

THE ROLE AND DUTIES OF AN EXPERT WITNESS AT PLANNING INQUIRIES

A BARRISTER'S EXPECTATIONS

Background

We are all so familiar with experts giving their testimony at a trial or hearing that it is often forgotten that the starting point in law is that opinion evidence is inadmissible.

Ironically, one of the first cases¹ addressing the admissibility of expert testimony involved the evidence of the father of civil engineering: John Smeaton. At the trial his expert evidence and opinion on the effectiveness of sea defences was ruled inadmissible. The appeal court overruled that decision and a re-trial was ordered. In the landmark judgment given by Lord Mansfield in 1782 the first clear recognition that an expert can offer evidence in the form of opinion was given, provided that the testimony is within his field of competence.

Lord Mansfield's judgement on the issue remains relevant:

"... opinion of scientific men upon proven fact may be given by men of science within their own science. When such a person is called as a witness, his opinion is admissible on any relevant matter".

Much more recently in the case of *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, the Supreme Court identified four factors that govern the admissibility of expert evidence in civil proceedings:

¹ *Foulkes v Chadd* (1782) 3 Doug KB 157

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1. Whether the proposed evidence will assist the court in its task,
2. Whether the witness has the necessary knowledge and experience,
3. Whether the witness is impartial in his or her presentation and assessment of evidence, and
4. Whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

The law draws a distinction between an ordinary witness, whose evidence is in relation to the establishment of facts and an expert who, because of the possession of specialist knowledge relevant to an issue in the case, is entitled to give evidence of opinion on facts that others have adduced before the court.

But it is also important to note that the Court or tribunal will come to its own independent judgment. The court is not bound by the view of the expert – however eminent in his or her field that expert is.

Role and Duty of an Expert Witness

Before considering the expectations that a Barrister has for his cohort of expert witnesses at a public planning inquiry it is fundamentally important that any expert witness understands his or her duty to the Court or Tribunal he is providing evidence to.

An expert witness enjoys both privilege and also power. The expert's specialist knowledge entitles him or her to give opinion evidence which a lay witness is not. That is a privilege. The expert also has power. No properly trained Barrister underestimates the difficulty involved in preparing and mounting an effective challenge to a well-prepared expert evidence by cross-examination. This is so even when the Barrister is helped by his or her client's own expert. With the power which an expert has goes responsibility.

Some controversial cases have shown that the abuse by an expert of that power can cause serious harm and injustice. The power of an expert to influence the tribunal of fact means that an expert must take great care in performing his or her task for fear of misleading the court.

One example will illustrate the point being made. Sir Roy Meadow, was a distinguished paediatrician and gave evidence for the prosecution in the case of Sally Clark. She had been accused and convicted of the murder of her two baby sons, whose deaths occurred over a year apart and when they were both only a few weeks old. One explanation for the death of each child was "cot death" or sudden infant death syndrome. Professor Meadow, had stated that one sudden infant death was a tragedy, two was suspicious and three was murder until proved otherwise. He asserted in the Sally Clark trial that the chance of two cases of sudden infant death syndrome occurring in one family was 1 in 73 million. Crucially the basis for this was calculation was flawed because the statistic was based on the premise that two deaths within the same family were unrelated to each other. The premise was unsound because a genetic disorder may exist in the family or the sleeping positions or other causes may be

related. The appeal court heard that the probability was, in fact, about 1 in 8000. Sally Clark's appeal was allowed and she was acquitted on appeal.

Lord Justice Judge later described the case as a:

"a salutary warning against the possible dangers of an over-dogmatic expert approach".

The role of the expert is to assist the court to make its decision. In a short and succinct statement on the function of expert witnesses Lord President Cooper in the Scottish case of *Davie v Magistrates of Edinburgh* (1953) SC 34 stated:

"Their duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

The General Rules Governing Expert Evidence

In the course of a civil trial the rules have been codified in the Civil Procedure Rules ("CPR"). When Lord Woolf reviewed civil procedure over twenty years ago he criticised the use of expert witnesses in civil litigation. In his Interim Report to the Lord Chancellor on the Civil Justice System of England and Wales (June 1995) he pointed out the excessive cost and the delays associated with each party appointing their own experts. He also recorded concerns about the failure of experts to maintain their independence from the party by whom they had been instructed.

In his Final Report he referred to the "large litigation support industry, generating a multi-million pound fee income" that had grown up.

His Report led to the adoption of strict rules in Part 35 of the Civil Procedure Rules to regulate the giving of expert evidence at trials. Part 35 of the CPR includes several rules. Although strictly speaking they only apply to trials and do not therefore bind the Planning inspectorate under the Town and Country Planning Act 1990 and the Inquiries Procedure Rules they represent good practice.

The Court is placed under a duty to restrict expert evidence to that which is reasonably required to resolve the issues in the proceedings. To perform that duty the parties must have the permission of the Court to call an expert or put in evidence an expert's report. A general rule is imposed that requires expert evidence to be given in a written report, by regulating the written questions which another party may ask of the expert, by providing for experts to discuss and, where possible, agree the expert issues in the proceedings.

Part 35.3 of the CPR enshrines the existing concept of the independent expert by providing that it is the duty of experts to help the court on matters within their expertise and that that duty overrides any obligation to the person who has instructed them or by whom they are paid. The rules also provide for protection of the expert against improper pressure (usually

from those instructing him or her) by enabling the expert to seek directions from the court. CPR Part 35 is supplemented by specialist guides containing guidance about the case management of expert evidence that can be found in the “White Book” on Civil Practice.

In the criminal courts the use of expert evidence was extensively reviewed by the Law Commission in 2011. The report contained a number of recommendations that were designed to improve the reliability of expert evidence and are enshrined in the Criminal Procedure Rules 2015 (“CrPR”) and accompanying Practice Directions.

Ikarian Reefer

The principal duties and responsibilities of an expert witness have been summarised by Mr. Justice Cresswell in *National Justice Compania Naviera SA v Prudential Assurance Company Limited* (the “Ikarian Reefer” case) [1993] 2 Lloyd’s Rep. 68. The principles summarised in this case are the “go to guide” for any person who holds themselves out as capable of and having the expertise to give expert evidence before a Court or Tribunal.

In the *Ikarian Reefer* case Mr Justice Cresswell said that he believed that a misunderstanding on the part of certain expert witnesses in the case as to their duties and responsibilities contributed to the length of the court proceedings. It was for these reasons that in the course of his judgement he set out the following:

“THE DUTIES AND RESPONSIBILITIES OF EXPERT WITNESSES

The duties and responsibilities of expert witnesses in civil cases include the following:

- 1. 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 (Whitehouse v. Jordan, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).*
- 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd. v. Commercial Union Assurance Co. Plc., [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and Re J, [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.*
- 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J sup.).*
- 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
- 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J sup.). In cases where an expert witness who has prepared a*

report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co. Ltd. and Others v. Weldon and Others, The Times, Nov. 9, 1990 per Lord Justice Staughton).

6. If, after exchange of reports, an expert witness changes his 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.

7. 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."

Two further rules have been added by Judge Toulmin in the case of *Anglo Group plc v Winther Brown & Co Ltd and BML (Office computers) Ltd* (2000) 72 Con LR 118. I have carried on the numbering from *Ikarian Reefer*.

"8. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.

9. [The expert] should co-operate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending without-prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely areas of disagreement to be set out in the joint statement of experts ordered by the court."

Finally, having set out some of the legal and regulatory framework for the introduction and presentation of expert evidence it is time to turn to the theme that **Ben Jackson** has specifically asked me to set out.

Barrister's Expectation

I have called **Ben Jackson** as an expert witness at many planning inquiries. He asked me to set out some thoughts about the qualities that Barristers value most in an expert witness and what are the qualities that I like to see in the witnesses I am minded to call to give evidence.

So here is the guide:

1. The expert witness should therefore have a high standard of technical knowledge and practical experience – this latter point is important because it is quite often the case particularly in planning inquiries that I will be looking to the expert to find solutions to any issue that arises.
2. The expert witness should keep up to date through work i.e. hands on experience and continuing professional development and training.
3. A key point to bear in mind is that it is crucial for the expert witness to convey to a non-expert decision maker a clear understanding of what is being addressed in the evidence. One of the biggest mistakes I see is where the expert simply fails to explain his subject. Almost as if the 'expert' is saying: "Look at all the jargon I can use that you don't properly understand so I must be an expert in this field and therefore you should agree with what I say even if you don't understand what I am talking about'. Be absolutely clear – attempting to blind a decision maker by the use of professional language that is not clearly explained almost invariably fails to convince. To get the decision maker to understand the subject matter and the reasoning behind the expert's conclusion is an overriding objective of expert evidence.
4. A recognition that the expert witness's primary obligation is to the Planning Inspector or the Court and this should be set out in the written evidence prepared for the inquiry.
5. The expert witness is required to be independent, impartial and objective. In the first instance this may well mean that after he or she has been instructed and examined all the issues that he or she cannot support the client's case. If that is the position the expert should make that position clear to the client and should not then give evidence contrary to his or her professional opinion. Surprisingly, this arises in practice more than you might think – usually with Local Planning Authorities. Before a Planning Committee makes a decision a professional officer of the Council will prepare a report setting out the consultation responses and making a recommendation. If the recommendation is to approve but that is rejected at the Planning Committee the author of the Report should not give evidence to support the reason for refusal where that is contrary to the recommendation and professional opinion he or she had come to. I have seen Inspectors tellingly ask such witnesses when giving their evidence to give their own professional view and not the view of the Planning Committee when giving evidence. The Royal Town Planning Institute Rules of Professional Conduct include:

“Members must not make or subscribe to any statements or reports which are contrary to their own bona fide professional opinions, nor knowingly enter into any contract or agreement which requires them to do so.”

6. This also means the expert witness is not to be selective in the materials drawn upon to support his or her conclusions reached. I expect the expert witness to take into account and address in the body of his or her written evidence any matter which might be seen to point to a different conclusion.
7. The expert witness should do nothing to compromise his integrity. Although numerous planning inquiries happen throughout the year a witness that has compromised his professional integrity at one becomes quite quickly known. Word does get around. As one *“Rumpole-like”* criminal barrister once said to me:
“Professional credibility is like virginity: once lost it can never be re-gained”
8. Avoid being an advocate. It is not the role of the expert to make the case for the client. If the expert does so it suggests a lack of objectivity and is quickly recognised by the Planning Inspector.
9. An expert witness is entitled to a proper professional fee but the fee should not depend on the outcome of the case.
10. The expert evidence should be properly informed and have regard to all appropriate codes of conduct, codes of practice and guidelines.
11. In preparing for the inquiry the Inquiry Procedure Rules provide that each side exchange their evidence usually 28 days before the Hearing date. On seeing the other sides’ written evidence I expect the expert to go through his or her opposition expert’s report and critically assess it. I will want to know whether it is a robust analysis or otherwise.
12. In practice shortly after the exchange of evidence a conference will be arranged with the Barrister and experts to go through the other side’s evidence. A decision will be made whether to produce Rebuttal evidence where this may be required – to address new issues raised in the evidence that needs addressing. Rebuttal evidence should not be a re-hash of the existing written evidence that has been submitted.
13. Practices will differ but shortly before the Hearing date I will prepare my cross-examination of the other side’s expert based on the written evidence and rebuttal where one has been prepared. I usually write down in quite some detail the questions I am proposing to put to the other side’s expert witness. I will expect my expert to examine with me the points of the prepared cross examination to ensure that the key issues raised by the other side can be properly and effectively challenged. If I have misunderstood any point I expect to be corrected by the expert.
14. When it comes to the inquiry preparation for the giving of evidence must be taken. There are two aspects to this. Firstly, reminding oneself of the written evidence that has been submitted and all the accompanying material upon which it is based. It sounds simple but navigating through a wealth of documents in a public forum can be daunting. Secondly, anticipating cross examination from the other side’s advocate. Part of the reasoning behind an exchange of evidence is to avoid an *“ambush”* of evidence. An expert should therefore be aware of the case of the other

side and should be able to be prepared to respond to it. If a Rebuttal has been provided reference the relevant passages and summarise them. If not, the expert should be able to succinctly and clearly explain their opinion and justify their conclusion on the relevant issues. Remember this line by John Henry Wigmore:

“Cross-examination is the greatest legal engine ever invented for the discovery of truth.”

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