

People in this
country have had
enough of experts

Expert witness
work in the UK
– legal scrutiny
of expert
witness ethical
standards

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The basics

- ▶ Help the court with matters within their expertise
 - ▶ Overriding duty
- ▶ Objective and unbiased
- ▶ Consideration of all facts including those which detract
- ▶ Identify areas outside expertise or areas where opinions cannot be reached
- ▶ Communicate changes of opinion

- ▶ Statement of instructions
 - ▶ Not privileged
- ▶ Qualifications, literature relied on, facts and opinions distinguished
- ▶ Summarise range of opinions and why your favour yours
- ▶ Summary of conclusions

The four requirements of admissibility

- ▶ Only if outside the experience of judge or jury
- ▶ Relevant experience or study
- ▶ Impartiality of expert
- ▶ A reliable subject

General Medical Council and Professor Sir Roy Meadow (2006)

- ▶ Prosecution of mother of two sons for murder
- ▶ Evidence from Prof. Meadow on SIDS
- ▶ Complaint to GMC about the evidence

Immunity from disciplinary proceedings

- ▶ Absolute or blanket immunity unnecessary

Jones v Kaney (2011)

- ▶ Jones has possible PTSD, adjustment disorder and chronic pain syndrome arising from road traffic accident
- ▶ Kaney (psychologist) prepared a report suggesting PTSD
- ▶ A psychiatrist disagreed and joint statement prepared
- ▶ Kaney changed opinion
- ▶ Jones settled for less

Expert witness immunity from suit

- ▶ From suit for breach of duty
- ▶ Appeal allowed

Kumar v GMC (2012)

- ▶ Homicide case
- ▶ Expert witness for the defence referred by the trial judge
- ▶ Diagnosis of intermittent explosive disorder

Accepting instructions and expertise

- ▶ Made no mention of the relevant law
- ▶ Expressed an opinion on the intention of the defendant
- ▶ Did not explain the controversial nature of IED
- ▶ Did not read the prosecution witness statements
- ▶ Failed to take account of alcohol
- ▶ Did not take proper account of diagnostic criteria
- ▶ Reckless and misleading
- ▶ Inexperienced in criminal procedure
- ▶ Only ever worked for a few weeks in clinical forensic psychiatry

Admissibility

- ▶ Lawyers and judges should identify what is admissible or not
- ▶ Cross-examination should not lure an expert beyond his expertise
- ▶ The expert should however know his limits

Pool v General Medical Council (2014)

- ▶ Paramedic with personality disorder in front of professional body
- ▶ Expert evidence from psychiatrist, Dr Pool
- ▶ Complaint to General Medical Council
- ▶ Acted outside of expertise

Necessary knowledge or experience

Generally

- ▶ Professional qualifications
- ▶ Training or study

In Pool

- ▶ Being on the specialist register in the relevant area
- ▶ MRCPsych or FRCPsych
- ▶ Higher professional training
- ▶ Substantive post in clinical practise (for 20 years)
- ▶ Publications
- ▶ Work in the relevant setting
- ▶ Standing above peers
- ▶ Not a trainee

R v Mulindwa (2017)

- ▶ Criminal case – preparation of terrorist acts
- ▶ Psychotic disorder
- ▶ Evidence and adverse inference

Limits of evidence - reliability

- ▶ What if his answers in evidence were the product of psychosis?
- ▶ Credibility of a witness is not for an expert but reliability might be
- ▶ 'Oath helping'
- ▶ Expert evidence before the defendant's evidence not after

R v Walls (2011)

- ▶ Criminal case
- ▶ Fitness to plead

Knowledge of relevant law (as well as psychiatry)

- ▶ A somewhat unsatisfactory witness
- ▶ Had not prepared for the hearing and had failed to address the Pritchard criteria
- ▶ We have rejected the evidence: evidence on which we could not rely

R v Grant-Murray and Alex Henry and R v others (2017)

- ▶ Joint enterprise case
- ▶ Autism raised on appeal

Expert bias

- ▶ The Professor agreed to assist him pro bono
- ▶ [The professor] runs a clinic for people “seeking a diagnosis of autism”
- ▶ Not obtained full medical history and had relied on the accounts of mother which was self-serving
- ▶ It is in our view insufficient simply to say that the diagnosis of autism is often missed without, in a case such as this, carefully analysing and explaining why over a 10 year period.... the professionals involved... had been so wrong

Expert bias

- ▶ Not evidence to which we could attach any weight
- ▶ Unfortunately, willingness as an expert to opine on the basis of inaccurate, incomplete and partisan accounts appears to be yet another growing trend before this court

Ackerley v HM AG The Isle of Man (2013)

- ▶ Sexual assault offence
- ▶ Autism raised on appeal

Staying within your limits

- ▶ Expertise is undoubted [but]
- ▶ Report strayed, no doubt inadvertently, into offering own assessment of the evidence in the case generally
 - ▶ [the appellant's account] by no means persuade me of his guilt
- ▶ Criticism of procedure demonstrated misunderstanding of the law

Pora v The Queen [2015]

- ▶ Murder case
- ▶ Confession reliability case
- ▶ Borderline intellectual disability

It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case. Professor G trenchantly asserts that Pora's confessions are unreliable and he advances a theory as to why the appellant confessed. In the Board's view this goes beyond his role. It is for the court to decide if the confessions are reliable and to reach conclusions on any reasons for their possible falsity. It would be open to Professor G to give evidence of his opinion as to why, by reason of his psychological assessment of the appellant, Pora might be disposed to make an unreliable confession but, in the Board's view, it is not open to him to assert that the confession is in fact unreliable.

R v Wilson (2018)

- ▶ Murder
- ▶ Suicide defence
- ▶ Expert evidence on self-stabbing as method of suicide
- ▶ Expert evidence on murder

Admissibility of expert evidence

- ▶ More common (than suicide by stabbing) for violent men to kill vulnerable women
 - ▶ May have gone so far as to suggest a male murderer might disguise his crime as suicide
- ▶ It may be that Dr J went further than they should but we are not persuaded that the expression of the opinions diverted the jury from its task

Lie, damn lies and

Even when an infant dies suddenly and unexpectedly in early life and no cause is found at autopsy, and the reason for death is thought to be an unidentified natural cause (Sudden Infant Death Syndrome) ["SIDS"], it is extremely rare for that to happen again within a family. For example, such a happening may occur 1:1,000 infants, therefore the chance of it happening twice within a family is 1:1m. Neither of these two deaths can be classified as SIDS. Each of the deaths was unusual and had the circumstances of a death caused by a parent.

Family proceedings (2017)

- ▶ Adoption likely
- ▶ Psychologist assessment v other professional observations of child-mother interactions
- ▶ Evidence also given in relation to the father

Evidence for opinions

- ▶ Opinions based on things said that had never been proven
- ▶ Confused her role as expert with that of the judge
- ▶ Should have given her view in the alternative
- ▶ Demoted the risk from “significant” to just “a risk”
- ▶ I fear that Dr R betrayed some degree of prejudgement from his [the father’s] failure to attend the first appointment
- ▶ Forced to fall back on opinion being based upon “a feeling”

Lessons they should have learned

- a. Not to proceed with her instructions if she is not confident she has all the documents/information she needs before she starts her work **or** if she is confident she is able to get on with the assessment work without them so as to avoid delay, identify to those instructing her what documents/information she will still need and ensure that she is confident that they will arrive before the deadline set for when she has to complete her assessment.
- b. To ensure that if she is supplied with documents she reads them before the hearing to make sure that updating documents have not been overlooked.
- c. If there are deficiencies in the extent of her instructions that are apparent to her at any point in time to take the initiative to go back to the instructing solicitor when those deficiencies become apparent and alert him/her so that the instructions can be revised if necessary.
- d. If there are deficiencies in her assessment for want of information or any other reason to take the initiative and include that fact in her report to alert the parties and the court of those.

e. She needs to take care to base her conclusions on proven facts and not supposition or allegations and if she feels it necessary to provide an expert opinion on the basis of unproven facts to prepare her opinion in the alternative i.e. if the given fact is proven or if it is not so that the court can determine the facts and apply the correct conclusion.

f. If she is unwell she needs to notify the instructing solicitor and the court both about the fact that she is unwell and the impact she thinks it will have on her giving evidence and any special arrangements she will need. Ploughing on bravely is not helpful to the court if it results in problems such as have happened in this case.

g. To ensure that she includes in her report an appropriate brief explanation of her methodology so that the means by which she has reached her conclusions are transparent to those reading her reports.

h. If she deploys an appropriate but perhaps novel psychometric measure to obtain data to include a brief explanation of the measure and her qualification to deploy the same so as to ensure that the parties have confidence in her qualification to deploy that measure where there could be doubt.

Lessons from other professions



Squier v General Medical Council (2016)

- ▶ Paediatric neuropathologist
- ▶ Non-accidental head injury cases
- ▶ Triad of subdural, retinal haemorrhage and encephalopathy
- ▶ Complaint made by National Policing Improvement Agency
- ▶ Found impaired

Basis of complaint

- ▶ Expression of opinion outside expertise
- ▶ Insufficient focus on evidence available
- ▶ Misinterpretation of research
- ▶ Failed objectivity
- ▶ Failed regard for views of other experts
- ▶ Deliberately misleading and dishonest

Bias

- ▶ I have read his report in which the suggestion of possible bias was made. ... He has been scrupulously objective. (additional expert)
- ▶ Failed to be objective and unbiased
- ▶ Failed to work within the limits of her competence
- ▶ Not deliberately misleading

Ruffell v Lovatt (2018)

- ▶ Passenger in car accident
- ▶ Complex regional pain syndrome
- ▶ High levels of anxiety and depression

Expert conduct

- ▶ I formed the view that Dr J has not mastered this topic: he had cited the papers, no-one else considered them relevant.
- ▶ Dr J has put the cart before the horse.
- ▶ Failure to properly read and consider the claimant's entire medical records before he first reached his conclusion
- ▶ I reject on its merits the expert evidence BUT
- ▶ Dr J on several occasions started laughing at propositions put to him by counsel and he also had a habit of lapsing into lecture mode.
- ▶ Strikingly demonstrated no real knowledge or proper understanding of the claimant's extensive and highly relevant pre-accident history
- ▶ Several plainly absurd propositions
- ▶ Dismissive of the views of others... at best off-hand, at worst, rude
- ▶ Combative and he repeatedly acted as an advocate

R v Pabon (2018)

- ▶ Banking
- ▶ LIBOR – London Inter-Bank Offered Rate
- ▶ Criminal charges
- ▶ Banking expert witnesses

Put bluntly, Rowe signally failed to comply with his basic duties as an expert. As will already be apparent, he signed declarations of truth and of understanding his disclosure duties, knowing that he had failed to comply with these obligations alternatively, at best, recklessly. He obscured the role Mr O’Kane had played in preparing his report. On the material available to us, he did not inform the SFO, or the Court, of the limits of his expertise. He strayed into areas in his evidence (in particular, STIR trading) when it was beyond his expertise (or, most charitably, at the outer edge of his expertise) – a matter glaringly revealed by his need to consult Ms Biddle, Mr Zapties and Mr Van Overstraeten. In this regard, he was no more than (in Bingham LJ’s words) an “enthusiastic amateur”. He flouted the Judge’s admonition not to discuss his evidence while he was still in the witness box.

Postscript

Nonetheless, there is no room for complacency and **this case stands as a stark reminder of the need for those instructing expert witnesses to satisfy themselves as to the witness' expertise and to engage (difficult though it sometimes may be) an expert of a suitable calibre.**

Van Oord UK Ltd and Allseas UK Ltd

- ▶ Gas pipes in the Shetland Isles
- ▶ Quantum experts

Expert conduct

- ▶ His abrupt departure from the witness box...never to return
- ▶ I came to the conclusions that his evidence was entirely worthless
 - ▶ 12 reasons why
- ▶ Not independent and evaluations were neither appropriate nor reliable

1. No checking of additional documents
2. Did not look at contradictory information (“inevitably biased”)
3. Contradictions in report
4. Disowned his own report under cross examination
5. Accepted his own report was confusing and misleading
6. Appended documents to his report that had been prepared by those instructing him without attribution
7. Subterfuge
8. Lying
9. No checking of figures quoted
10. Used by the lawyers

Summary

- ▶ Increasing scrutiny of expert witnesses
- ▶ Increasing criticism of method of experts in mental health
- ▶ Criticisms allied to expectations of experts
- ▶ Expectations probably unrealistic
 - ▶ Unbiased and objective
 - ▶ Validity of retrospective analysis
 - ▶ Psychiatrists commenting on legal tests
- ▶ Is everyone sick of experts?

Questions and discussion

