Expert evidence: dangers and the enhancement of reasoning†

ARTICLE

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SUMMARY

This article considers the role of experts and their interaction with the legal system to better understand the benefits and potential dangers of expert evidence to fact-finders in trials. 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. This would render courts, absent expert evidence, vastly under-equipped in making decisions of fact. However, the dangers of surrendering authority to experts or of misunderstanding their role must be considered to ensure that expert evidence is used to benefit the administration of justice.

KEYWORDS

Expert evidence; psychiatry and law; scientific evidence; role of a judge; medical evidence.

LEARNING OBJECTIVES

After reading this article you will be able to:

- understand the role of experts within the legal system, what their testimony should consist of and when it is admissible before court
- understand the significance of the ultimate issue rule and why lawyers and clinicians may approach matters differently
- understand the role of a judge when assessing expert evidence and what they are looking for throughout a case in which experts are involved.

The purpose of this article is to examine expert evidence through the filter of the judicial mind. Fact-finding is often a hidden process of analysis, where scepticism is masked by detachment, but which all judges need to grapple with openly for fear of falling into the kind of trap that the deployment of experts in litigation may open up. In all common law jurisdictions, an expert may only be called to give evidence where what is involved is beyond normal judicial experience. As a result, the difference between evidence as to fact and evidence of opinion, and how that difference plays out between expert and ordinary testimony, the hearsay rule and the tools for assessing evidence on a practical basis are brought into focus.

The balancing act

Expert evidence is invaluable to the administration of justice. In some litigation it is indispensable. Without reliance on experts (Box 1), many issues involving patent law, forensic pathology, psychiatry, engineering, medicine and other areas beyond the knowledge of judges and juries could not reliably be assessed: 'whole categories of cases are dominated by issues that can only be resolved with expert knowledge' (Gross 1991: p. 1116). Nonetheless, there are dangers: that of the judge leaning on one individual's view or interpretation of a scientific theory and that of the judge and expert not understanding each other's mindsets. Experience indicates that experts, far from invariably assisting the court, can slow trials or lead fact-finders towards error through their support of untenable theories or their failure to recognise inconsistencies in their own.

Judges should always be aware of how dangerous expert testimony is. Expert evidence may be ruinously expensive and without a clear rule as to deployment and a limitation on numbers that may be deployed, the principle of equality of treatment risks being unbalanced in favour of those with the deepest pockets. Experts should be aware that their language is not that of the judge and their reasoning, while clinically accurate, may clash with legal analysis. A better place is reached if experts have some idea of how judges assess their testimony.

BOX 1 The qualities of an expert giving evidence

The best of experts are:

- clear-sighted
- able to explain otherwise challenging concepts, owing to their expertise
- balanced through consideration of alternative theories: Part 19 of the Criminal Procedure Rules in England and Wales states that an expert's report must, where there exists a range of opinion on the topic being considered, 'summarise the range of opinion' (para. 19.4: www.legislation.gov.uk/uksi/2020/759/part/19/made).

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Admissibility tests for expert evidence

An expert may only be called to offer testimony on an arcane discipline, meaning an area of fact outside general experience. This does not extend to issues such as what may cause an individual to enter an uncontrollable rage or to act carelessly, but rather how paranoia may affect the mind of someone with a severe psychiatric illness (*The People (DPP) v Kehoe* [1992]). There has been a significant pressure, largely due to the increasingly complex and niche litigation before modern courts, to expand the number of fields that may permit the assistance of expert evidence. The rule permitting expert evidence only on matters 'upon which competency to form an opinion can only be acquired by a course of special study' goes back as far as 1782 in England (*Folkes v Chadd* (1782); Malek 2022: p. 1245). As a working rule, this has the advantage of clarity. It also keeps experts confined to those cases where their use is indispensable. Common law systems, however, continue to struggle to find the right test for admissibility.

An alternative approach has been proposed by the Australian Law Reform Commission, emphasising whether expert evidence would be of assistance to the trier of fact, as opposed to focusing on whether the topic addressed is the scope of common knowledge (Irish Law Reform Commission 2016: p. 73). But approaches differ in the common law world, with a significant degree of uncertainty in practice as to when expert evidence is to be admitted, particularly in the USA. Federal Rule 702 states that 'the standard as to whether expert testimony is warranted is whether it will "assist the trier of fact"', a broad approach towards admissibility that is heavily influenced by the facts of the particular trial. The trial judge in the USA is viewed as a 'gatekeeper', determining such preliminary issues with reference to 'the qualification of witnesses, and the existence of any privileges' (Grimm 2017: p. 1601). The Canadian Supreme Court established a four-point test in *R v Mohan* [1994], requiring the court to consider relevance, necessity, the absence of any other exclusionary rule and a properly qualified expert. However, relevant evidence may be excluded where the court determines that it would have a prejudicial effect on the conduct of the trial (*R v DD* [2000]: para. 11), among other factors. This was described in *R v Mohan* [1994: p. 11] as a 'cost–benefit analysis' undertaken by the court in considering admitting such evidence.

Keeping to the arcane knowledge test strictly, experts remain a rarity. In England and Wales, since the Woolf reforms of the late 1990s, courts may significantly restrict the number of experts permitted to give evidence, and the scope of the evidence given (Practice Direction 35 of the Civil Procedure Rules; Ministry of Justice 2021). Rule 35.4(3A) provides that for a number of claims, expert evidence will be given 'from only one expert on a particular issue'.

Insanity and psychiatric evidence

Once the admissibility threshold is passed for expert evidence, however, more challenging issues are faced by the tribunal of fact (the judge deciding the facts or, in a criminal case, the jury, which has that responsibility) in hearing such testimony, including 'the effective comprehension of complex issues and their synthesis into the judicial determination' or into a direction to a jury (Wilson 2013: p. 493). Here, we use psychiatric evidence as the exemplar, but in approaching any expert evidence, a judge is required to have the same mindset: that of equipping their analysis through absorption of the fundamental principles on which the expert testifies and of maintaining independence.

A truly difficult area, exemplifying the pitfalls awaiting a judge, emerges from criminal cases in which a plea of not guilty by reason of insanity is entered by an accused. In such cases, complex rules address the duty of the prosecution: if there is any evidence of insanity, that must be reported to the defence; if there has been an examination by a doctor, the defence must obtain any report, and any committal to a psychiatric hospital must also be reported. Insanity, as defined initially in M'Naghten's Case (1843), requires 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, and was later developed to include that the actor was unable to refrain from committing the act owing to insane compulsion (*R v Sullivan* [1984]).

A distinction arises between the statutory definition of insanity in Ireland and the application of the M'Naghten Rules in England and Wales. In Ireland, the law requires that an accused meet only one of the three prongs of the test set out above (that the person did not know the nature and quality of the act, or did not know that what they were doing was wrong, or that they were unable to refrain from committing the act) for a special verdict of insanity to be required under section 5 of the Criminal Law (Insanity) Act 2006. This was initially developed from the M'Naghten Rules in Ireland in *Doyle v Wicklow County Council* [1974], in which the Supreme Court held that someone acting under an irresistible compulsion, even with the knowledge that what there were doing was wrong, could be found not guilty by reason of insanity.

The position in England and Wales is highlighted by the Court of Appeal ruling in *R v Keal* [2022], in

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which it was held that an inability to refrain from acting where the accused is aware that their actions are wrong (a word that was held to encompass the act being against the law and the act being wrong by the standards of 'reasonable ordinary people', at para. 41) was insufficient to meet the criteria for the defence of insanity. It has always been the case, as this decision confirms, that where an accused has control, even where this control is limited, this must be exercised to divert them away from crime, and this is confirmed by the *Keal* ruling. Hence, in both jurisdictions, there is a defence of diminished responsibility, a diminution of control (see *The People (DPP) v Heffernan* [2017]).

In the case of diminished responsibility, a substantial diminution in understanding or control not caused by substance misuse must have affected the accused, the burden of proof resting with the defendant (Lucraft 2021: p. 2239). To rely on insanity or diminished responsibility, the accused must prove such a defence only as a probability, in stark contrast to other criminal defences, such as duress, where the prosecution must disprove that the defence might exist beyond a reasonable doubt – a much higher standard than the balance of probabilities. As a result, in the case of insanity and diminished responsibility, the accused carries only an evidential burden, meaning that they must point to some evidence from the entire body of evidence that makes such a defence reasonably tenable. Civil cases invariably adopt that standard for experts since the duty of a pleader of a wrong is to establish a probability of that wrong.

Although it is impossible to determine what particular evidence, or combination thereof with facts-on-the-ground, convinces the jury to return a particular verdict, cases involving an insanity plea are oftentimes based largely on a forensic psychiatrist's evidence. Nonetheless, it is important to note that, as in all other areas of the law in which expert evidence is provided to a decider of fact, a jury is not bound by psychiatric evidence, even where that evidence is unchallenged. Clinicians may make mistakes or may be misunderstood. The Irish Supreme Court in *The People (DPP) v Abdi* [2022] outlined the built-in potential for mistaken or uncertain diagnoses in psychiatric evidence in particular, not as a result of any bias or negligence, but merely due to the very nature of such evidence:

> 'Experience indicates that psychiatry is not a science which unwaveringly yields precise and unassailable diagnoses. Diagnoses depend on what is reported by witnesses as to the circumstances of the commission of the action, on winning trust, on what family and others say as to the conduct of the accused, on mental health history, on medical history, on objective psychological testing, on alcohol consumption or substance abuse, on what is reported by the accused at interview, on an analysis of consistency with objective fact, on gaining insight over time and on a fair analysis in matching or rejecting a diagnosis based on the application of clinical judgment' (para. 31).

Rightly, judges should approach all experts with polite scepticism. Habitually, juries are instructed that the concept of 'innocent until proven guilty' requires them to accept individual facts only once they are proven beyond reasonable doubt and, at the conclusion of the trial, to examine all such facts so as to ascertain whether these accepted facts prove collectively that the accused committed the offence. Helpful experts will approach their task in the same way, without preconceptions, emphasising only investigation, analysis and fact, and where their opinion is required, this is based on rational deduction founded on experience and scholarship.

The significance of trust

This privileged position that experts tend to be afforded before the courts has led to concerns regarding potential partisanship among expert witnesses, particularly with respect to their remuneration. The significant sums often paid to experts for their testimony can give rise to concerns regarding a perceived or actual 'pull of the team' (supporting the side the expert is called on, out of sheer loyalty), and this raises a stark warning that the result can be a potential inequality of arms between litigants. Judging expert evidence, however, will remain focused on the testimony itself.

The precepts set out by Lord Justice Stuart Smith in *Loveday v Renton (No 1)* [1989] (at para. 125) remain helpful, in stating that the judge guides themselves as to accepting or rejecting expert evidence according to:

- its 'internal consistency and logic';
- the 'precision and accuracy of thought as demonstrated' in answering questions;
- facing up to the logic of a contrary proposition, perhaps in 'searching and informed cross-examination';
- the expert's willingness to not shy away from conceding 'points that are seen to be correct'; and
- scrutinising 'the care with which' the issue was considered and the report to the court was prepared.

The reality of ascertaining whether or not expert evidence is to be accepted is much more complex. Factors such as clarity of reasoning are considered also in determining whether a particular expert's testimony will be accepted, or whether it supports a proposition contrary to the testimony of another specialist giving evidence. It may be a prime example of the psychology of the law to try to cover all eventualities through legal justification. It

is therefore useful to consider how the judge in the court is reacting or assessing expert evidence as it is presented. Our suggested approach is not only based on experience but is posited as essential to opposing the privileges of experts with the safeguard of judicial independence. That is only possible through understanding and careful analysis.

How the judge may be thinking

The area of specialisation of an expert witness may be as unfamiliar to the judiciary as to a jury. Hence, first, the imperative focus of a trial judge is on grasping the fundamental elements of the very arcane discipline that has enabled the calling of an expert. Independence is central to the role of a judge, which requires ensuring that no expert may usurp their position during the hearing. Without a working grasp of the relevant scientific discipline, a judge can neither properly instruct a jury on issues such as psychiatric evidence, nor make a safe and valid decision in civil matters relating to scientific evidence. For a judge, it is consequently essential for experts to cite medical and other scientific reference texts. Thereby, quiet study outside of court is enabled and the judge may become master of at least the fundamentals.

It is also important for experts to remember that a judge is a lawyer rather than a clinician or engineer, and that therefore the judicial mind tends to grasp towards definitions and descriptions. The legal mind looks for legal certainty; what is concrete, graspable, relatable and workable. Law is a discipline that over centuries has tamped down instinctive human reaction to wrong and replaced emotion with a set of rules as to how a judge ought to react when faced with particular circumstances. But these may conflict. Potentially this conflict is in place in every case. The reason that all legal rules exist, such as those related to the defence of insanity that the accused must prove clearly that he or she was insane and that insanity is limited to a complete loss of understanding or control, is that all cases may benefit from the same approach. In other words, the elusive chimera of legal certainty. Thus, a judge is interested in any expert's opinion but will require such opinion to be founded clearly on an explanation of the science informing the final position.

The second thing that a judge is focusing on is the application of the science set out by an expert. As the expert is speaking, everything that is stated must be stored and compared with prior statements and reports. Ndou (2019: p. 62) states that 'what is required in the evaluation of the expert evidence is to determine whether and to what extent the experts' opinions are founded on logical reasoning'. This process of comparing the statements of witnesses with what others have said is done with non-expert witnesses as a matter of judicial habit; but the process of reasoning is more extreme in expert evidence cases as the expert is the one laying the pathway that is to be followed to a particular outcome and that oftentimes the expert contends is the sole plausible outcome. Whether this is in fact the case is always being asked in the judge's mind, and this cannot be done without a thorough understanding of the fundamentals of the discipline.

As with any witness, a judge, thirdly, is wary of deception. This is not to state that expert witnesses are more likely to mislead a court; but the risk is lessened by judicial mindfulness of the danger. Through the development of specialist language, experts may be faced with temptations to present more foggy testimony than would be accepted from other witnesses and to dish up a conclusion against a background where that conclusion cannot easily be analysed. As Justice Collins explained in *Duffy v McGee* [2022] (at para. 20), it was concerns regarding the potential for bias or lack of independence that led to the development of duties and responsibilities of expert witnesses by Justice Cresswell in *The Ikarian Reefer* [1993]. Hence, experience has shown that what tends to spotlight a true expert in their evidence is a willingness to impart knowledge freely. By opting to lay out the science as part of the satisfaction of knowledge, an expert signals that they have nothing to fear, and thereby their testimony becomes increasingly persuasive or significant. This is particularly apposite in relation to expert opinion evidence that has changed over the course of a hearing. Rix (2011), referring to changes in expert evidence in light of new information or due to a misunderstanding of a particular legal test, notes that 'if you change your opinion, the basis for doing so should be crystal clear. If it is not and if the earlier version of your report has already been disclosed, or is disclosed inadvertently […] you will be accused of being biased' (p. 9). Apart from that, grappling with knowledge of the science reasserts judicial control over the process of decision-making.

Fourth, as has been made clear by the myriad regulations and practice directions set out across several jurisdictions, judges, dimly or vividly, are aware of the potential dangers of experts. Often their evidence is the fulcrum of the case which may ultimately determine the result of the hearing. Strong views have been expressed in the past that experts may shift theories or views to match the shape of a problem (Best 1911: p. 491; Taylor 1931: p. 59). Therefore, a judge considers how any expert witness was identified and briefed. It is therefore useful for experts to include in a report how they were contacted and what the task was that they accepted. This is particularly important where there may be concerns regarding 'structural bias',

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as discussed by Dwyer (2007: p. 59), where bias arises not from personal interest in litigation, but rather from a pre-existing view of a particular expert, resulting in their selection by a plaintiff or a defendant to support their position.

Last, every judge listening to a case is looking for pivot points, the moments that the balance of a case tips one way or another. During both the examination-in-chief and the cross-examination, the judge is ideally silent, considering the particularly significant details and principles and making a mental list linking the science to the facts. That is being done whether the salient ideas are being gathered to instruct a jury or to justify a later written decision. An expert view may be reasoned out of the final conclusion or may inform a judicial decision. However, what a judge should never do is to impose their own theory upon the expert's views; where the science is not backed explicitly by an expert, it should not be invented or inferred.

The rule against hearsay

Expert evidence is one of the exceptions to the rule against hearsay evidence being admitted, the general rule being that a 'statement other than one made by a witness while giving oral evidence in the proceedings is inadmissible as evidence of any facts stated' (Charleton 2020: para. 3.02). The purpose of such a general prohibition is that statements of this kind are both unsworn and 'cannot be tested by cross-examination' (Hodgkinson 2020: p. 276), and therefore the exception with regard to expert evidence is justified as providing 'the judge or jury with the necessary specialist criteria for testing the accuracy of their conclusions' (Heffernan 2013: p. 135). Heffernan notes that the Criminal Justice Act 2003 in England and Wales has 'altered radically' the position in relation to hearsay in criminal matters, resulting in a 'substantial revision of the rule' (p. 135). In England and Wales, hearsay in criminal proceedings is governed by the Criminal Justice Act 2003, while the rule against hearsay in civil proceedings was abolished by section 1(2)(a) of the Civil Evidence Act 1995, enacting recommendations of the Law Commission.

References, at common law, to papers or research carried out by other experts are not hearsay, provided these references are connected to the assessment of the expert witness in that particular area of study. Similarly, doctors relying on notes of other treating physicians do not breach the rule against hearsay, although the courts have generally noted that evidence or other prime material given by individuals who have not examined the patient carries significantly less weight.

Psychiatrists and other medical experts may also wish to rely on so-called collateral information, whereby information is gathered from those who know the patient or the accused. Although such information would undoubtedly run foul of the rule against hearsay evidence, the position in Ireland is that this is admissible as evidence of an expert's opinion, but not as proof of any fact stated by the patient or the accused of themselves (Irish Law Reform Commission 2008: p. 57). This position has been echoed in Canada in the case of *R v Rosik* [1971], in which it was held by Judge of Appeal Jessup that such collateral information is permissible as evidence as it forms the foundation of an expert's opinion, rather than constituting evidence as to the information received by the expert. However, such evidence may be barred where a particular incident becomes a fact that is in issue in the case, such as whether a relevant prior episode occurred or not, which in England and Wales is now governed by section 114 of the Criminal Justice Act 2003.

It is, however, important to note that in common law jurisdictions hearsay evidence cannot be automatically rendered admissible due to its delivery by way of expert witness testimony. Furthermore, reliance on notes or scientific research is not only permissible in the case of expert evidence, but often required as an 'expression of an existing body of thought that informs an expert analysis', and it is not necessary to produce formal corroboration in the same way as it might be in the case of non-expert witnesses.

Practical science

Any judge or jury may find it difficult to grapple with the intricate scientific evidence produced at a trial. That evidence may be as variable as to the state of materials or, in the case of psychiatric evidence, may require a judge or jury looking into the mind of a person. To take the latter, although no one can fully do that, the psychiatrist certainly provides the most detailed analysis of this area and thus may be taken more seriously than any other witness in a case relating to insanity or diminished responsibility.

Such an expert is not alone in the danger posed. This is of particular concern, as highlighted by the Irish Law Reform Commission (2016: p. 228), owing to the potential rise of a 'trial by expert', stemming from 'a concern that jurors are ill-equipped to weigh the evidence on matters of great technical complexity and are liable to defer to whichever expert commands the most authority on the stand, a question which may not necessarily turn on the objective quality of his or her evidence'.

The ultimate issue

Wise advocates learn that in presenting a case it can help to slowly unravel the point. Persuasive testimony is about logically, and in well-defined steps, setting out the basis of an opinion, one all the stronger since it is

only come to in consequence of thought and analysis that is discernible from the manner in which it is built up. But experts may, in effect, jump the gun. Experts are allowed to give opinion whereas non-experts generally are not. Even in such cases, however, the expert is apparently limited since he or she is traditionally required to not occupy the ultimate issue. The ultimate issue is the kernel of the case: was the employer negligent in not fencing a machine? Was the accused insane at the time of killing? Did a car crash a red light? Can scooters without lights be regarded as contributing to an accident?

Sometimes, a view on the ultimate issue is so bound up with the case as to render a view on it inescapable. In English law, a forensic psychiatrist may express the view that at the time of the killing the accused was legally insane (*R v Atkins* [2009]). Similarly, in the case of diminished responsibility cases in England and Wales, it has been held that it is 'a matter for individual judgment' as to whether the expert witness should offer an opinion on whether any impairment faced by the accused meets the threshold of 'substantial' (*R v Golds* [2016]: para. 42). The ultimate issue rule rests as a protection for the court. Again, if it is abided by, no litigant can claim that the judge ignored expert advice. Thereby, a judge maintains independence. One of the most helpful and neutral approaches that can be taken by an expert witness is that of a sliding scale of strength whereby, for instance, forensic scientists express a view – does not support, supports, strongly supports, very strongly supports – on a connection between an object found at the scene of a crime and an object found in the accused's possession. For civil cases, a similar approach helps.

Opinion and fact

Although it has often been (falsely) suggested that experts are present in court cases to express an opinion, as they are the sole witness who can legally do so, the reality is more nuanced: opinion is expressed by witnesses frequently. Exceptions to the rule against the general admissibility of opinion include both the exception for experts and matters that cannot be exactly observed. But courts have equally accepted that, where evidence is of probative value and likely to be of assistance to the judge or jury, this is to be viewed as an overriding principle. Often it is virtually impossible to disentangle a bundle of facts from the expression of an opinion, such as when a witness states that a photograph is of a person who attacked them.

Such an approach is necessary as it is the foundation for the rules of evidencem to generally omit opinion from non-experts, though everyday opinions cannot sensibly be excluded:

> 'apart from identity of person, things and handwriting are age; speed; temperature; weather; light; the passing of time; sanity; the condition of objects – new, shabby, worn; emotional and bodily states; and intoxication. The law's hostility to opinion evidence is partly supported by the fact these are all cases where it is very easy for witnesses to make mistakes' (Heydon 1975: p. 370).

Cross & Wilkins (1964) (referred to here because of the exposition of the common law) note that:

> 'In many cases, although the answer to a question does not call for specialised knowledge, it would be difficult or impossible for a witness to give his evidence without referring to his opinion. [...] It is impossible to draw up a closed list of cases falling within the second exception to the general rule prohibiting the reception of evidence of opinion' (p. 82).

Opinion is, after all, woven into everyday discourse. The term may be defined broadly as a belief, judgement or view that a person forms, and seeks to express, through either objective or subjective reasoning, about any topic, issue, person or thing. But it is important to distinguish between the everyday use of the term and the legal approach to the definition; an opinion, as introduced before a court by an expert may, instead of being an opinion, be a fact. It may be a rational and scientific expression of fact using an arcane discipline that takes years of study and experience to acquire. The judge or jury must then find the fact and on that basis assess the hypothesis. For an expert, reaching the point of expressing a viewpoint, often incorrectly described as an opinion, may engage the application of knowledge and professional judgement and the comparative study of relevant literature. That is much more fact than opinion and may be pure fact.

It is difficult to draw a clear line between opinion and fact, causing difficulties for the rules of evidence in separating between what testimony may be given by experts and non-experts. What appears to be an opinion may be as much a statement of fact as a mathematical result. Rules have therefore developed to empower finders of fact to determine the foundations of any opinion expressed, such as requiring an expert's report to give details of any information relied on, as seen under Criminal Procedure Rule 33.3(1) in England and Wales (Criminal Procedure Rules 2020, No. 759 (L. 19): www.legislation.gov.uk/uksi/2020/759/rule/33.1/made). Nonetheless, any such resulting fact or finding may be challenged, in the same way as it could be where stated by any other witness.

As a result, the manner in which evidence was tested, or results of experimentation obtained, as well as the state of scientific literature as supportive or contradictory, are vital information for the court. These stay on the line of fact and do not cross into opinion. This, again, requires not just listening to

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and absorbing the principles and application of an arcane discipline. Justice Jacob in *Routestone Ltd v Minories Finance Ltd & Anor* [1997] stated that 'what really matters in most cases is the reasons given for the opinion' (para. 187). Experts may further be challenged as to their objectivity, but, where it is shown that any theory is based on prior analysis of fact, this is a safe foundation for the expression of an opinion. These intermediary facts may often be omitted during testimony or in a report, in the interests of brevity; truncated principles are expressed, but this does not make such evidence unassailable. The expert may be cross-examined on any of the relevant steps, principles, contradictory literature or possible other causes and, thereby, the tribunal of fact is further informed and will not just be looking at the demeanour of the witness but the soundness of the underlying science and its proper application in the formation of the conclusion. It might be cautioned, however, that without an ability to analyse the basis for an apparent opinion, a judge endangers judicial independence. Without that, is there any true analysis? An opinion from an expert, no more than an opinion from any other witness, cannot be just accepted.

This principle of an apparent opinion being, in reality, a fact is further illustrated in cases where expert statements have the appearance of predicting the future; cases in which there is a particular probability of the litigant developing a form of illness, for example. Although this appears to be mere speculation, such statements are often statements of fact on a review of scientific literature that analyses multiple prior instances. That is fact. Similarly, where psychiatric literature indicates a severe risk of a particular disorder developing, this may be a fact determined by way of empirical study.

A summation

One thing often blandly asserted as to the duty of an expert is that experts should not disagree. Thus, some argue, all experts should be distrusted. But lawyers disagree and dissenting judgments in final courts of appeal abound. Disagreement is not to be equated with deceit. All professionals deserve respect on the basis of not only knowledge but truthfulness. Some perhaps suspect that the draw of reward may influence reports or opinions, whether in law or in other fields of expertise. Others may cavil at experts routinely reciting 'I realise my duty is to the court and not to the parties'. One of us (P.C.) referred to this duty in our judgment in *James Elliott Construction Ltd v Irish Asphalt Ltd* [2011], noting that 'it is a natural aspect of human nature that even a professional person retained on behalf of a plaintiff or defendant may feel themselves to be part of that side's team' (para. 13).

In reality, in any area of expertise that is well beyond the exploratory or the theoretical, such as chemistry, physics, psychiatry or pathology, basic concepts should exist to be explained to the tribunal of fact and its assessment should be slow to shift radically. The most helpful testimony is given where points of difference are explained since it may be here that the fulcrum of the case is found and the court's focus can be narrowed to the contested areas of testimony. There, of course, remain rare instances in which experts may stray towards contradiction or place excessive emphasis on a particular theory without clarifying the purpose of such a focus; Rix (2011: p. 41) discusses this helpfully and states that it is vital for experts giving evidence to make clear to the court when any issue falls outside the expertise of a particular expert.

Judicial analysis remains sound where an expert is quietly listened to, the science is absorbed, analysis proceeds on the basis of comparison with the facts and with the fundamental principles of the discipline under discussion. Expert witnesses are adjudged sound where they genuinely and objectively engage with the issue presented and do not shy away from sharing their knowledge with the court, remain detached and treat challenges as an intellectual and academic exercise as opposed to a personal attack. Remember, lawyers (including judges) and clinicians or scientists have their minds set on different tracks.

MCQ answers
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Data availability

Data availability is not applicable to this article as no new data were created or analysed in this study.

Author contributions

P.C. intended that expert witnesses should have a clearer idea as to how judges think: a view from the bench. I.R. researched the wider rules on the admission and treatment of expert evidence. Both P.C. and I.R. formed the article as an amalgam of what they hope are two useful approaches for those appearing as an expert witness.

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MCQs

Select the single best option for each question stem

1 An expert, by law, is:
- a someone who is certified in a particular area
- b a generally knowledgeable person
- c the master of an arcane discipline
- d someone who testifies regularly in court
- e always an academic.

2 Opinion differs from fact in:
- a giving the result of a scientific calculation
- b presenting an overall view of tests
- c offering a viewpoint on a matter outside the competence of lawyers
- d being more interesting
- e how easy it is to understand.

3 A judge looking at a witness is thinking:
- a does this person have sufficient legal qualifications to give this evidence
- b does this person make sense legally
- c how do they compare to the opposing witness
- d how much is this witness getting paid
- e does this witness violate the hearsay rule through relying on external sources.

4 During a trial with complex scientific issues a judge should:
- a rely on what the experts put forward
- b acquire a basic background in the scientific issues
- c prefer one expert over another
- d create their own theories
- e discuss the matter with other judges.

5 Which of the following statements is true?
- a Experts should be called on the reliability of eyewitness testimony
- b A higher number of experts in a case will help the judge make a decision
- c Judges should have a healthy scepticism of experts
- d Experts can be called on any issue before the court
- e Experts should not refer to external medical or scientific textbooks in court as it infringes the hearsay rule.

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