953 established that it is the duty of the expert to provide the court with that which is necessary for the court to reach its own conclusion on the basis of the facts produced in evidence rather than decide the issue for the court (Davie *v.* Magistrates of Edinburgh, 1953). What the court has to decide is sometimes called 'the ultimate issue' or 'the ultimate question'.

This case also established that the judge or jury is not bound to accept the expert opinion even if it is uncontradicted. This judgment also drew attention to the need for expert evidence to be intelligible, convincing and tested:

> "Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the function of the jury or judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the court. Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the application of their criteria to the facts proved in evidence. The scientific opinion, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge and jury".

Muddied waters

A singularly important ruling, brought about by psychiatric testimony in a murder case, but with relevance for experts in general, is that of Lawton LJ (R *v.* Turner, 1975):

> "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case, if it is given dressed up in scientific jargon, it may make judgment more difficult. The fact that an expert has impressive scientific qualifications does not by that fact alone make his opinion, on matters of human nature and behaviour within the limits of normality, any more helpful that that of the jurors themselves; but there is a danger that they may think it does".

This ruling established that if matters are within the experience and knowledge of the judge and jury, the evidence of an expert on these matters is inadmissible. The ruling in the Turner case also points to disadvantages of expert testimony. On matters which do not require expert opinion the jury may think that the expert knows best and set aside their own views in favour of the expert's views. Expert evidence can make issues appear unusually complex, for example, by introducing unnecessary terminology. Expert evidence can considerably prolong the proceedings and compromise the ability of the jury to focus on the issues in question. The jury needs to focus on as few points as possible and if expert evidence is going to take the jury too far away from the main issues or raise too many side issues, it may be ruled inadmissible. Thus, a judge, in deciding whether or not to admit expert testimony, has to satisfy himself or herself that the probative value of the evidence outweighs its prejudicial effects.

Mixing fact and opinion

A further feature of the Turner case was to draw an important distinction between the opinion of the expert and the facts on which it is based. In this case the psychiatrist had formed an opinion of the defendant's personality which was somewhat at odds with some of the evidence. The trial judge commented that this aspect of the expert's testimony was 'hearsay evidence'. At the appeal Lawton LJ observed:

> "He could have said that all the facts on which the psychiatrist based his opinion were hearsay save for those which he observed for himself during his examination of the appellant such as his appearance of depression and his becoming emotional when discussing the deceased girl and his own family. It is not for the court to instruct psychiatrists how to draft their reports, but those who call psychiatrists as witnesses should remember that the facts on which

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they base their opinions must be proved by admissible evidence. This elementary principle is frequently overlooked".

Putting the jury out of business

Another lesson from the Turner case concerns the dangers of offering an opinion on the credibility of a defendant who is not mentally disordered:

> "The jury had to decide what reliance they could put on the appellant's evidence. He had to be judged as someone who was not mentally disordered. This is what juries are empanelled to do. The law assumes they can perform their duties properly. The jury in this case did not need, and should not have been offered the evidence of a psychiatrist to help them decide whether the appellant's evidence was truthful".

This was confirmed in a murder case in which the central issue was whether the appellant's confessions were true and it was proposed that a psychiatrist should give evidence that the defendant had an abnormal personality in that she was histrionic, theatrical and likely to say things to draw attention to herself (R *v.* Weightman, 1990). It was ruled that this was not something which was beyond the experience of normal non-medical people and the jury would not be helped by the evidence of a psychiatrist.

No place for 'rent-a-witness'

Several recent judgments have drawn attention to the importance of independence and impartiality in expert evidence for the courts. Wilberforce J in Whitehouse *v.* Jordan (1981) said:

> "It is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of the litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating".

These judgments lie behind that statement of the Academy of Experts (1987) on 'Ethics and values' in which experts are advised that they should "never knowingly (mislead) in respect of either the weakness or the strengths of a case". This is also reflected in one of the statements which forms part of the declaration which Lord Woolf has advised that experts should include in their reports. In the model declaration recommended by the Expert Witness Institute, the expert declares that:

> "I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion".

Thinking on your feet

When the mother of a child with brain damage brought an action against the general practitioner who had vaccinated the child against whooping cough (Loveday *v.* Renton and Wellcome Foundation Limited, 1990) Stuart-Smith LJ was faced with eight experts called by the plaintiff and 10 called by the defendants. Criticisms had been made by counsel of some of the witnesses on both sides. When the judge introduced his approach to the evaluation of their oral evidence he also indicated how important it is for the expert to be able to give reasons for his or her opinion and relate his opinion to the evidence:

> "In reaching my decision a number of processes have to be undertaken. The mere expression of opinion or belief by a witness, however eminent, that the vaccine can or cannot cause brain damage, does not suffice. The court has to evaluate the witness and the soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witness's opinion by examining the internal consistency and logic of his evidence; the care with which he has considered the subject and presented his evidence; his precision and accuracy of thought as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic of a proposition put in cross-examination or is prepared to concede to points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in the light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether or not a witness is biased or lacks independence".

Lessons of the Ikarian Reefer

The duties and responsibilities of expert witnesses in civil cases have since been most comprehensively brought together by Cresswell J in a case involving an insurance claim arising out of the sinking of the *Ikarian Reefer* (National Justice Compania Naviera SA *v.* Prudential Assurance Co Ltd "*Ikarian Reefer*", 1993) (see Box 1). Since then judges have frequently referred to this case when considering expert testimony and experts will be increasingly judged by reference to these duties and responsibilities.

Avoiding boundary disputes

In the case of R *v.* Hurst (1995) a psychiatrist prepared a report on a woman charged with drug

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Box 1. Judgment of Mr Justice Cresswell in the *Ikarian Reefer* case

Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation

An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise

An expert witness should state the facts or assumptions upon which his or her opinion is based; he or she should not omit to consider material facts which could detract from his or her concluded opinion

An expert witness should make it clear when a particular question or issue falls outside his or her expertise

If an expert's opinion is not properly researched because he or she considers that insufficient data are available, then this must be stated with an indication that the opinion is no more than a provisional one

In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth and nothing but the truth without some qualification, that qualification should be stated in the report

If, after exchange of reports, an expert witness changes his or her view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court

Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports

trafficking and whose defence was duress. The trial judge refused to admit his evidence and his refusal was upheld on appeal. One reason was that the psychiatrist had stepped outside his field of expertise in giving an opinion on the cultural differences between the USA and UK in seeking assistance from the police. Once an expert steps outside the boundary of his or her own expertise, and is no longer within his or her own science, his or her testimony is no longer an expert testimony and it becomes simply the testimony of an expert. The other reason was that he advanced the opinion that the defendant had a personality which lacked reasonable firmness but this was irrelevant because the defence of duress is only available to persons of reasonable fortitude. It is necessary to have some understanding of the particular legal issue in question.

Cooking the books

The dangers of partiality and bias have been illustrated recently in a case involving expert accountancy evidence (Re Oakframe Construction Limited, 1997). The affidavits of the accountants were struck out by a judge who observed that it was not a promising start to say: "This report has been prepared for the purpose of supporting the defence of ... ". His criticisms extended to the experts' failure to provide "explanations and workings", their failure to state the basis on which they purported to draw expert opinions, their failure to relate their opinions to the issues in question and their adoption of the role of advocate rather than expert. In commenting on one of the reports the judge said that:

> "the vast bulk of this report ... is irrelevant in that it is advocacy, hearsay evidence and comment. It is not what can properly be regarded as being a proper expert's report for the purposes of this litigation, aimed at specific matters on which expert opinion could properly be sought and on which expert evidence would properly be admitted".

The judge felt that the expert witness:

> "Must state the facts and assumptions on which he forms his opinion, and will usefully state the sources from which he derives those facts and assumptions. He cannot introduce hearsay evidence".

Changing your mind

A recent case involving psychiatric evidence has established the importance of experts communicating any changes of opinion. Vernon *v.* Bosley (1997) was a case in which a plaintiff was awarded damages in the High Court for 'nervous shock' occasioned when he witnessed unsuccessful attempts to rescue his two daughters from a car. The car had been driven into a river by the defendant who was employed by the plaintiff and his wife as a nanny. Oral evidence was given by a consultant psychiatrist and a clinical psychologist. Before a final order regarding damages had been drawn up

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by the court, an anonymous person sent the court a copy of a judgment made in county court proceedings a year previously relating to the plaintiff and his wife and their three children. The judgment revealed that the plaintiff's psychiatric health had dramatically improved according to the evidence of the same psychiatrist and psychologist. At the appeal it was held that the psychiatrist's later reports for these county court proceedings should have been made available to the defendant's advisers in the personal injury case. The two appeal court judges who gave the majority decision criticised the plaintiff's counsel for not advising him of the need to disclose the more up-to-date reports from the county court in the personal injury litigation. They did not criticise the psychiatrist and psychologist whose evidence on the plaintiff's current condition and prognosis was based on the earlier examinations for the personal injury litigation (not on the more recent examinations for the county court proceedings). However, in a dissenting judgment the third judge referred to "the irresponsibility shown by two of (the plaintiff's) expert witnesses in subsequently expressing views in the family proceedings which were not easy to reconcile with their evidence" in the personal injury litigation. This is reflected in one of the statements in the 'Woolf Declaration' in which it is recommended that experts incorporate in their reports the following statement:

> "At the time of signing the report I consider it to be complete and accurate. I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification".

Creeping up to the opinion

A recent case in the field of negligence has shed further light on the role of the expert in relation to the 'ultimate question'. In a case in which it was alleged that an estate agent was negligent in marketing properties (Roadstone Ltd *v.* Minories Finance Ltd, 1997) it was held that although the legal duty rested on the court to decide whether or not the defendant had made an error which amounted to negligence, the judge accepted that under section 3 of the Civil Evidence Act 1972 the expert's opinion was admissible. However, he went on:

> "It by no means follows that the court must follow it. On its own (unless uncontested) it would be a mere bit of empty rhetoric. What really matters in most cases is the reasons given for the opinion ... I think it is a good thing for the (defendant's) expert to have given to him the legal test and the facts as alleged by the plaintiff".

On this basis he said that the practice referred to by the judge of experts who "simply creep up to the opinion without openly giving it" should become unnecessary. He said that they will not have to "insinuate rather than explicate".

This case therefore also serves as reminder that the expert should give the reasons for the opinion advanced and relate his opinion to the legal issue in question.

No cheating at cards

A recent negligence case (Clough *v.* Tameside & Glossop Health Authority, 1998) arose out of an expert's reference in his report to a letter which those instructing him had supplied to him but did not wish to disclose to the other side. Bracewell J ordered that the letter should be disclosed. In her judgment she not only dealt with this issue of one party keeping their cards face down on the table but also summarised the present view of the role of the expert as particularly identified in the *Ikarian Reefer* case:

> "Those duties apply to all the courts in all the divisions and require experts to give independent assistance to the courts by way of objective, unbiased opinion in relation to matters within their expertise. An expert must state the facts or assumptions on which the opinion was based and should not omit to consider material facts which detract from any concluded opinion. An essential element of the process is for a party to know and to be able to test in evidence the information supplied to the experts in order to ascertain if the opinion is based on a sound factual basis or on disputed matters or hypothetical facts yet to be determined by the courts.
>
> If an expert has discounted some evidence supplied to him, he may, at the conclusion of the case, be held wrong to have done so and his opinion may thereby be invalidated. Equally, he may have assumed an incorrect significance for a particular piece of material. It is only by proper and full disclosure to all parties, that an expert's opinion can be tested in court: in order to ascertain whether all appropriate information was supplied and how the expert dealt with it. It is not for one party to keep their cards face down on the table so that the other party does not know the full extent of information supplied. Fairness dictates that a party should not be forced to meet a case pleaded or an expert opinion on the basis of documents he cannot see. Although civil litigation is adversarial, it is not a matter of withholding information if you can get away with it.
>
> The Commercial Courts and the Family Division have been in the forefront of developing procedures whereby experts give unbiased opinions based on instructions and on information disclosed and known to all parties.

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This is, in my judgment, essential if experts are to be of any assistance to the court. The report of Lord Woolf, *Access to Justice*, specifically commends this approach to expert evidence and the trend in the Queen's Bench Division is developing to require candour particularly in professional negligence cases ..."

This case is also a reminder of the importance of the court being able to distinguish in an expert's report sound facts from disputed matters or hypothetical facts yet to be determined by the courts.

Growth area

The role of the expert witness is constantly evolving. The courts are often asked to admit evidence of a nature which may not previously have been admitted and in relation to areas where such evidence has not been admitted previously. This was the case recently in R *v.* Strudwick and Merry (1994). It was submitted that at their trial on charges of murdering Merry's three-year-old child, Merry should have been allowed to call a psychologist and a psychiatrist to give evidence on her behalf. They would have said that her failure to protect her children may have been explained in part by her own treatment as a child. The trial judge decided that the experts were "not likely to afford the jury the kind of help without which they would be unable to do justice to Mrs Merry's case". The appeal court judges were satisfied that the correct test was applied because "there was nothing in the case which a jury would be unable to deal with unaided by experts". However, they acknowledged that:

> "The law is in a state of development in this area. There may well be other mental conditions about which a jury might require expert assistance in order to understand and evaluate their effect on the issues in a case".

They did admit that the evidence of the psychologist and the psychiatrist was "highly relevant to understanding why (Mrs Merry) may have behaved in the way she did, and is therefore of importance when considering the appropriate sentence".

Expert's 12 commandments

It may be deceptively simple and potentially misleading to try and reduce a complex and evolving area of the law of evidence to a set of simple rules. However, what might be called the 'Expert's 12 commandments' (see Box 2) have some merit in focusing attention on the important points in the law of evidence as it relates to expert testimony.

Box 2. The expert's 12 commandments

Stick to your field of expertise
Beware of offering an opinion on 'the ultimate issue'
Beware of offering an opinion on the veracity of the defendant in a criminal case
Do not offer an unnecessary opinion
Ask yourself whether your opinion is relevant in the light of the law
Provide an opinion which helps rather than hinders – keep it simple
State the facts or assumptions on which your opinion is based
Identify, if appropriate, your reliance on hearsay
Show the reasoning behind your opinion
Be objective and unbiased
Include and identify points which detract from your opinion
If you change you opinion, say so

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Multiple choice questions

1. The expert witness:
   a must belong to an appropriate professional institute, college or similar body to be recognised an as expert by the courts
   b must have personal knowledge of the facts about which he or she draws inferences or gives an opinion

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c when cross-examined must be prepared to hold to his or her opinion in the face of contrary logical propositions put to him
d must not introduce hearsay evidence
e should omit material facts which could detract from his or her concluded opinion if they conflict with the arguments of the side which has instructed him.

2. The expert witness:
a provides opinion which substitutes for the judgment of the court in cases of technical complexity which are beyond the expertise of the court
b owes a duty to those instructing him to give his evidence so as to emphasise the strengths of their case
c can expect that by virtue of his status as an expert his opinion will be accepted without regard to the internal consistency or logic of his evidence
d does not need to state the facts or assumptions on which his opinion is based
e need not be skilled as long as he has experience in the relevant discipline.

3. The expert witness:
a is someone who has acquired a good knowledge of the art concerning which his opinion is sought
b adopts the role of advocate when advancing his opinion to the court
c cannot give an opinion on 'the ultimate question' which is to be decided by the court
d is limited to giving opinions on matters determined by statute and existing case law
e giving evidence on a question of human physiology need not have a qualification in biology or medicine.

MCQ answers

1	2	3
a F	a F	a T
b F	b F	b F
c F	c F	c F
d T	d F	d F
e F	e F	e T

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