

Middle Temple Guest Lecture
Expert Evidence: use, abuse and boundaries
Lord Hodge, Justice of The Supreme Court
9 October 2017

Saunders J said this:

If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve and encourage them as things worthy of commendation.¹

That quotation from 464 years ago sounds condescending to modern ears. But at least it was a recognition of intellectual interdependence in the search for the truth. There are so many things that lawyers and judges do not understand. As scientific knowledge has increased and society has become more complex, the courts have become increasingly dependent upon expert testimony in order to achieve justice.

My involvement in 2 recent cases on the admissibility of expert evidence, one in the Judicial Committee of the Privy Council and other in the Supreme Court, has encouraged me to look at where the law now stands on the use, abuse and boundaries of expert evidence. While the Privy Council case, which I will discuss is a criminal case, I will concentrate in this lecture on expert evidence in civil cases and will not seek to cover the use of such evidence in criminal cases, in which the rules are not the same.²

The law has historically been reluctant to allow ordinary witness to draw inferences from the facts which they have observed. Thus, there was and, arguably still is, a general rule that a non-expert witness speaks only to what he or she has directly observed. But often the borderline between observation and inference is impossible to maintain. A person, who gives an account of

¹ *Buckley v Rice-Thomas* (1554) 1 Plowd 118, 124.

² The test in *R v Bonython* which I discuss below cannot be applied without qualification in the criminal sphere where the focus is more on the relevance and reliability of the field of knowledge rather than its organisation: see the Canadian case of *R v Mohan* [1994] 2 SCR 9, in which the Canadian court adopts a gate-keeping role which emphasises reliability. See also the Law Commission, “The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales” (2009) Law Commission Consultation Paper 190, para 3.14.

an event which he or she has observed, may often be unable to describe the event in a natural and convincing way without speaking of both the facts and the impressions which he or she had at the time. When I have witnessed an accident or a near miss it is much easier and more natural for me to speak of my impression at the time that a driver was going much too fast, and then to explain why I had that impression and perhaps estimate his speed. Similarly, the law will not shut its eyes to a lay person's evidence that he or she had had the impression from a driver's demeanour after an accident that the driver had been drinking.

But the law has drawn a distinction between an ordinary witness, whose evidence is factual, however it is expressed, and an expert who because of the possession of specialist knowledge is entitled to give evidence of opinion on facts which others have adduced before the court. As I shall seek to show, the giving of such evidence is not the only role of the expert, but it is the unique characteristic of expert evidence.

An expert witness enjoys both privilege and also power. The expert's specialist knowledge entitles him or her to give such opinion evidence which a lay witness may not. That is a privilege. The expert also has power. No practising lawyer should underestimate the difficulty involved in preparing and mounting an effective challenge to a well-prepared expert's evidence by cross-examination, even when assisted by his or her client's own expert. With the power which an expert has to influence the decision of a fact-finding tribunal, whether judge or jury, goes responsibility. As some controversial cases have shown, the abuse by an expert of the power which he or she is given can cause serious harm and injustice.

Expert evidence also involves the parties to a litigation in considerable expense. It is a resource which needs to be deployed with care and excluded where it is not needed.

Perhaps the clearest statement of the basis on which a court should permit expert testimony in a case is found in the judgement of Chief Justice King in the South Australian case of *R v Bonython*,³ in which he set out a test with three limbs.

The first may be summarised as "does the court need expert evidence to reach an informed conclusion?" It is whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a

³ (1984) 38 SASR 45, 46.

sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area.

The second limb may be summarised as “is there a reliable body of specialist knowledge?”. It is whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his or her opinion of assistance to the court.

The third may be summarised as “is the particular witness an expert in that field?” It is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his or her opinion of value in resolving the issues before the court.

The traditional expert who readily meets these tests is a member of the scientific community practising in an identified science or the member of a recognised professional body. Thus, in cases of clinical negligence the evidence of medical practitioners with qualifications and experience in the relevant area is indispensable. So too in cases involving complex building works is the evidence of specialist engineers or architects or surveyors. But there is scope for people with experience in a particular area of life, who do not have formal scientific or professional qualifications, to assist the court with their specialist knowledge. A obvious example is the policeman who has gained a practical expertise through the investigation of traffic accidents and who assists the court with an analysis of the evidence at the scene of the accident by which he or she reconstructs the accident.⁴ In the criminal field, another common area of expert evidence is evidence of the practices of drug users and suppliers, such as the prevailing prices of drugs, their packaging, and methods and quantities of usage and supply.⁵

The role of the expert is to assist the court make its decision. English textbooks often quote the succinct statement on the function of expert witnesses which Lord President Cooper gave in the Scottish case of *Davie v Magistrates of Edinburgh*,⁶ where he said:

“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

⁴ See for example, *R v Oakley* [1979] RTR 417.

⁵ *R v Hodges* [2003] 2 Cr App R 15.

⁶ 1953 SC 34, 40.

independent judgment by the application of these criteria to the facts proved in evidence.”

The Lord President emphasised the court’s independent judgment. The court is not bound by the view of the expert.

That statement is written with a focus on the role of the expert in giving opinion evidence. But as a leading textbook on expert evidence has stated,⁷ one can distinguish between different categories of such evidence. Hodgkinson and James list five categories of expert evidence.

First, like the Lord President in *Davie*, they refer to expert evidence of opinion, upon facts adduced before the court.

Secondly, there is explicatory evidence - that is expert evidence to explain technical subjects or the meaning of technical words.

Thirdly, there is evidence of fact, given by an expert, the observation, comprehension and description of which require expertise.

Fourthly, there is evidence of fact, given by an expert, which does not require expertise for its observation, comprehension and description, but which is a necessary preliminary to the giving of evidence in the other four categories.

Fifthly, there is admissible hearsay of a specialist nature. In civil proceedings the old rule against hearsay has been abolished.⁸ But the reliance of an expert on, for example, medical textbooks and scientific works, or on the product of scientific teamwork, or on what a patient has told him or her, or on the opinions and reports of other experts who are not called as witnesses, means that hearsay evidence plays a much larger role in expert evidence than it does in the evidence of a non-expert witness. In order to give expert evidence an expert will often have to draw on reading materials within his or her discipline. As Kerr LJ put it,

“the process of taking account of information stemming from the work of others in the same field is an essential ingredient of the nature of expert evidence.”⁹

⁷ Hodgkinson & James, “Expert Evidence: Law and Practice” (4th ed.) (2014), para 1-012.

⁸ Civil Evidence Act 1995, s 1(2)(a).

⁹ *R v Abadom* [1983] 1 WLR 126, 129-130.

There are also other roles for the expert in the court process beyond giving evidence. Parties often employ experts to give advice or to brief counsel on the preparation of a cross-examination without using them to give evidence. They can also assist the court in its preparation for a technical case. I recall being given the task of adjudicating on a dispute about the construction of a motorway in which the very substantial claim in damages was based on an assertion that the contractors had breached their implied duties of skill and care as it was alleged that the different layers of material which made up the road had not bonded satisfactorily. The trial was likely to involve complex and contested evidence from civil engineers. In order to prepare me to hear the evidence the parties agreed to the engagement of an expert road engineer, who was not involved in the disputed project, to give me a non-contentious private briefing on the physics which underlay the dispute. I found it very valuable when I read the papers in advance of the trial, but was nonetheless very relieved when the parties compromised the case.

I turn then to the two cases.

In the first case which has prompted this lecture, *Myers, Cox and Brangman v The Queen*,¹⁰ the Judicial Committee of the Privy Council was concerned with three criminal appeals from Bermuda. Two of the appellants had been convicted of murder and one of attempted murder in three separate gang shootings. In each case a young man had been sought out and shot by a gunman for no apparent reason. The police sought to establish the motive of the accused persons for the killings and attempted murder by leading as an expert on gangs in Bermuda a police officer, Sergeant Rollin, who was a member of a unit which targeted criminal gangs. The defence objected to such evidence but the courts in Bermuda admitted the evidence and the accused persons were convicted in three separate trials. The challenge was renewed in the Bermuda Court of Appeal who upheld the admission of the evidence and the convictions.

Sergeant Rollin gave evidence in two of the trials that the particular shooting was an incident in a long-standing feud between two rival gangs, which had been triggered by an incident shortly beforehand in which there had been an insult to or an attack on someone associated with one of the gangs. The two murder victims were not the perpetrators of the prior insult or attack but Sergeant Rollin sought to show that they were chosen as targets for retribution simply because they were members of the rival gang. In the third appeal, he gave similar evidence about gang behaviour in order to prove inter-gang loyalty between the defendant and an associate of his

¹⁰ [2015] UKPC 40; [2016] AC 314

who had suffered an insult and thus demonstrate a motive for the defendant's attempt to kill the victim.

The Crown presented Sergeant Rollin as an expert in gang culture and Bermuda gangs in particular. Much of his evidence was based on personal observation. He explained that he was a member of the unit targeting gangs and that he had for several years regularly patrolled the streets where the gangs congregated. He had frequently spoken to the gang members, most of whom he knew by name. He had studied their territories, the markings which they put on the walls and their structures. He had received specialist training on the observation of gangs from the FBI both in Bermuda and in the USA. He also relied to a much more limited extent on evidence which other members of his unit had gathered. He explained that the unit had three other officers, who also patrolled regularly. The officers pooled their information, sightings and other material on a shared database.

He gave factual evidence of the violent feud between the Parkside and Middleton gangs on the one hand and on the other the 42nd gang and its associate, the MOB gang. In the case of Myers, he was able to link the killing of a member of the 42nd gang by Myers, a member of the Middleton gang, to an incident which had occurred an hour and a half beforehand, when a woman associated with the Middleton gang had been insulted by a member of the 42nd gang. He supported his evidence with photographs of the defendant in company making the "M" symbol, which was a sign of the Middleton gang. The police also led evidence of firearms experts which implicated weapons which had been used in other attacks and supported the inference that the gangs kept weapons ready for their members to use.

In Cox's case, Sergeant Rollin's evidence was that there had been a shooting of a member of the 42nd gang at a club, 45 minutes before Cox and another member of that gang murdered a member of the Parkside gang in retaliation. He was able from his direct observation to give evidence associating the first victim and Cox with the 42nd gang and the murder victim with the Parkside gang. Cox in particular wore a pendant with "42" on it and had a tattoo reading "Coxy 42nd holla". There was also ballistics evidence associating the murder weapon with other shootings in the territory of the Parkside gang.

In Brangman's case, Sergeant Rollin's evidence was adduced to counter a suggestion on cross-examination that someone other than the accused had a motive for shooting the victim of the

attempted murder. He gave evidence from his personal observation over three years that both Brangman and that other person were members of the MOB gang and supported it with a photograph which showed the two together and Brangman making “W” sign with his fingers, which was a symbol of the MOB gang who derived from the west of the island.

The Privy Council upheld both the admission of the expert evidence and the criminal convictions. Almost all of the evidence was relevant to issues which the juries had to determine. The Board was critical of the adducing of irrelevant evidence, such as that the gangs were involved in drug trafficking and that one of the accused had never been in employment. In relation to the use of a police officer as an expert witness on gang behaviour, the Board gave advice on (a) the quality of the evidence, (b) the role of the officer as an expert and (c) the presentation of his evidence. In relation to the former the Board held:

“The officer must have made a sufficient study, whether by formal training or through practical experience, to assemble what can properly be regarded as a balanced body of specialised knowledge which would not be available to the tribunal of fact.”

It warned that care must be taken so that “simple, and not necessarily balanced, anecdotal evidence is not permitted to assume the robe of expertise”.

In relation to the role of the expert, the Board emphasised that the police officer comes under the same duties as any other expert and reiterated the duties of the expert witness which Cresswell J set out in *The Ikarian Reefer*,¹¹ a case to which I will return. The Board recognised that it would be difficult for a serving police officer to perform those duties when he had duties as an active investigator in other cases. It was important that he understood that as an expert he was not simply a part of the prosecution team but had a separate duty to the court to give independent evidence, whichever side it would favour.

Thirdly, the Board stated that the police officer as an expert must make full disclosure of the nature of his material. First, he must set out his qualifications to give expert evidence, by training and experience. Secondly, he must state not only his conclusions but also how he has arrived at them; he should say if they were by personal observation and, if based on information from other officers, he must show how the information was collected and exchanged and, if it was recorded, how. Thirdly, when reaching conclusions in relation to the defendant or other key

¹¹ *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyds Rep 68, 81.

persons, he must go beyond saying he has sources A, B and C, but give the source of the particular information he is advancing.

The second case on expert evidence in which I was involved took place against a completely different factual background. It could hardly be more different. The case, *Kennedy v Cordia (Services) LLP*,¹² concerned a lady who was employed by Cordia as a home carer and who injured herself when she slipped and fell on ice on a pavement in Glasgow during a prolonged spell of cold weather. The question for the court was whether, under relevant statutory regulations, her employers should have provided her with personal protective equipment in the form of anti-slip footwear attachments. I am not concerned today with the details of those regulations but with guidance which the Supreme Court gave on the use of expert evidence in cases concerning health and safety practice. While the judgment is concerned with Scots law, which has much less prescriptive rules of court on the use of expert evidence, the differences between Scots law and the English law of evidence in civil matters are not great and the case may be of some assistance in English cases also.

The claimant led the evidence of a consulting engineer with qualifications and experience in the field of health and safety at work. She succeeded in her claim before the Lord Ordinary at first instance but the judgment in her favour was overturned on appeal by the Inner House of the Court of Session, which held that the judge had impermissibly admitted and adopted the evidence of the consulting engineer, which had not been needed in order to allow the court to determine the case. The Supreme Court overturned that ruling and restored the judgment of the Lord Ordinary. We held that the expert's factual evidence on health and safety practice, based on published literature, and on the efficacy of anti-slip devices, and his opinion evidence on the way in which a risk assessment should have been carried out in this case, had been properly admitted in evidence. In so doing we took the opportunity to give guidance on the use of expert witnesses. We gave that guidance on 4 matters, namely (i) the admissibility of expert evidence, (ii) the responsibility of the legal team adducing such evidence to make sure that the expert keeps to his or her role of giving the court useful information, (iii) the policing by the court of the expert's performance of his duties and (iv) economy in litigation.

¹² [2016] UKSC 6; [2016] 1 WLR 597.

In considering the admissibility of expert evidence, the Court accepted as authoritative the guidance given in *R v Bonython*, which I have already discussed. The Court suggested that there were four considerations which governed the admissibility of expert evidence. They were:

First, whether the proposed expert evidence will assist the court in its task;

Secondly, whether the witness has the necessary knowledge and expertise;

Thirdly, whether the witness is impartial in his or her presentation and assessment of the evidence; and

Fourthly, whether there is a reliable body of knowledge and experience to underpin the expert's evidence.

We suggested that there was a role for an expert witness to collate and present to the court the relevant facts in a field of specialist activity, such as health and safety at work, and thus avoid the expense of calling many factual witnesses to speak to such matters. Thus, in relation to factual expert evidence, we suggested that the test for admissibility was not strict necessity but whether the evidence would assist the court to determine the case in an efficient manner. In relation to the expert's knowledge and expertise we referred to the guidance of the Privy Council in the *Myers* case which I have discussed. On impartiality and independence we quoted and endorsed Cresswell J's well-known guidance on the duties of the expert in *The Ikarian Reefer*.

We accepted that where the subject matter of proposed expert evidence was within a recognised scientific discipline, it was easy to be satisfied about the reliability of the body of knowledge.

Where a body of knowledge was not so widely recognised we endorsed the proposition derived from an obiter dictum of Lord Eassie,¹³ that

“A party seeking to lead a witness with purported knowledge or experience outwith generally recognised fields would need to set up by investigation and evidence not only the qualifications and expertise of the individual skilled witness, but [also] the methodology and validity of that field of knowledge or science.”¹⁴

The court stated that it was in the first instance the task of counsel and solicitors who seek to adduce the evidence of an expert to assess whether he or she has the necessary expertise and whether the evidence is admissible. The legal team was also under a duty to make sure that the expert was aware of the duties imposed on an expert witness. The team also had to disclose to the expert all of the relevant factual material which was to contribute to the expert's evidence,

¹³ *Mearns v Smedvig* 1999 SC 243.

¹⁴ Walker and Walker, “The Law of Evidence in Scotland” (4th Ed.), para 16.3.5.

including material which did not support the client's case. The expert should disclose in the written report the relevant factual evidence so provided.

The court's discussion of the policing by the judge of an expert's duties and economy in litigation through judicial case management was concerned with Scots law procedures and is therefore not relevant to this address. But at a more general level, the task of the trial judge to consider whether the expert was aware of and observed his or her function, and to decide what lay within the expert's field of expertise, is common to the jurisdictions of the United Kingdom.

I turn then from use to abuse.

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.

The experience of Sir Roy Meadow, the distinguished paediatrician, is perhaps the most well-known recent example of faulty evidence contributing to a miscarriage of justice. As you may recall, Sally Clark was accused and convicted of the murder of her two baby sons, whose deaths occurred about 13 months apart from each other, when they were only weeks old. One possible explanation for their deaths was so-called "cot death" or sudden infant death syndrome. Professor Meadow, who had stated that one sudden infant death was a tragedy, two was suspicious and three was murder until proved otherwise,¹⁵ asserted in the Sally Clark trial that the chance of two cases of sudden infant death syndrome occurring in the Clark family was one in 73 million. Unfortunately, he used this statistic on the premise that two deaths within the same family caused by sudden infant death syndrome were unrelated to each other. That premise was unsound, as a genetic disorder or disposition to illness may exist within a family, or the sleeping positions of the children or other cause may be related. The probability was about 1 in 8000. Mrs Clark was acquitted on appeal, largely as a result of the court's acceptance of serious criticisms of the methods of the pathologist, Dr Williams, who conducted post mortem examinations of the children and of his failure to disclose certain test results.¹⁶ But Lord Justice Judge later described the case as a "a salutary warning against the possible dangers of an over-dogmatic expert approach".¹⁷

¹⁵ The ABC of Child Abuse, p.100.

¹⁶ *R v Sally Clark* [2003] 2 FCR 447; [2003] EWCA Crim 1020.

¹⁷ *R v Cannings* [2004] EWCA Civ Crim 1, para 17.

Concerns about the abuse of the position of an expert are not confined to England and Wales. In a very interesting lecture in 2011, The Hon Thomas Cromwell, a Justice of the Canadian Supreme Court, compared miscarriages of justice in Canada, England and Wales, and Scotland to which flawed expert evidence had contributed.¹⁸ He referred to the Goudge Commission which in 2007-2008 reviewed the work of a previously respected paediatric pathologist in Ontario, Dr Charles Smith. Among the failings which Justice Goudge identified were a failure to understand the duty to the court to act impartially; a failure to prepare properly to give evidence, overstating his knowledge in certain areas and thus misleading the court, the use of loose and unscientific language, the failure to give a balanced view, and testifying on matters beyond his expertise and giving speculative opinions.

Justice Cromwell in his lecture also commented on the concerns over the reliability of fingerprint evidence to which the Shirley McKie case in Scotland gave rise. While the experts were eventually cleared of any misconduct, the differences in opinion between professional witnesses about the fingerprints was striking and appeared to call into question the reliability of such evidence.

It is not the norm for courts in the United Kingdom to assume that experts are hired guns who will allow their instructing solicitors, by whom they are paid, to call the tune. Instead, we seek to promote a norm of fair play. The promotion of fair play calls for an awareness that because an expert enjoys a privileged position in the forensic process, he or she can cause significant harm by failing to be reflective and balanced in approach, by going beyond his or her expertise, by adopting a crusading approach to a subject, by being partisan, and by straying into the role of advocate.

In promoting fair play in a system, which adopts an adversarial approach to fact-finding, we have also to be aware of the risk that litigants with deep pockets would, unless constrained, seek to call an excessive number of experts to wear down the other side to the litigation. In recent years the court has promoted the proportionate use of resources in litigation. It has imposed and polices boundaries, to which I now turn.

¹⁸ Thomas A Cromwell, “The Challenges of Scientific Evidence” (The MacFadyen Lecture 2011) <http://www.scottishlawreports.org.uk/publications/macfadyen-2011.html>

Historically, there have been legal boundaries. An expert should not involve himself or herself in answering the legal question which it is for the court, whether a judge or jury, to decide. The speed of the car is fact; evidence to ascertain that speed may involve expert evidence both of fact and of opinion; but it is for the court to determine whether the driver's actions were negligent. That remains true. While textbooks have pointed out that the Civil Evidence Act 1972 section 3 abolished the rule that a witness cannot express a view on the legal issue before the court in the context of civil procedure, that abolition is more apparent than real. Section 3 provides that a witness's opinion on any relevant matter, on which he is qualified to give evidence, is admissible and a relevant matter includes an issue in the proceedings. But the statutory provision makes that rule subject to the rules of court, to which I will shortly turn. Further, recalling the first limb of the *Bonython* test, the expert's personal view on the ultimate legal issue is strictly irrelevant. It is hard to think of cases where the opinion of an expert on the legal issue would be necessary for the determination of the case. The weight which a judge would give to such expressions of view on legal issues would in my view be very limited as the expert is there to assist the judge and not to usurp his or her role.

When Lord Woolf reviewed civil procedure over twenty years ago, he was very critical of the use of expert witnesses in civil litigation. In his interim report, he pointed out the excessive cost and the delays associated with each party appointing their own experts and he recorded concerns expressed about the failure of experts to maintain their independence from the party by whom they had been instructed.¹⁹ In his final report he spoke of the "large litigation support industry, generating a multi-million pound fee income" which had grown up. But he softened earlier recommendation that the court should appoint a single expert over the heads of the litigating parties.²⁰ His report led to the adoption of strict rules in Part 35 of the Civil Procedure Rules to regulate the giving of expert evidence. Part 35 includes several salutary rules. The court is placed under a duty to restrict expert evidence to that which is reasonably required to resolve the proceedings. The Rules empower the court to perform that duty by providing that parties must have the permission of the court to call an expert or put in evidence an expert's report. Efficiency is promoted by imposing as a general rule that expert evidence is 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, if possible, agree the expert issues in the proceedings, and by facilitating the instruction of a single joint expert. Fairness is promoted by regulating the

¹⁹ Interim Report to the Lord Chancellor on the civil justice system of England and Wales (June 1995), chapter 23.

²⁰ Final Report to the Lord Chancellor on the civil justice system of England and Wales (July 1996) chapter 13

content of the expert's report in Practice Direction 35 and requiring the disclosure of the substance of the instructions on which the expert has written the report.

Part 35.3 of the CPR enshrines the 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. It provides protection to the expert against, among other things, improper pressure by enabling the expert to seek directions from the court. Practice Direction 35 has provided for the option of concurrent questioning of experts in the same discipline, the so-called "hot-tubbing". PD 35 has also codified the statement of an expert's duties by Cresswell J in *The Ikarian Reefer*.

Para 2 states:

"Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.

Experts should consider all material facts, including those which might detract from their opinions.

Experts should make it clear-

- (a) when a question or issue falls outside their expertise; and
- (b) when they are not able to reach a definite opinion, for example because they have insufficient information.

If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court."

Shortly after Cresswell J handed down his judgement in *The Ikarian Reefer*, Anthony Speaight QC published a short critique.²¹ He pointed out, among other things, that an expert's report could not be a wholly independent product as lawyers were inevitably involved, at least in posing the

²¹ (1996) 146 NLJ 1100.

questions which the expert had to consider. That must be so. It is the expert's answers, which on occasion may include the reformulation of the question, which the lawyers must not distort. He also suggested that the assistance of the court by an expert would not be wholly independent as the expert would advance the case of the party who called him or her, within the limits of propriety. In my view the guidance is salutary and in particular the requirements of independence and lack of bias set the limits of propriety and serve to protect the professional integrity of the expert.

The courts have thus set out rules to promote the impartiality of the expert witness and procedures to counter the temptation of a witness to behave like a hired gun. But it requires and will require the cooperation of other actors in the forensic exercise to make sure that experts live up to the standards which the law requires and to exercise a sufficient degree of quality control.

One actor in this field is the professional regulatory body of the expert in question. Thus, it has fallen to the General Medical Council to conduct disciplinary proceedings against Professor Meadow and, more recently, Dr Waney Squier. This is an important task but it is not an easy task, and can expose the body to legal challenges because so much is at stake for the impugned expert. Thus, Professor Meadow succeeded in persuading the courts that he was not guilty of serious professional misconduct, when the Court of Appeal, by majority, found that he had been guilty only of professional misconduct.²² More recently, Dr Squier succeeded in her appeal against a finding by the Medical Practitioners' Tribunal that she had acted dishonestly in giving expert evidence, while findings that she had failed to work within the limits of her competence, to be objective and unbiased and pay due regard to the evidence of other experts were upheld.²³ As a result her registration was restricted.

There is also an important role for accreditation as an expert and training for the role of the expert witness. In the medical sphere, training and Codes of Practice by the Royal Colleges have a role to play. In some professions, there is a facility for accreditation, such as the RICS Expert Witness Accreditation Service.²⁴ The Law Society of Scotland has published a Directory of Expert Witnesses.²⁵ In England and Wales the Law Society refer people seeking appropriate

²² *Meadow v General Medical Council* [2007] QB 462.

²³ *Squier v General Medical Council* [2016] EWHC 2739 (Admin).

²⁴ <http://www.rics.org/uk/join/member-accreditations/expert-witness-accreditation-service/>

²⁵ https://www.lawscot.org.uk/wcm/lssservices/Member_Services/Expert_Witness/Search_Expert_Witness.aspx

expert assistance to the Academy of Experts and the Expert Witness Institute.²⁶ The Association of Personal Injury Lawyers also publishes a refereed directory.²⁷ The Law Society of Scotland has also published a Code of Practice for Expert Witnesses.²⁸ Specialist associations, such as the Academy of Experts²⁹ and the Expert Witness Institute,³⁰ also seek to promote higher standards.

Lawyers may obtain useful assistance on best practice in the application of CPR Part 35 from the website of the Civil Justice Council in its “Guidance for the Instruction of Experts in Civil Claims”.³¹

Judges also need to have a better understanding of scientific methodology so that they can ask the right questions when faced with applications to adduce expert evidence in areas where the reliability of the alleged science is questionable. In Canada, the National Judicial Institute has done valuable work to assist judges to cope with applications to lead such evidence, including the publication of a list of important questions which judges should ask themselves when faced with such applications.³² Lawyers also need to improve their scientific literacy to do their job effectively in cases involving expert evidence.

Conclusion

The expert witness often has a difficult task to perform. When the task is performed well, expert evidence can be invaluable in determining a controversy. When an expert falls below expected standards, he or she may face legal action for negligence by the person who has instructed him or her,³³ or professional disciplinary proceedings as I have mentioned.

The upholding of both the standards adopted by expert witnesses and the quality of their evidence is a collaborative exercise in which the judge, the lawyer and the expert’s professional

²⁶ Academy of Experts (<https://www.academyofexperts.org/>); Expert Witness Institute (<http://www.ewi.org.uk/>).

²⁷ <https://www.apil.org.uk/find-an-expert>

²⁸ <https://www.lawscot.org.uk/members/expert-witness-directory/expert-witness-code-of-practice/>

²⁹ <https://www.academyofexperts.org/guidance/expert-witnesses>

³⁰ http://www.ewi.org.uk/membership_directory_why_join_ewi/code_professional_conduct_practise

³¹ <https://www.judiciary.gov.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf>

³² Justice Thomas Cromwell, footnote 18 above. National Judicial Institute of Canada, *Science Manual for Canadian Judges*, (2013). Available at: <https://www.nji-inm.ca/index.cfm/publications/science-manual-for-canadian-judges/>

³³ *Jones v Kaney* [2011] UKSC 13; [2011] 2 AC 398.

organisations each have an interest. Such cooperation is, in the words of Saunders J back in 1553, “a commendable thing”. In many cases, expert evidence is an essential component of the attempt by the courts to get to the truth and thus achieve justice. Such collaboration, particularly when it extends to keeping costs proportionate and delays to a minimum, makes an important contribution to our justice system.

Thank you.

Lord Hodge

Justice of The Supreme Court

9 October 2017