High Noon for Hired Guns and Charlatans: Duties and Standard of Expert Witnesses

Expert witnesses play an important role in the administration of justice and expert evidence can be vital in many cases. By sharing their expert knowledge, expert witness provide a valuable role in assisting the courts.

The use of experts for their specialist knowledge by the English courts is nothing new. Cases where surgeons were summoned by the Courts to provide expert opinion date back to the 14th century. The practice involving the courts calling surgeons to provide their expert evidence continued through the 16th and 17th centuries and by the mid-18th century records show that this practice had expanded to the courts calling merchants to give expert advice. By the late 18th century, in the context of transformation of the common law system to the adversarial one recognisable today, the practice of the courts calling experts to provide their expert knowledge gave way to experts being called by the parties themselves.

In the adversarial context, the greater role of advocates and the separation of the role of jury and witness, gave rise to the need for rules to govern the use of evidence. One such rule, the general rule that the opinions of witnesses are inadmissible, confines witnesses to stating the facts. The reasoning for this is that the court must draw its own conclusions from the facts and form any opinions which need to be formed, and there is a risk that the court may be unduly influenced by the opinion of a witness who may not be as impartial as the court. The creation of these rules caused a problem of how to rationalise the use of the established role of experts providing opinion evidence to the court and the newly developed rule prohibiting the use of opinion evidence. The problem was settled by Lord Mansfield in 1782 in the seminal case of Folkes v Chadd, where it was accepted that the evidence of expert witnesses was an exception to the general rule prohibiting opinion evidence and the expert witness became "a special type of witness".

By the mid-19th Century, in the context of great industrial expansion and ever-changing society with science being applied to many new and developing areas, the need for expert opinion to assist the Courts expanded. Joining the ranks of the expert witnesses were chemists, geologists, engineers and the like.

What is an Expert Witness?

In Folkes and Chadd it was established that the opinions of skilled witnesses were admissible whenever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience. An expert's evidence is necessarily founded on training, practice and experience. Experts have the advantage of a particular skill or special knowledge that causes them to be an authority on the given subject. If an issue requires the opinion evidence of an expert, only a suitably qualified expert should give it. This does not necessarily mean that the expert has to have formal qualifications. However, it will be difficult to satisfy a court that a witness is an expert in a field if they lack formal qualifications. In essence, an expert should have the knowledge of given facts, the ability to form opinions and draw conclusions from the facts. The expert witness should also be able to identify facts which may be obscure or invisible to those without such expertise. The service that expert witnesses provide assists the court to interpret the factual evidence and understand the implications. As such, expert witnesses are a crucial resource to assist the courts in order that they may dispense justice.

Roles and Responsibility of an expert witness

All witnesses have a duty to tell the truth, whether they are giving evidence of fact or of opinion. However, the particular reliance that the courts place upon the opinion of an expert witness creates a special position and relationship. In the 19th Century, at the same time as the expansion in the use of expert witness, there was clear concern within the judiciary about the use of partisan expert evidence. There was a perception that experts could be found who would testify to anything absurd. In his Treatise on the Law of Evidence (1885), Taylor states:

> ***"Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These gentlemen are usually required to speak, not of facts, but to opinions: and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them."***

The difficulties associated with the partisan use of expert evidence persisted and the abuse of expert evidence was one of the matters cited in criticism of the Civil Justice System by Lord Woolfe in Access

to Justice. Due to the important role that the expert performs, and the significance placed on the evidence they provide, abuse of expert evidence had an effect on access to justice and responsible use of court resources. Consequently, it is of paramount importance that the successful delivery of the service provided by expert witnesses is not left to chance. The past abuse of the system led, in part, to the reform of the system and the introduction of a set of rules to regulate the conduct of experts and those that instruct them. The terms on which expert evidence is admissible is governed in civil cases by the Civil Evidence Act 1972 and the Civil Procedure Rules, Practice Direction 35, the Civil Justice Council Protocol for the Instruction of Experts to give Evidence in Civil Claims. The most important principles are found in the Civil Procedure Rules; the rules that apply to the conduct of court proceedings. The rules reflect a re-statement of an expert's duties as contained in the case of National Justice Cia Naviera SA v Prudential Assurance Co Ltd, the Ikarian Reefer, [1993] 2 Lloyd's Rep 68. These rules very clearly state that it is the duty of the expert to help the court in relation to matters within their expertise and that this duty to the court overrides any obligation to the person from whom they have received instructions or by whom they are paid. The role of an expert witness is succinctly summarised in Practice Direction 35.1 ***"An expert should assist the court by providing objective, unbiased opinion on matters within his expertise, and should not assume the role of an advocate."***

Understand expert duties

The principles apply whether the tribunal is a court or arbitration. If the expert does not comply with the principles, they run the risk of the tribunal either giving their evidence very little weight or, possibly disregarding it altogether. Therefore, it is essential that all potential experts and those appointing them fully understand their duties. The position of the judiciary in the support of the principles is clear. In the case of the Stevens v Gullis [2001] All ER 527, [1999] BLR 394, the court of Appeal determined that an expert who failed to comply with the requirements of the Practice Direction to part 35 of the Civil Procedure Rules should not be permitted to give evidence even if as a result of debarring them the case must be dismissed. The trial judge found that the failure of the defendant's expert to comply with the Practice Direction 35 meant that his evidence was debarred. The debarring of the evidence meant that the claim had little chance of success and was dismissed. The debarring order was appealed. Even though the parties had submitted a consent

order requesting that the expert be allowed to give evidence, the Court of Appeal found little trouble in supporting the decision of the trial judge and rejected the appeal. In dismissing the appeal Lord Woolfe M.R. stated:

> ***"I consider that it would be wholly wrong to impose Mr. Isaac as an expert upon the judge. The judge had very properly indicated his view that Mr. Isaac is not an appropriate person to give expert evidence in a court having regard to his conduct to which I have referred. That being so, it would be quite wrong for this court, even by consent, to interfere with the judge's judgement. Mr Isaac lacks the basic knowledge of the responsibilities which an expert has when giving evidence…Mr Isaac had demonstrated that he had no conception of the requirements of the CPR… I am quite satisfied that the judge had no alternative but to take the action he did, notwithstanding the fact that the CPR had not only recently come into force, and that the consequences to the defendant of the course which was taken was draconian and could deprive him of a claim which he might otherwise have against the architect."***

The loss of expert evidence may be a harsh blow but, as demonstrated in Phillips & Ors v Symes & Ors [2004] equally damaging is the admission, under cross examination, that the expert has not given due consideration to all the facts. The case involved an expert, who was owed a large sum for professional fees and no hope of recovering additional fees for the consideration of new material, who declined to read further evidence that might change his opinion. The judge commented

> ***"I have however, some sympathy with Dr X in the sense that he was being required to do work without an instructing solicitor or client and therefore nobody to reimburse him for the time that he would spend. However, he had provided a report to the Court and his duty as an expert to the court requires him (amongst other things) to correct or reconsider any report in the light of changed circumstances."***

Under cross examination the expert admitted that he had not read new submissions and as a result his evidence was of little value to the court. This case clearly demonstrates that experts must consider all the available information and

they cannot crystallise their opinion and ignore alternative propositions. The case also clearly illustrates the continuing duty of an expert to the court exceeds that of their own personal considerations.

The case of London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd and Others in 2007 provides another example of the court's response when experts do not comply with the principles contained in the CPR. The case relied extensively upon the evidence of four experts. In respect of three of the experts the judge was severely critical, saying that the evidence of one was ***"…partial, biased, and on occasions misleading to such an extent that it could not be described as independent",*** that another reached a ***"conclusion that was wholly unsustainable"*** and stating that a third gave rise to concern as to his ***"lack of independence as an expert."*** The weight attached to these experts' opinion was reduced accordingly, and to the extent the case relied upon that evidence was undermined as a consequence.

Another clear example of how the courts expect experts to approach their task is found in the case of Great Eastern Hotel Co Ltd v John Laing Construction Ltd in 2005. This case illustrates the position an expert must adopt when considering the various merits of the case presented by its client. In this case the expert's evidence was rejected on many grounds, but it was the expert's unquestioning reliance on his client's version of events that ultimately and completely undermined him. This clearly demonstrates that the expert owes a duty to the court to present its findings, avoiding the temptation to fill in the evidentiary gaps or to act as advocate.

An overriding duty to assist the court

The courts have clearly admonished those that approach their task in a less than prepared manner and have now demonstrated without a shadow of a doubt that they will not tolerate a return to the partisan behaviour of the mid-19th Century that led to a widespread criticism of expert witnesses.

Whilst experts come from disparate backgrounds, from surgeons to engineers, and can become narrowly drawn into the issues under consideration, they should always comply with their overriding duty to assist the court by providing objective, unbiased opinion on matters within their expertise, and should not assume the role of an advocate.

To comply with their obligations, they must first understand their role as experts, and they should take their training as experts as seriously as their training in their primary discipline.