

## Lecture Notes

### The Role of the Expert Witness



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## *THE ROLE OF THE EXPERT*

### The Adversarial System

The objectives of the adversarial system and what might collectively be called the inquisitorial system are not the same. In the latter, it is the absolute truth which is concerned to be discovered, whereas the English system is designed to adjudicate as to the strength of such rival contentions as the opposing parties have presented. (7)

### The Expert

A basic law dictionary (Black's) sweepingly defines experts as "men of science educated in the art, or persons possessing special or peculiar knowledge, acquired from practical experience". (Cited reference 1 at page 318).

An ordinary witness is called to tell, and is only allowed to tell, the judge or jury what he himself actually perceived. An expert witness may, however, draw an inference from facts that he observed himself, or assumes to be true, if he did not himself observe them. But it is always for the judge or jury to decide if those facts are true. (2)

The expert witness differs fundamentally from the ordinary witness. He did not see or hear the incident in dispute, he gives evidence of scientific fact and he gives an opinion based on professional knowledge and experience, though he may subsequently see the body, or the vehicle, or the instrument, or the scene. (4)

An expert witness, such as a pathologist or ballistics technician, can testify to an opinion, or conclusion, if four basic conditions are met:

1. The opinion, inferences, or conclusions, depend on special knowledge, skill or training not within the ordinary experience of lay jurors;
2. The witness must be shown to be qualified as a true expert in the particular field of expertise;
3. The witness must testify to a reasonable degree of certainty (probability) regarding his opinion, inference, or conclusion; and
4. Although this fourth condition is currently in the process of modification, at least in times past, it has generally been true that an expert witness must first describe the data (facts) on

which his opinion, inference, or conclusion, is based or, in the alternative, he must testify in response to a hypothetical question that sets forth the underlying data. (8 at page 318)

The weight to be attached to the evidence of the expert witness is a matter for the court, judge, or jury, as the case may be. Critical matters will be his status, qualifications, interests, experience, reputation, bearing and response. Specialisation being what it is today, the expert professing expertise in two or more fields, e.g. handwriting and cloth and blood, may find himself criticised and belittled because of his versatility. (4)

Aside from attacking his qualifications and disinterestedness, or the thoroughness and competence of his investigation, there are two commonly encountered methods of attacking or impeaching an expert witness's opinion. They involve (1) contradictory materials in authoritative publications in the field, and (2) alteration of the facts of a hypothetical question put to the witness during his direct examination. (8 at 333)

### **Qualities of an Expert**

The one essential of all expert evidence is a frank statement by the expert of the limits of accuracy within which he is speaking, and a readiness to indicate, whether asked or not, what his evidence, does not prove, or suggest, as likely. Just as counsel is under an obligation to call the judges attention to points of law which are against his case, so the expert should be under an obligation to make sure that the court does not, unwittingly, use his evidence without realising its scientific limitations. (Sir Roger Ormrod cited 4)

A summary of the necessary qualifications for an expert witness may be listed as follows:

1. Knowledge based upon proper training in the subject under review.
2. Humility in admitting when there is doubt.
3. Courage in desiring to establish the truth.

(Professor Francis Camps cited 4)

Absolute integrity is absolutely vital. To be interested in the outcome of a case is to have vested interests, whereas to concern oneself with the emergence of the truth of the matter at all costs, becomes more and more apparent as the case progresses. This applies equally to both civil and criminal procedures. This is not to say that to discuss the presentation of the evidence at conference with counsel before going into court is in any sense improper.

What is improper in the preparation of a case? To introduce unfounded evidence, insupportable theory, or suggestions, that are calculated to "throw a spanner into the works", or to "find" someone to say this or that in evidence (irrespective of the facts or of current knowledge). This is palpably wrong. (Professor Keith Simpson, 6)

### **Giving Testimony**

No medical or scientific witness is likely to find himself in difficulties if he has paid attention to four basic rules:

1. Familiarise yourself with the facts of the case, your autopsy and laboratory findings, and the views you have decided to put forward.
2. Make positive efforts in the choice of words and phrases to express yourself clearly and succinctly.
3. Confine your evidence to your field(s) of expertise.

4. Remain tolerant and courteous, whilst firm.

(Professor Keith Simpson, 6)

It is desirable to ensure that the judge or jury should not only understand the words, terms, and expressions, but do so without too much effort. He (the expert) must build a bridge to every conclusion and indicate the way to the bridge. He must not leave the judge or juror to jump from fact to conclusion. I know that experts often have to qualify the conclusions of a general nature which in their opinion can be drawn from certain facts. This very proper feeling for scientific accuracy can make it difficult for the judge or jury to work out the statement that the witness thinks they should accept. That statement must, for our sakes, be separated clearly from the qualification. It is also important to bear in mind that a generalisation, a general truth, needs an example or illustration. Human nature being what it is, one's mind will search for such an example or illustration. It is wise to save the judge or juror from letting their minds wander in search of the example or illustration. Therefore, the advocate and experts should try to plan to give us one. It should be familiar to us, free from other associations, a true example or illustration, rather than a metaphor, or analogy, which tends to mislead. (2)

When in the witness box, there are those who, faced with difficulty, will dig in their heels and refuse to budge. There are also those who show over enthusiasm in expressing their opinions. Finally, there are those who, when faced with something new, consider it, and then, fairly and properly if they think it right, modify their opinions.

Two of them (expert witnesses) gave their evidence modestly, firmly and without frills, and their evidence was accepted by the court. The third knew his subject too well and continually made small qualifications which illustrated his great knowledge of the subject, but reduced his credibility in the eyes of the unscientific judge. (3)

A certain tension, even mistrust, between court and expert may be no bad thing, but there must be mutual tolerance, understanding, and respect. (4)

Should the expert simply answer the questions put to him or should he volunteer additional facts or opinions if he considers them relevant? If he has made a full report beforehand, the problem may not arise. He may be asked by the judge to elucidate a point if the judge feels that he would like to say more. However, in the end, it is submitted that the expert should say whatever he bona fide believes to be relevant and appear to the judge if counsel attempts to stop him. Negative evidence should be given if relevant. (4)

### **The "Defence Pathologist"**

The defence pathologist is considerably disadvantaged by a number of considerations. Firstly, he is almost never present at the original post mortem examination when the main findings can usually be clearly demonstrated in a fresh cadaver with all the organs in situ.

Those representing the accused must depend upon the original pathologist having taken suitable samples and specimens, and having recorded his original observations accurately, and permanently by means of charts, diagrams, X-rays and, above all, by adequate and careful photography.

Secondly, and again because of the time factor, the defence expert rarely gets to visit the undisturbed scene of the incident which is often so helpful in reconstruction events around the crime when corroborating or destroying accounts given by the accused.

Thirdly, the scientific and investigational back-up for the defence pathologist is rarely as good as that for the prosecution. (5)

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