SENIOR PRESIDING JUDGE
FOR ENGLAND AND WALES

CHECK AGAINST DELIVERY

THE CURRENT THINKING OF THE JUDICIARY

KEYNOTE ADDRESS BY THE SENIOR PRESIDING JUDGE

BOND SOLON CONFERENCE ON EXPERT WITNESSES

9 NOVEMBER 2012

Introduction

1. It is a pleasure for me to be here. As a barrister I spent a good deal of my time with experts- particularly doctors and accountants. You are a varied group. On the one hand there is the expert who asks, what do you want me to say? On the other, there is the expert who says, this is my view, whatever the evidence to the contrary. I remember too one very distinguished consultant who was so important that he absolutely refused to talk to junior counsel and would only discuss the issues with the leader.

2. I am going to try and give you *a* judicial perspective – which is not the same as saying 'the' judicial perspective as of course I can not speak for all of my colleagues. I note that it states on the flyer advertising this conference that this is the largest annual gathering of expert witnesses in the UK, which might be regarded as a daunting prospect for any speaker. You are all used to

appearing before a judge, but no judge is used to appearing before such a large and varied assortment of experts.

3. There have been three recent reports which are relevant to the role of the expert. In crime there was the Law Commission's Report of 2011 on Expert Witnesses. In family, there was David Norgrove's Family Justice Review, which was followed most recently by Mr Justice Ryder's 'Judicial Proposals for the Modernisation of family justice.' And in civil, there was Lord Justice Jackson's Review of Civil Justice published in January 2010. The fact that the role of the expert is under such scrutiny reflects does it not, several concerns? I take a few. First, the use of expert evidence where in truth no expert evidence is required. That may be a particular issue in criminal and family cases. Second, the substantial increase in the cost of litigation which expert evidence occasions. That is a particular concern in the current climate in cases which are funded by the taxpayer. Third, the use of too many expert witnesses in one case. Fourth, there is a concern about the quality of some expert evidence.

4. Before I turn to the three areas of family, crime and civil, forgive me re-iterating some principles so important to the role of the expert; things with which you will all be familiar, but which may be forgotten in the heat of the battle which is our adversarial system. These were the well known words spoken by Creswell J in a commercial case.

> *(1) Expert evidence presented to the court should be, and seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*

(2) An expert witness should provide independent assistance to the court by way of unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.

(3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.

(4) An expert 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.

(6) *If after exchange of reports, an expert witness changes his view on material matters, such change of view should be communicated to the other side without delay and when appropriate, to the court.*

5. The expert's duty to the court was of course further underlined last year in *Jones v Kaney* [2011] UKSC 13, a Supreme Court case with which you will all be very familiar. In that case Lord Brown observed that potential liability for negligence in relation to their evidence would render experts more circumspect in their views and in how they advance them to their clients. This would increase the expert's ability to assist the court in fairly determining proceedings and finding the truth.[1]

[1] [2011] UKSC 13, [2011] 2 WLR 823 at [52] – [57]

6. In other words, the danger of being sued if such guidance as was set out by Cresswell J is not followed, may have a measurable effect on the views and behaviour of the expert.

Costs in publicly funded cases

7. Finally, in this more general section of what I have to say, may I mention the vexed issue of the fees of expert evidence in publicly funded cases; in other words, in criminal and family cases?

8. In 2011 the Ministry of Justice through the Legal Services Commission paid some £160 million on experts. In family cases the figure spent on experts was between £71 and £97 million; in other civil cases it was approximately £24 million and in crime, £60 million. That is a lot of public money. In October 2011 the Government introduced codified, capped rates for experts. It sets out hourly rates. As I understand it, the intention was to reduce the expert fee bill by about 10%. Their introduction has not been without problems, particularly in London. I understand too that the LSC is currently looking at the extent to which savings have been made, if they have. I have heard a very concerning rumour. The number of hours worked, or said to have been worked, per case have increased significantly. If the rumour is right, one is bound to infer that it reflects some people padding out hours. That would plainly be wholly unacceptable. It would call into question the integrity of the expert. It would too inevitably lead to a more draconian approach by the LSC, and, as it seems to me, fixed fees. I cannot imagine any member of this group would be involved.

Crime, family and civil

9. In your break-out sessions, you are considering three specialist areas, namely, crime, family and civil/commercial. In each area a particular aspect struck me. In crime, it was, is a single joint expert good or bad? In family, it was, how many experts does one case need? In civil/commercial, it was “hot tubbing: how does it work and why is it useful? While these aspects are highlighted in particular specialisms, there is a common theme. How many experts does one case need? How best should the evidence be presented? It seems to me axiomatic that, assuming a case needs an expert at all, and many do not, the number of experts should be as few as possible with the greatest possible agreement in advance between them.

Crime

10. I turn first to crime. Let me start with an example of a case which highlights a number of the difficulties.

11. *Harris and Others* [2006] 1 Cr. App. R 55 was an appeal involving four different convictions. They had occurred between 1995 and 2000. One was for murder, two were for manslaughter and one was for inflicting grievous bodily harm. In three cases a child had died. In one a child had been seriously injured. At the heart of these appeals was a challenge to the accepted hypothesis concerning "shaken baby syndrome" or, as it should be more properly called, non-accidental head injury. There was a plethora of experts. They jostled with each other over the prominence and strength of their respective medical hypotheses. They disagreed about the cause of death in each case. The appellant called ten medical expert witnesses. The Crown called eleven. Some of the experts sought to expound controversial, relatively untested hypotheses which were insufficiently advanced to withstand legal scrutiny and were ultimately discredited. Can one really justify 21 experts in

four similar cases? Can the complexities of a case demand substantial numbers of subject matter experts, often in very stark ideological and/or scientific disagreement with each other? Could there be one expert for each relevant specialty?

12. These can be difficult enough issues for a judge. For a jury to have to resolve genuine points of disagreement between experts is even harder. In a more recent case of non-accidental head injury (*R v Henderson, Butler and Oyediran* [2010] EWCA Crim 1269), the Court of Appeal emphasised the need for such cases to be dealt with by counsel and judges who were suitably experienced. They had to be able to set out points made by each expert in a way that assisted the jury to evaluate the evidence. As the Court put it:

> *"It will usually be necessary for the court to direct a meeting of experts so that a statement can be prepared on areas of agreement and disagreement. The essential medical issues which the jury have to resolve should be clear by the time the trial starts."*

15. That said, it is clear that jurors cannot be assumed to be able to cope with the demands of statistics, medical specialism or other complex scientific areas. That increases the burden on each of us. It requires judges and advocates to take responsibility for ensuring that such evidence is presented to the court in as clear and comprehensible a fashion as possible. The input of the knowledgeable and dispassionate expert to that process is vital.

16. In truth, legal professionals' grasp of statistics and probability may be little better than that of the average member of the public. There is a danger that jurors (and for that matter advocates and judges) will place

too much weight on what may be seen as unequivocal scientific expert evidence as against conflicting and often confusing eye witness evidence. The reality of course is that science ultimately depends on probabilities and, while there are facts that are incontrovertible, the expert opinion on a given matter may be fallible, as we all know.

17. Better understanding by lawyers and judges is plainly desirable. That is why Andrew Rennison, the Forensic Services Regulator and the Forensic Science Advisory Council, (which has a judicial representative) are doing work in this area. The Regulator and Council are seeking to ensure quality is maintained; that unsubstantiated theories are kept away from the court room. Short, authoritative documents on key scientific areas, such as DNA, fingerprints and so on are to be prepared for judges; in effect a 'Noddy's guide' to the given area. The guide will set out the agreed science and will be updated on a regular basis, with the support of the Royal Society.

The Law Commission Report on expert evidence in criminal proceedings

20. The Law Commission's 2011 Report on Expert Witnesses was prompted by a request from the House of Commons' Science and Technology Committee. There was concern that expert evidence was being admitted in criminal proceedings too readily and with insufficient scrutiny. Some well known cases prompted it. (*Dallagher* (2002) – ear print evidence; *Clark* (2003) and *Cannings* (2004) – sudden infant death syndrome; and the case I have already touched upon- *Harris and others* (2005)).

21. The Law Commission's key recommendations were to:

(i) Introduce a statutory admissibility test. The expert opinion was only to be admitted if was sufficiently reliable ("the reliability test"); [2]

(ii) Provide a statutory list of generic factors to help judges apply the reliability test;

(iii) Codify (with slight modifications) the uncontroversial aspects of the present law, so that all the admissibility requirements for expert evidence would be set out in a single Act of Parliament.

22. The legislation would list factors which the court would be required to take account when assessing the reliability of the evidence. There would be examples of matters which may detract from the reliability of opinion evidence. The Law Commission itself acknowledged that there is no guarantee that the implementation of its recommendations would have prevented some of the well-known miscarriages of justice. I think it is an open question as to whether the implementation of the Law Commission's proposals would lead to a significant reduction in the number of convictions quashed on the basis of unreliable or conflicting expert evidence. Much uncertainty remains around the number of such convictions that are directly attributable to unreliable expert evidence, rather than, for example, changes in experts' views or new discoveries. There is too uncertainty as to how judges would use the reliability test: whether a judge at an early stage of a trial really would feel sufficiently confident to exclude expert evidence. The process envisaged by the proposals would significantly lengthen trials and increase cost. Those are not attractive attributes in the present environment.

[2] The Law Commission "Expert Evidence in Criminal Proceedings" 2011: Part 9 paragraph 3.136

Family cases

23. I start by dealing with public law cases, that is to say, cases in which the state is seeking involvement in the lives of children, often by seeking to take them into care, possibly with a view to adoption.

24. I start with a quotation from paragraph 86 of the executive summary of David Norgrove's Family Justice Review.

> "*Expert evidence is often necessary to a fair and complete court process. But growth in the use of experts is now a major contributor to unacceptable delay. The child's timescales must exert a greater influence over the decision to commission reports and judges must order only those reports strictly needed for the determination of the case.*"

25. Primary legislation is recommended:

> "*It should assert that expert testimony should be commissioned only where necessary to resolve the case.*"

26. The Government has accepted Norgrove in this regard. The proposed clause in the draft legislation, under the heading "*Control of expert evidence*" states that the court may only give permission for such evidence if:

> "*[In its] the opinion...the expert evidence is necessary to assist the court to resolve the proceedings justly.*
> *(7) When deciding whether to give permission...the court is to have regard in particular to:*

(a) any impact which giving permission would be likely to have on the welfare of the children concerned...,

(b) the issues to which the expert evidence would relate,

(c) the questions which the court would require the expert to answer,

(d) what other expert evidence is available (whether obtained before or after the start of proceedings),

(e) whether evidence could be given by another person on the matters on which the expert would give evidence,

(f) the impact which giving permission would be likely to have on the timetable, duration and conduct of the proceedings,

(g) the cost of the expert evidence...."

27. Although the legislation is not in place (and will not be for some time), we, the judiciary are working on the basis that what is proposed sets out a sensible approach to managing family cases.

28. The national Family Justice Council (which is an independent advisory body, chaired by the President of the Family Division) has been asked to contribute to the modernisation programme by providing multi-disciplinary advice on a number of issues including:[3]

(1) More effective use of expert evidence in the family courts

(2) Best practice and quality standards for experts in the family courts

29. There will too be Rule and Practice Direction changes relating to the use of experts. New Practice Directions will make it clear that it should be the exception rather the norm to seek expert reports. It is also proposed that

[3] Mr Justice Ryder, paragraph 25 to the '*Judicial Proposals for the modernisation of family justice*' (2012)

where expert evidence is required, the standard practice will be to use a single or single joint expert and that issues in the case will be identified sooner and well before the final hearing.

30. I should make one thing plain. There will still be the need for highly qualified, mostly medical, expert evidence in the sort of non-accidental injury cases I have spoken about in the criminal context.

31. No doubt Matthew Thorpe will cover the topics I have touched upon in greater detail.

Civil

32. Finally, I turn to civil. This is a quotation from The Lawyer of November 1994. It precedes the Woolf reforms. It shows how slow change is in our system.

> "*The expert witness gravy train may be diverted into a siding, if the signals from three top judges are anything to go by. The spotlight has been turned by judges Bingham, Taylor and Woolf on the practice of the automatic loading up of litigation by anxious lawyers with experts and counter experts, whether cases need them or not....*"

33. In his report in 1996, 'Access to Justice,' Lord Woolf referred to expert evidence as one of the 'major generators of unnecessary cost' in civil work[4]. The reforms, among other things, sought to address the perception of the expert as a 'hired gun' by imposing a *primary*, or in the language of the Civil Procedure Rules, *overriding* duty to the court, as a means of eliminating the problem of partiality.

[4] Woolf, *Access to Justice*: Final Report, [13.1]

34. On to 2010 and Lord Justice Jackson's Interim and Final Reports. Lord Justice Jackson stressed the crucial role of judicial case management (as in family work). It was for the judge to make sure that the cost of experts was proportionate; that their evidence went to the heart of the case. The Final Report acknowledged that while a single solution would not be appropriate for all cases, alternative techniques for dealing with expert evidence could be tried for particular types of case. He recommended that a pilot scheme should be set up to assess the extent to which the Australian court technique of using *concurrent evidence* (colloquially referred to as "hot tubbing"), could be implemented in English courts.

"Hot tubbing"

35. Forgive me if I speak of something with which you are familiar. Mr. Justice Heerey of the Australian Federal Court in 2004 in the Civil Justice Quarterly, explained the process as follows:

> "*...the parties' experts giving evidence in the presence of each other after all the lay evidence on both sides has been given. The experts are sworn in and sit in the witness box or... a suitably large table which is treated notionally as a witness box.... A day or so previously, each expert has filed a brief summary of his or her position in the light of all the evidence so far. In the box, the Plaintiff's expert will give a brief oral exposition, typically for ten minutes or so. Then the defendant's expert will ask the plaintiff's expert questions that is to say directly, without the intervention of counsel. Then the process is reversed. In effect a brief colloquium takes place. Finally each expert*

gives a brief summary. When all this is completed, counsel cross-examine and re-examine in the conventional way."[5]

36. A pilot scheme was set up in Summer 2010 at the Manchester Technology, Construction and Mercantile Court. I am conscious that you will be hearing from His Honour Judge Waksman QC who has, I anticipate, direct experience of this. The first case to adopt the concurrent evidence procedure in court was in December 2010. Professor Dame Hazel Genn of University College London produced an interim report on the scheme in January of this year. She accepted that it was impossible to reach solid conclusions on the effectiveness of the procedure. Only three cases had been through the full process. At least 15 further cases had agreed to participate in the scheme. These cases were given a 'Concurrent Expert Evidence Direction' from the Judge. They settled before trial. A key question you may think, which indeed Professor Genn asks, is whether the Direction in itself had a positive impact on the settlement process? [6]

37. Judicial feedback to Professor Genn was generally positive: some felt that the process was more efficient, saved time and allowed them greater control of the issues. There was support for the contention that the procedure enhanced the quality of judicial decision-making and improved focus for all parties. The experts' feedback on the whole was similarly positive. The process was regarded as less adversarial and the opportunity to deal with the issues directly and with greater objectivity was welcomed.

38. Another benefit of the scheme, commented upon recently by a colleague who has seen hot tubbing when sitting as an arbitrator, is that opposing

[5] Heerey, *Recent Australian Developments*, (2004) CJQ (23) 386 at 390-391
[6] Manchester Concurrent Evidence Pilot Interim Report – Professor Dame Hazel Genn, UCL Judicial Institute. January 2012

experts are more likely to find common ground when talking face-to-face on a key point with their peers.

39. Given such a limited number of cases it is hard to say whether or not this saved much by way of costs. The parties felt that little was. The likely saving was in relation to court time. One of the Judges stated that the court time saved was in the region of 50%. If that is right, it is a substantial saving. The knock-on effect enabling other cases to be listed sooner is highly beneficial. There is too the possibility that at least some of the 15 plus cases that settled did so as a result of this process; that minds were applied sooner to the real issues and the respective strengths and weaknesses on each side. It seems to me clear that a substantial saving in court time would alone justify hot tubbing. Moreover, the Australian experience suggests clear financial and practical advantages to this scheme. Hazel Genn recommended a further evaluation. She suggested too that the scheme needed to expand and cover different kinds of cases.

40. On that basis the pilot has been extended to include Chancery cases in Manchester. It is to continue until next April on a voluntary basis. From April 2013, agreed amendments to Practice Direction 35 of the Civil Procedure Rules will come into effect. This will provide for the procedure to be an option in all civil proceedings.

41. Hot tubbing changes how experts engage with the parties, each other and with the court. If it serves to limit and focus the issues in the case, reduce the extent or opportunity for long-winded or repetitive cross examination and saves court time, hot tubbing must clearly be a step in the right direction. It will be interesting to see in how many cases parties will choose hot tubbing next year. I hope many will.

42. As I have emphasised, what applies in one area may well be relevant to another. Ryder J is considering hot tubbing in his modernisation of family justice work. I also wonder whether it could be appropriate, possibly with some changes, for certain criminal cases.

Conclusion

42. As experts, you have a very important role in the administration of justice. Just as the advocates have to abide by a high ethical code, so do you. It is not only a question of integrity. It is also, a question of cost and time. As we look to the future, wasted time and excessive expense must become features of an outdated legal system. We can no longer tolerate them. We all have our part to play in achieving the necessary change and operating effectively within this new world. I am confident that you will pay your part.
