Your Witness

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Sherlock Holmes and the case of the missing humility

Did you know that Sir Arthur Conan Doyle, creator of Sherlock Holmes, was a one-time ophthalmologist and a life-long spiritualist? In the early 1900s he took upon himself the task of righting a racist miscarriage of justice that had shocked Edwardian England.

The case centred on George Edalji, the oldest son of three to his Scottish mother and Parsee father. By the 1870s George's father had converted to Christianity and taken up residence in Staffordshire as the vicar of Great Wyrley.

In those perhaps less tolerant times the myopic and astigmatic George developed a trust in the rule of law as protection against the routine racism he and his family encountered. He even went to the trouble of qualifying as a solicitor. He also loved railway timetables – a not uncommon affliction, so I am told, in an era when trains ran on time. It was, then, a particular irony that this man of absolutes, for whom truth was something verifiable – such as the 08:26 to Brighton – became the victim of a grotesque fantasy in 1903.

Police, lawyers, judge and jury all contrived to believe, on completely specious evidence, that he was behind a string of animal maimings. Edalji, according to several leading legal experts of the time, was convicted principally on inadmissible evidence. This evidence concerned similar crimes for which Edalji was not on trial, as well as the testimony of a – later discredited – handwriting 'expert' who swore that Edalji was responsible for a number of anonymous letters which had no connection at all with the case on trial. Edalji was sent down for 7 years of penal servitude. He was released early from prison in 1906, but even then was subjected to police surveillance.

George Edalji at his trial in 1903

In late 1906 Sir Arthur Conan Doyle became interested in the Edalji case and wrote a series of articles for the *Daily Telegraph* setting out the details of the case and calling for a public Commission of Inquiry. The Home Office stood firmly behind the Staffordshire Constabulary, despite evidence that legal advisers believed the case against Edalji to have been extremely weak. Conan Doyle eventually succeeded in gaining a pardon for Edalji, but no compensation was ever paid.

In the process, and a little too high on indignation, Conan Doyle (undoubtedly to Edalji's embarrassment) accused someone else on evidence as flimsy as that used against Edalji. To paraphrase *The Economist* (9 July, 2005), it seemed that the eye doctor and seer couldn't see straight whilst Edalji, shortsighted and sceptical, saw more.

I hope you will forgive the slightly strained paradox, but this case from a century ago has important resonance with our own times. We can see the fragility of the law in the face of unblushing authority and the important role expert evidence can play in this respect. We also find institutional racism and the intransigence of bureaucrats, particularly when they are more concerned with looking out for professional colleagues than with justice for the individual.

On page 7 we consider the dangers that lie in wait whenever the court (and particularly the criminal court) admits expert evidence based on 'frontier science'. I have long argued that the root cause of the problems in the high-profile child death cases is the systemic failure of the criminal court properly to handle conflicting scientific evidence. The criminal court should understand the true nature of scientific opinions, recognise the conflicts they often embody and never expect a lay jury to arbitrate between them in isolation. Instead we have Part 33 of the Criminal Procedure Rules acting as a 'procedural carpet' under which to sweep such matters.

Fragility in the face of unblushing authority, apparent in our courts 100 years ago, remains today. With no new procedural tools with which to confront this weakness, I am more convinced than ever that a good expert witness is one who recognises the role personal humility plays in avoiding this particular failing of the courts.

You can read more about the Edalji case in the book *Conan Doyle and the Parson's Son: The George Edalji Case* published by The Vanguard Press (ISBN 1 843 86241 7).

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Inside

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In court: etiquette and procedure

Most of the judiciary are not addressed as 'your honour'

Although it is increasingly rare for an expert witness in a civil case to have to make a personal court appearance it does still happen, and it is still a common enough requirement in criminal cases. Those unfamiliar with the workings of the court should, therefore, prepare by making themselves familiar with court etiquette and the rules governing the giving of evidence.

Courtroom etiquette

Courtroom etiquette is the same for expert witnesses as for any other person using or appearing in the court. Broadly speaking, these are merely rules of good behaviour and can be summarised as follows:

- Remove all head gear before entering the court. (There are exceptions for religious observances.)
- Enter and leave the courtroom at a time that causes as little disturbance as possible.
- Sit in the designated area, which will be pointed out to you by the usher.
- Stand when the judge enters or leaves the courtroom.
- The following activities are not permitted in court: smoking, eating, drinking, reading magazines or newspapers, taking photographs, making tape recordings, using a mobile phone or using a personal stereo. Animals are not permitted in court, except a guide dog accompanying a registered blind person.

Forms of address

It is a common misconception that all members of the judiciary be addressed as 'your honour'. In fact, most are not. District judges sitting in the county or magistrates courts should be addressed as *Sir* or *Madam*, as should asylum and immigration tribunal judges and chairmen of other tribunals. Magistrates can also be addressed as *Sir* or *Madam* or as *Your Worship.* High Court Masters should be addressed as *Master* (regardless of gender) and, similarly, Registrars should be addressed as *Registrar.* For high court judges and appeal court judges one should use *My Lord* or *My Lady*. It is only circuit judges who should be addressed as *Your Honour*, and even here there are exceptions to the rule. For example, Central Criminal Court judges and some other circuit judges (like the Recorder of Liverpool) are traditionally addressed as *My Lord* or *My Lady* rather than as *Your Honour.*

However, avoid excessive use of these terms. It is probably sufficient to use them once to preface or end your responses, and it would be inappropriate and, frankly, laborious to use them in every sentence.

Do not allow the advocate to drive your answers

Taking the oath

The expert witness will be called by the court usher and asked to stand whilst taking the oath. The court views taking of the oath as a grave matter. The Oaths Act 1978 makes provisions for the forms in which oaths may be administered and states that a solemn affirmation shall be of the same force and effect as an oath. As with other witnesses, the expert remains under oath until dismissed by the judge. At the conclusion of the evidence the judge will usually thank and formally release the expert. The expert is then free to go, but should not discuss the case with people outside the court. Usually, however, the expert will be required to assist the instructing legal team. This will frequently mean sitting behind counsel while the other side's expert is examined and answering any questions that may arise. Experts will often be required to explain quite basic things about the opposing expert's evidence and will need to stay alert for any inaccuracies it might contain.

Examination-in-chief

The sequence in which civil and criminal courts hear evidence is broadly the same. Following opening submissions from the parties, the party bringing the case (variously called the claimant, applicant or plaintiff in civil cases and the prosecutor in criminal cases) will present its case and call its witnesses to give evidence. The party defending the case (variously called the defendant or respondent) will then give its evidence. There is no set order in which a party should call its witnesses but, given that the evidence must follow some logical narrative sequence, it is probable that the witnesses of fact will be called first, followed by any expert evidence.

When called to give evidence, the advocate representing the instructing party will question the expert first. This is known as the *examination-in-chief*, the object of which is to elicit from the expert all the facts supporting the party's case. The examination-in-chief will usually begin with questions about the expert's qualifications and experience and the methodology used in preparing the report.

The expert in court has a special responsibility to assist the court in coming to a just conclusion. Experts should not be partisan and should not seek to hide matters that help or hinder one party or the other. This role is in contrast to that of the lawyers, who are partisan and whose questions will be designed to present a client's case to its best advantage.

Consequently, expert witnesses should not be afraid to expand on a reply to a question and should not allow answers to be driven by the examining advocate. When in doubt, the expert should ask the judge for permission to offer a fuller explanation and, where necessary, to use visual aids and other materials if these will assist in presenting the evidence in a way that will be more easily understood. In general, leading questions are not allowed.

In expressing an opinion, the expert should take into consideration all the material facts

before the court at the time the opinion is expressed. If, for any reason, the expert is not satisfied that the opinion can be expressed finally and without qualification, the expert should indicate that the opinion is provisional or qualified, as the case may be.

Finally, experts should take great care to confine their responses and opinions to matters that are material to the dispute between the parties and that lie within their expertise. But it should be recognised that this 'knowledge boundary' is not always clear-cut. Accordingly, experts should make it clear to the court when a particular matter falls near the periphery of their area of expertise.

Normally, the party bringing the action will not be permitted to call further evidence after it has finished putting its case. Consequently, if an expert witness believes that important evidence has been excluded, the prosecuting advocate should be informed before the close of the prosecution case.

Cross-examination

After conclusion of the examination-in-chief the other party (or parties) will have the opportunity to put its own questions to the expert. This is known as cross-examination. If the expert witness has not said anything to damage that party's case, or with which its own expert disagrees, there may be no need to cross-examine the expert at all.

When cross-examination of expert witnesses takes place it may or may not be hostile in nature. The expert may simply be asked to expand on, or clarify, responses given in the examination-in-chief, or to state an opinion based on a slightly different hypothetical premise. However, the cross-examination may be an all out attempt to discredit the expert's evidence. This may be done by making an attack on qualifications and credentials, adducing scientific literature containing authorities contradicting the evidence given or ridiculing the methodology used. An expert can be cross-examined about the bases of the opinion, whether or not those bases were covered under examination-in-chief. The expert can also be asked to explain the significance of each step of the procedure followed.

As the scope for cross-examining of experts is much wider than it is for ordinary witnesses, the advocate might also ask about materials not considered, tests not conducted and data not reviewed, as well as the implications of these. Bear in mind that in cross-examination it is permissible to ask leading questions, and the skilful advocate will often seek to take control by asking such questions or others that require a simple 'yes' or 'no' answer.

The techniques the advocate might employ are many and various. These will range from the aggressive to the flattering, and may well involve questions designed to unsettle or cause a loss of temper or objective demeanour. As unpleasant as it can be, cross-examination is seen as the most effective device for testing the veracity of witnesses, to expose the dishonest, mistaken or unreliable and to uncover inconsistencies and inaccuracies in oral testimony. Cross-examination, by its very nature, is designed to produce answers that are favourable to the cross-examiner and cast doubt on the quality of the expert's evidence.

The 'golden rule' for the expert is to maintain a measured and calm approach. If you find yourself in court, remember that you are there to assist the court and it is to the court that you owe your primary duty. Take your time, be deliberate and ensure you fully understand the question before giving your answer. Be vigilant for the ambiguous question that could have a double meaning or assumes an answer to an earlier question that you have not given. If you do not understand the question, or if it seems ambiguous, ask the advocate to repeat or clarify it. (See side panel for some tips on cross-examination.)

In the 1990s the Runciman Royal Commission was asked to consider unfairness to witnesses by the incompetence or overbearing behaviour of advocates and the failure, on occasion, of judges to control such conduct. Since then, much has been done to improve the general quality of advocacy. It remains true that cross-examination can still be an ordeal, but the traditional image of the expert being torn to shreds by skilful cross-examination is actually quite rare.

Re-examination and further questions

The judge might put questions to the expert during either the examination-in-chief or cross-examination. These will usually be designed to clarify an answer that has been given or to explore an area the judge considers particularly significant. In the crown court the jury, too, can put questions. These will be in the form of a written request to the judge. After cross-examination has concluded, the party that originally called the witness may conduct a re-examination of that witness but must limit questions to clarify only those matters arising during cross-examination. Leading questions may not be asked. In some circumstances the court itself can recall a witness for further examination or cross-examination and, in rare cases, a party might be permitted to call evidence after it has closed its case to rebut evidence that was totally unforeseen.

Closing remarks

A first court appearance can be confusing and even intimidating. It is certainly not for the feint of heart. Even the experienced witness can find procedural matters bewildering at times. However, by correctly observing rules of conduct and court etiquette the expert's path will be made somewhat easier.

Stay calm and measured – it's not personal!

Cross-examination hints and tips

- Do not be over-enthusiastic and do not exaggerate – these can lead to suggestions of bias.
- Be neither evasive nor aggressive, and *never* lose your temper.
- Maintain an objective approach and acknowledge the existence of alternative opinions or theories when it is reasonable to do so.
- Do not be flippant and never fence or argue with the advocate.
- Try to be courteous, no matter how irritated you might become
- Remember, *it's not personal*!

Case reports

Experts and the ultimate issue

'Truthfulness' is a question for the jury, not the experts

Experts, unlike other witnesses, are permitted to give an opinion to the court on matters they have not witnessed directly. However, they are not there to decide the ultimate issue: such decisions are for the jury alone. In some cases the very nature of the expert evidence, if accepted, will directly address the ultimate issue and, consequently, such evidence must be treated with great caution. Expert evidence in the field of human memory research falls into this category.

It's a relatively new science and concerns itself with the nature of human recollection. It seeks to provide indicators as to whether a memory is true or is likely to be false. One area in which it has been particularly active is in the field of childhood memory. It defines a phenomenon known as childhood amnesia which, it is said, affects our recollection of events before the age of 7 years. According to the theory, events that are allegedly recalled in a particularly detailed way are likely to be false memories, fantasies or later fabrications. That, certainly, is an oversimplification, but it serves to explain why attempts have been made to adduce expert evidence from this area of research.

In *R -v- S:R -v- W* [1] the appellants sought to adduce fresh evidence from an expert in human memory. Both had been convicted of sexual offences against children. The two children in question had been aged between 6 and 8 and 3 and 11 years at the time of the offences, but 20 and 27 years at the time of trial. The fresh evidence concerned childhood amnesia. It sought to show that the detail contained in the witness statements was such that it could not be consistent with normal childhood memories and was consequently unreliable.

In considering whether such evidence should be admitted, the court was concerned that the nature of the evidence spoke to the ultimate issue in the cases. If the expert evidence was accepted it would tend to suggest that the victims's statements could not have been based in fact but, instead, were likely to have been fabricated, whether consciously or unconsciously. The truthfulness or otherwise of the victims's statements was a question for the jury and not for expert evidence. Accordingly, the appeal was dismissed and the fresh evidence was not allowed.

Adjudicator's decision should stand, even if expert wrongly ignored

The decision of the Court of Appeal followed an earlier ruling in *R -v- JH* [2]. In that case the court ruled that human memory evidence should be treated with extreme caution and should be admitted only in cases where there was also evidence of mental disability or learning difficulty. In cases where it was allowed, however, a judge would be obliged to warn the jury to approach evidence of an early memory with special caution, on the basis that it might sound convincing but be unreliable, and that a conviction might be rendered unsafe if such a warning was not given when it was necessary.

Adjudicator's discretion to disregard expert

If a party adduces expert evidence in support of a claim in adjudication proceedings, is the adjudicator bound to take notice of this? This very question was considered by the court in *Kier Regional Ltd -v- City & General (Holborn) Ltd* [3]. The claimant in this case was a building contractor who had referred a construction dispute to adjudication. The defendant served a response to the claim that was supported by two expert reports. The adjudicator agreed with the claimant's submissions that the expert reports constituted new evidence and, consequently, he refused to consider these. The adjudicator subsequently found in favour of the claimant and made an award against the defendant.

The defendant refused to make payment and the claimant then made application for summary judgment to enforce the adjudicator's award. The defendant responded by arguing that the adjudicator had no discretion to ignore the expert evidence that had been served properly with the response, and that the adjudicator's decision should, therefore, be invalidated as being contrary to natural justice.

The question was referred to Mr Justice Jackson, the most senior judge at the Technology and Construction Court, who appears to have had sympathy with the defendant's argument. He said that there was some force in the assertion that the adjudicator should have taken the expert reports into account. However, he held that, whilst the adjudicator might have been wrong in failing to consider such evidence, not doing so was not something that could invalidate his decision.

In arriving at this conclusion Jackson J was following his decision in *Carillion Construction Ltd -v- Devonport Royal Dockyard Ltd* [4]. That decision had been endorsed by the Court of Appeal which said that the objective underlying the *Housing Grants, Construction and Regeneration Act 1996* and the statutory scheme therein require the courts to respect and enforce the adjudicator's decision. This should be so unless it is plain that the question decided was not the question referred to the adjudicator or the manner in which the adjudicator had gone about the task was obviously unfair. It should be in rare circumstances only that the courts will interfere with the decision of an adjudicator. Chadwick LJ observed that to seek to challenge the adjudicator's decision on the grounds that he had exceeded his jurisdiction or breached the rules of natural justice, save in the plainest cases, was likely to lead to a substantial waste of time and expense. It seems that the effect of this decision is that, whilst the adjudicator in construction cases might have no discretion to ignore properly served expert evidence, his

refusal to consider it is unlikely to render his decision invalid.

What constitutes 'fresh evidence'?

We know of no record for the greatest length of time elapsed before challenging previous expert opinion, but the recent case of *R -v- Bowman*[5] might be a contender. In that case Mr Bowman was charged and convicted of murdering his wife 22 years after the event took place. At the original autopsy, the pathologist, instructed by HM Coroner, had concluded that the cause of death was due to alcohol and valium poisoning. Following an allegation that Mr Bowman had murdered her, the case was re-investigated and a second autopsy carried out by a Home Office pathologist. This concluded that Mrs Bowman had been manually strangled.

At trial, the main issue was whether fractures to the larynx had occurred before or after death. It was the case of the prosecution that the first pathologist had been negligent in missing these fractures. Evidence of Mr Bowman's violent behaviour, together with confession evidence, was adduced to support the findings of the second pathologist. Mr Bowman procured expert evidence to support both the findings of the first pathologist and the argument that the fractures might have been caused by the original autopsy, but this evidence was never called by his defence team. Instead, the second pathologist's evidence was challenged on grounds of credibility.

Mr Bowman was convicted of murder and he appealed. He argued that the evidence of the second pathologist could not be justified in the light of contrary expert evidence that had been available to the defence team. Although this had been available at trial, it was sought in the appeal to adduce it as fresh evidence. It was also argued that the second pathologist had expressed her reasons with a certainty that could not be justified, given the circumstances and the length of time that had elapsed since the original autopsy. Lastly, it was argued that the second expert had erred in failing to give alternative possible causes of death.

The Court of Appeal dismissed Mr Bowman's appeal. The decision not to call the defence experts at trial had been one taken by counsel for Mr Bowman. There was no suggestion that he had been unreasonable or negligent in so doing and so it must be assumed that he did not feel that such evidence would have assisted the defence. Unlike witnesses of fact, expert witnesses are interchangeable. It would, said the Court, subvert the trial process if a convicted defendant was free to mount an appeal based on expert evidence which, if sound, could and should have been placed before the jury at trial.

The court held that criticism of the second pathologist's evidence was unfounded, save in one respect, and that this did not render the conviction unsafe. So far as the failure to give possible alternative causes of death was concerned, the Court went on to give guidance on the specific factors to be included in an expert's report. These were:

- Details of the expert's academic record and professional qualifications, range of experience and any limitations on expertise.
- The substance of the instructions received, the questions upon which an opinion was sought, the materials provided and considered and the information or assumptions that were material to the opinions expressed.
- Information about who carried out measurements and tests, the methodology and whether they were supervised by the expert.
- Where there was a range of opinion in the matters dealt with in the report, a summary of the range of opinion and the reasons for the opinion given. In that connection, any material facts or matters that detracted from the expert's opinion and any points that should fairly be made against any opinions expressed should be set out.
- Relevant extracts of literature or other material that might assist the court.
- A statement that the expert had complied with his duty to the court to provide independent assistance by way of objective, unbiased opinion and an acknowledgement that the expert would inform all parties and, where appropriate, the court if his opinion changed on any material issue.

The same guidelines should be followed in any supplemental report.

It was recognised that the Home Office pathologist had referred in her report to other possible causes of death. She had also made it clear that she was not a toxicologist and, although she had suggested that a toxicologist's report be obtained, she was not herself qualified to express an opinion on the toxicology findings. Whilst there is no specific requirement to list alternative theories or causes, an expert will have an obligation to summarise the range of opinions that might be supported by the same facts and draw attention to any facts or matters that might detract from the opinion given.

If expert evidence is available, then, it should be called at trial. If it is not, the court is entitled to the view that there is nothing in it that will assist that party. The only exception to this is if there is an allegation that counsel had been negligent in failing to call such evidence. What if there is only one expert in an established field whose opinion supports the defence and that expert was unavailable to attend trial? In dealing with this hypothetical question, the judge made the laconic observation that this would 'reflect on the acceptability of that opinion'.

Can 'unused' evidence become 'fresh' evidence on appeal?

Case references

[1]*R -v- S:R -v- W* (2006) *EWCA Crim* 1404.

[2]*R -v- JH* (2005) *EWCA Crim* 1828.

[3]*Kier Regional Ltd -v- City & General (Holborn) Ltd* (2006) *EWHC* 848 (TCC).

[4]*Carillion Construction Ltd v- Devonport Royal Dockyard Ltd* (2005) *EWCA Civ* 1358.

[5]*R -v- Bowman* (2006) *EWCA Crim* 417.

The courts: what's what?

Guide to the courts in England and Wales

April saw the introduction of HM Court Service as a central court administration agency. For those left wondering what the new agency will be administering, we offer this short guide to the judicial institutions of England and Wales.

Criminal justice system

The **Magistrates Courts** or Petty Sessions are the lowest criminal courts in England and Wales and they can be traced back to 1327. There are currently 550 magistrates courts in England and Wales and they handle 97% of all criminal cases. A few also deal with some civil actions, such as family matters, whilst others are designated **Youth Courts**, where specially trained justices deal with anyone under the age of 18 years. However, most of the work of the magistrates courts is performed by unqualified members of the public who are appointed as lay magistrates, or justices of the peace, and who usually sit in panels of two or three. They deal with minor offences for which they can impose fines and other penalties limited by statute. They are advised by a legally qualified clerk, who is often a solicitor. There are also district judges (formerly stipendiary magistrates) who are both legally qualified and paid a salary. Unlike lay magistrates, district judges normally sit alone. More serious offences (usually those that carry a maximum penalty of more that 6 months' imprisonment or a fine of more than £5,000) will be referred to the crown court.

Appeal from the magistrates court lies to the crown court. However, some appeals on points of law can be dealt with by the Queen's Bench Division of the High Court.

Almost all criminal cases begin life in the magistrates court, but the more serious cases (called indictable-only offences) will be committed for trial in one of the 78 **Crown Courts**. Some hybrid cases (called either-way cases) can be heard in either court. The crown court is the higher court of first instance and, together with the High Court and the Court of Appeal, forms part of the **Supreme Court of Judicature of England and Wales**. A circuit judge presides over the crown court and will usually hear cases with a jury.

Appeal from the crown court lies to the **Criminal Division of the Court of Appeal**. To mount an appeal, a defendant must first obtain leave (either from the Court of Appeal itself or from the judge of first instance). There is a fairly rigorous filter system, however, and only about 25% of applications for appeal are granted. The cases for which leave to appeal has been granted will then be heard by Lord Justices of Appeal, who are 35 in number and currently deal with around 6,000 cases annually.

House of Lords falls outside the Court Service

Civil justice system

There are 218 **County Courts** in England and Wales, and it is in these courts that the vast majority of civil cases are heard. Since the introduction of the Civil Procedure Rules, cases in the county court are allocated to one of three tracks (**small claims track, fast track or multi-track**) depending on the value of the claim, the complexity of the issues or the time estimate for trial. Some county courts also have a family or bankruptcy jurisdiction.

Cases in the county courts are heard by district judges or deputy district judges. The more substantial civil cases are usually referred to the **High Court**. The principal court of the High Court is at the **Royal Courts of Justice** in the Strand, but there are also regional centres that share premises with some county courts.

The High Court is divided into three divisions. The **Family Division** hears cases that involve child welfare (including adoption), divorce and intestacy. Divorce actions are also dealt with in the county courts, and it is usually only those that involve large sums of money (or celebrity couples!) that are heard in the High Court.

The **Chancery Division** hears claims that are principally money related, such as bankruptcy, land disputes, copyright, company insolvency, complex wills and trusts, and equities.

What remains is handled by the **Queen's Bench Division**, which deals with cases involving contract disputes, torts (civil wrongs) and the like. The Queen's Bench also has specialist subdivisions that hear complicated business and company cases (the **Commercial Court**), shipping cases (the **Admiralty Court**) and actions against public authorities and a variety of judicial review matters (the **Administrative Court**).

There is also a **Divisional Court** of the High Court which sits in the Family and Chancery Divisions and hears appeals from the magistrates and county courts.

Appeal from the High Court, once leave has been granted, lies to the **Civil Division of the Court of Appeal**, which also sits at the Royal Courts of Justice.

For the majority of legal cases – both criminal and civil – the final point of appeal, but only on matters of law, is to the **House of Lords**. However, a relatively small number of cases may be referred to the **European Court of Justice**, which has jurisdiction over matters of European Community law. The Law Lords also hear appeals from cases in Scotland and Northern Ireland. Additionally, they sit as the **Judicial Committee of the Privy Council** to hear appeals from those Commonwealth countries whose legal systems are still linked to the UK.

Sir Robin Auld's *Review of the Criminal Courts* (2001) proposed that there should be a single, centrally funded department to administer all courts in England and Wales (excepting the House of Lords). This recommendation was adopted and from April 2006 the courts are administered by a unified department, **Her Majesty's Court Service**, part of the Department for Constitutional Affairs.

Frontier science re-assessed

Frontier science in the courtroom has been a recurring theme in *Your Witness* over the years. Recent reviews of Sudden Infant Death Syndrome (SIDS) cases have provided every opportunity for reforms to be enacted in the way the courts handle such evidence. But if you examine what has actually been done to address these concerns, you will find that it is very little.

In *R -v- Lorraine Harris & Others*[1] counsel for the Crown actually invited Lord Justice Gage to give guidance in relation to expert evidence, claiming that the appeals in the SIDS cases '*demonstrated that there had been a significant failure within the criminal justice system to control and manage expert evidence*'. Counsel argued that there must be a change in approach. The Court of Appeal, however, took the view that, regardless of whether or not the criminal justice system had failed to control and manage expert evidence, they were reluctant to give any new guidance on expert evidence arising from the facts in these particular cases.

The adversarial system – on the wane?

Traditionally, one of the safeguards of our adversarial system of justice was the opportunity it gave to challenge expert evidence. It was usually possible for a party to call their own expert evidence to challenge the evidence of an opposing expert.

In recent years, however, there have been moves away from this adversarial approach. Lord Justice Auld has said that part of the function of an expert's overriding duty is to provide objective expert evidence and *not* to be drawn into the adversarial mode of some of the instructing lawyers. At the same time, there have been calls for the use of single experts, a pool of accredited experts and even court-appointed experts. There is, though, a danger that any move away from the adversarial system will create a greater risk of error when opinion evidence based on frontier science is adduced in court. With developing sciences the court needs all the help it can get. But how is such evidence to be tested?

Publish and be damned

Some argue that the rigorous screening process used by the leading journals (such as *Nature*, *Science* and *The Lancet*) constitutes sufficient peer review. Indeed they point to the huge number of papers that are rejected as evidence of this quality control. Therein lies a paradox. It is precisely because it is so difficult to get published in the top-flight journals that they are so highly regarded and so often quoted. However, the publisher's natural leaning towards what is attention grabbing, innovative or novel means there is greater scope for errors to creep in – as amply demonstrated by Dr Hwang Woo Suk's claims to have cloned human embryonic cells.

So why should frontier science and new or developing theories be kept from the courts? Surely it is in the nature of science that new ground is constantly being broken. Is this not precisely the kind of specialist knowledge the court needs the expert to provide? However, if the scientific community itself and the scientific journals are occasionally unable to spot a flawed hypothesis, how can the courts?

In *Harris & Others*, Gage LJ took the view that developments in scientific thinking and techniques should not be kept from the court. He considered this to have been demonstrated amply by recent cases involving new techniques such as facial mapping. He went on to express the view that this openness should be so even in cases where scientific thinking was at such an early stage that it could amount to no more than a hypothesis. Obviously, it would be imperative that the true hypothetical nature of the expert's evidence be frankly indicated to the court.

Court of Appeal reluctant to give new guidance

Be humble in the face of the court

In the Family Division case of *Re AB (Child Abuse: Expert Witnesses)*[2], Wall J pointed out that there will always be cases in which there is a genuine disagreement on a scientific or medical issue, or where it is necessary for a party to advance a particular hypothesis to explain a given set of facts. Where that occurs, he said, the jury will have to resolve the issue raised. However, as Wall J pointed out, the expert who advances such a hypothesis owes a very heavy duty to explain to the court that what is being advanced is a hypothesis. If appropriate, the expert should also identify that the hypothesis is controversial, and place before the court all contradicting material. Second, the expert must make all the material available to the other experts in the case. It is the common experience of the courts, said Wall J, that '*the better the experts, the more limited their areas of disagreement, and in the forensic context of a contested case relating to children, the objective of the lawyers and the experts should always be to limit the ambit of disagreement on medical issues to the minimum*'.

The reasoning of Wall J was echoed by the Court of Appeal in *Harris & Others*.

So the current thinking of the Court of Appeal is that expert evidence in developing or controversial fields should have its place in court and ought not to be discouraged. However, the expert must be frank and open about the scientific status of such evidence and should reveal any material that might be contradictory. There can never be, said the court, a single test to provide a threshold for admissibility in all cases. It is up to the judge in each case to decide whether expert evidence should be admitted.

Given the sound and fury of those who seek to criticise the role of the expert within the justice system, the views of the Court of Appeal are somewhat refreshing!

Judges must be left to determine admissibility case by case

Case references

[1]*R -v- Lorraine Harris & Others* (2005) *EWCA Crim* 1980.

[2]*Re AB (Child Abuse: Expert Witnesses)* (1995) 1 *FLR* 181.

Services for registered experts

Expert witnesses listed in the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 54). You can read them all on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, privilege, disclosure and fees. When you need clarification, the Factsheets should help. If not, call us for assistance on 01638 561590.

Court reports – FREE

Accessible freely on-line at **www.jspubs.com** are details of many leading cases that touch upon expert evidence.

LawyerLists

How would you like to have a database of 13,126 (and counting...) litigation lawyers at your fingertips? Based on the litigation lawyers on the *Register*'s Controlled Distribution List, *LawyerLists* enables you to purchase top-quality, recently validated mailing lists of litigators based across the UK. Now you can have fast, easy, flexible and cost-effective access to top-quality address data for litigation lawyers. Getting your own marketing material directly onto the desks of key litigators has never been this simple!

Register logo – FREE to download

All experts vetted and currently listed may use our undated logo to advertise their inclusion. A dated version of the logo is also available bearing the year of most recent recommendation. Successful re-vetting in 2006 will enable you to download the 2006 logo.

General helpline – FREE

We operate a general helpline for experts seeking assistance in any aspect of their work as expert witnesses. Call 01638 561590 for assistance, or e-mail helpline@jspubs.com.

Re-vetting

You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas. This would both enhance your expert profile and give you access to the 2006 dated logo. The results of the re-vetting process are published in summary form in the printed *Register*, and in detail in the software and on-line versions of the *Register*.

Profiles and CVs – FREE

As part of our service to members of the legal profession, we provide free access to more detailed information on our listed expert witnesses. At no charge, experts may submit:

- a **profile sheet** – a one-page A4 synopsis of additional information
- a **CV**.

Extended entry

At a cost of 2p + VAT per character, an extended entry offers experts the opportunity to provide lawyers with a more detailed summary of expertise, a brief career history, training achievements, publishing record, etc.

Photographs – FREE

Why not enhance your on-line and CD-ROM entries with a head-and-shoulders portrait photograph?

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If corporate branding is important to you, for a one-off fee you can badge your on-line and CD-ROM entries with your business logo.

Multiple entries

As well as saving you money, multiple entries offer improved geographical and expertise coverage for multi-site firms. If your company has several offices around the UK combined with a wide range of expertise, call to discuss the options.

Web integration – FREE

The on-line *Register* is also integrated into other legal websites, effectively placing your details on other sites that lawyers habitually visit.

Surveys and consultations – FREE

We bring together the largest community of expert witnesses in the UK. Since 1995, we have tapped into this community, through our survey work, both to build up a body of statistics that reveal changes over time and to gather data on areas of specific and topical interest. If you want a say in how systems develop, take part in the surveys and consultations.

Professional advice helpline – FREE

A valuable benefit for those experts who opt for the Professional service level is our independently operated professional advice helpline. It provides access to reliable and underwritten professional advice on matters relating to tax, VAT, employment and commercial legal issues.

Software

Drawing on over 19 years' experience of working with the expert witness community, we have designed a suite of task-specific software modules to help keep experts informed.

Discounts – FREE

We represent the largest community of expert witnesses in the UK. As such, we have been able to negotiate with publishers and training providers to obtain discounts on books, conferences, training courses and videos.

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