Your Witness

Newsletter of the UK Register of Expert Witnesses, published by J S Publications

Legal Aid Consultation

As promised, the Ministry of Justice (MoJ) has rolled the work it has been doing on expert witness fees into the wide-ranging consultation on reform of legal aid in England and Wales. The new Consultation Paper (numbered CP12/10) was published on 15 November and the consultation itself runs until 15 February 2011. Chapter 8 of the Consultation Paper – Expert Fees: Civil, Family and Criminal Proceedings – sets out the same background as the last consultation. But it now proposes that 'the benchmark hourly rates currently applied by the Legal Services Commission (LSC) when considering whether experts' charges are reasonable should be codified and subject to a 10% reduction'. The MoJ goes on to explain:

> *'The "benchmark" rates were developed by the LSC on the basis of the experience and expertise of case workers dealing with experts' bills. Although there are limitations on the data collected in the file review (due to the diverse nature of experts and their work), it does show that the median level of fees charged by experts in some key categories is in line with the LSC's benchmark rates. We believe that codification (and the accompanying publication) of the rates will increase clarity and transparency, and ensure that experts carrying out the same type of work are consistently paid at the same rates.'*

In the long term, the Government wants to put in place a new set of fees for expert witnesses, wherever possible made up of fixed fees, graduated fees (where specific totals are set for particular activities) and a limited number of hourly rates.

The MoJ sees the new rates (and, in due course, the new fee structure) binding the Court to prevent expert costs from increasing at the assessment stage. However, the LSC will have discretion to authorise that they be exceeded in 'exceptional' circumstances. At this stage, exceptional circumstances are defined as cases where the expert evidence is key to the client's case and either:

- the complexity of the material is such that an expert with a high level of seniority is required, or
- the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence.

The intention is that:

> *'... in the short term the codified hourly rates and, in the longer term, the new fee structure, will achieve more transparency in the management of public expenditure, and provide greater clarity and certainty for experts and for the solicitors who engage them, and that these factors will help ensure that supply is maintained.'*

The MoJ has been frustrated by its inability to apply the cost-control model it developed for lawyers onto expert fees. But, to give it its due, it has held back from simply ignoring all the views it has received over recent years and just imposing an unsophisticated fee cap. Its frustration is revealed when it exhorts respondents to its consultation to 'have the overall fiscal context firmly in mind' when responding!

Still, hidden away in the Impact Assessment for the expert fees proposals, the MoJ notes that if its proposals lead to reductions in the quality and/or supply of expert services, this would be tantamount to reductions in legal aid scope and eligibility. The MoJ goes on to say that it 'does not intend this situation to arise.'

It is tempting to quip that if the five experts still able to work for the LSC under the new reduced scope for legal aid simply refuse to do so, the Government could stop issuing consultations on expert fees!

New edition of the Register

Preparations for edition 24 of the *UK Register of Expert Witnesses* have begun. A draft of your entry for the new edition will be sent in the New Year for you to check, sign and return. If you will be away during the first half of January you may wish to contact us now so that we can make appropriate alternative arrangements.

Extend your entry coverage

Last year we redesigned our systems to enable you to have more than 98 index terms assigned to your entry. If you currently have close to 98, it may well be worth your time taking a look at this new on-line tool.

Remember that maximising the number of index terms will increase the likelihood of your entry appearing on the results pages of the CD-ROM and on-line search engines.

To take a look, please visit *www.jspubs.com* and follow the link on the right-hand side of the home page to the *Subject Index Controller*. Through our website you can assign sets of 50 additional terms for just £25 + VAT each, with no upper limit – much cheaper than taking additional entries to gain the required coverage.

Season's greetings!

Everyone here at J S Publications sends their best wishes to you for a Happy Christmas!
Chris Pamplin

Inside

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Experts and the ultimate issue

Ultimate issue rule designed to stop trial by expert

It had long been a rule of evidence at common law that a witness – and that included expert witnesses – should not give evidence in relation to what is termed the 'ultimate issue' (i.e. any fact in issue) in a case. The rule applied in both the civil and criminal courts, and was based upon the principle that a matter that is for the jury (or the judge) to decide should not be usurped by a witness.

So, for example, a fingerprint expert witness could state, with varying degrees of certainty, whether fingerprints found on a murder weapon were a match for those of the accused. He was not, however, permitted to go beyond this and say that, in his opinion, the accused *was* the murderer. Guilt or innocence was a matter for the jury to decide, and the prohibition on expert witnesses addressing the ultimate issue was designed to prevent trial by jury being supplanted by trial by expert.

In *DPP -v- A and BC Chewing Gum*[1], Lord Parker CJ said that, while an expert in child psychiatry was competent to give an opinion on the effect of battle scenes on children, it would be wrong for the expert witness to give his opinion on whether any of the defendant company's products containing such images actually tended to corrupt or deprave '... because that final stage was a matter which was entirely for the justices'.

This basic premise of the ultimate issue rule was also outlined by Cresswell J in the *Ikarian Reefer*[2] in 1993. The expert should only give evidence in relation to matters within his expertise and on issues not within the ordinary experience of the jury. If the jury is capable of forming an opinion without the assistance of an expert because the matter is within their own experience or knowledge, then expert opinion is not necessary.

Weakening of the rule

For some time there has been an ongoing and steady weakening of the rule against expert opinion on the ultimate issue. The 1972 Civil Evidence Act made expert opinion on the ultimate issue admissible in civil cases, giving effect to the 1970 Report of the Law Reform Committee on Evidence of Opinion and Expert Evidence. This report recommended that '... a statement by an expert witness... shall not be inadmissible upon the ground only that it expressed his opinion on the issue in the proceedings...'. In criminal cases, the abolition of the rule was recommended by the Criminal Law Revision Committee in its Eleventh Report (Cmnd 4991 (1972) p. 155), but this recommendation was never put into effect.

Law reform bodies have called for its abolition

However, even in civil cases, there remained definite limits on the extent to which opinion on the ultimate issue would be admissible, and the common law rule continued to exert pressure in determining the line between what was acceptable and what was not.

In *Pride Valley Foods Ltd -v- Hall and Partners*[3], an expert witness in a construction law case gave an opinion on what he would have done if he had been in a similar position to the defendant. In doing so, he was directly addressing questions relating to the ultimate issue. Toumlin J said that these were not questions for expert witnesses but were matters for the court to decide. The expert, he said, purported to make findings of fact on matters that are for the judge, and that his report offended against the established basis on which experts should give their evidence.

Complexity rules

However, with increasingly complex areas of evidence, and particularly those involving medical malpractice, fraud or forensic science, the boundaries between acceptable expert opinion and opinion that addresses the ultimate issue have become blurred. In fraud cases, for example, expert accountants have given opinions which effectively state that there can be no rational, honest explanation for the transactions under consideration, thus inferring that the only remaining explanation is one of fraud.

In the same year as the *Ikarian Reefer* case, Lord Taylor stated, as an aside, that:

> *'... the rationale behind the supposed prohibition is that the expert should not usurp the functions of the jury. But since counsel can bring the witness so close to opining on the ultimate issue that the inference as to his view is obvious, the rule can only be a matter of form rather than substance'.*

For example, in a medical malpractice case an expert witness cannot be asked to state, outright, whether a doctor's behaviour has fallen short of that expected by a professional doctor. However, it is easy to see how a particular line of questioning by an advocate might elicit an inference from an expert that is not too far removed from an opinion on the ultimate issue.

In 2006 we reported on cases that dealt with the emerging science of human memory research, particularly the reliability or otherwise of childhood recollection (see *Your Witness* 45). In *R -v- S:R -v- W* [4], 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 were aged 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 witness evidence was accepted, it would tend to suggest that the

victims' statements could not have been based in fact but, instead, were likely to have been fabricated, whether consciously or otherwise. The truthfulness of the victims' statements was a question for the jury and not for expert evidence. Accordingly, the appeal was dismissed and the fresh evidence was not allowed.

Facing facts

Facial mapping is another area where the courts have considered the admissibility of expert evidence on the ultimate issue.

In *R -v- Gray*[5], the Court of Appeal held that, because there was no evidence of a national database of facial characteristics, or any accepted statistical formula for determining the probable occurrence of a particular characteristic or combination of characteristics, an expert witness should not go further than to say that the accused and the offender shared certain facial characteristics; he should *not* seek to opine on whether the evidence provided 'strong support' of identification of the accused. The cogency of the expert opinion in relation to identification was a matter for the jury.

However, more recently in *R -v- Mitchell*[6], it was accepted that a facial mapping expert *can* give an opinion on the likelihood that the accused is the offender if the jury is shown (and provided with) high-quality images and has the matches pointed out to them. This is particularly so if the judge gives an adequate direction on the evidence.

Mitchell was followed by the court in the case of *R -v- Atkins*[7], where the judge allowed a facial mapping expert to provide an assessment of the likelihood that the accused was the offender, notwithstanding the absence of a national database of facial characteristics. It was held that the limit imposed by *Gray* could actually result in the jury giving *too much* weight to the evidence – a result the judgment had been designed to avoid.

The only safeguard for the accused is that the trial judge must explain to the jury in clear terms that a facial mapping expert's opinion is not based upon a database but is a subjective opinion founded on experience. (We look in more detail at likelihood in our next article.)

Learned opinion is against the rule

Academic lawyers have commented unfavourably on the continued existence of the rule. It has been said to be wholly antithetical to the underlying justification for having expert witnesses, namely that 'the drawing of inferences from the facts in question calls for an expertise which the tribunal of fact does not possess'.

The sort of quasi-existence of the rule brings its own problems. In *R -v- Stockwell*[8], the Court of Appeal accepted that if there was a rule prohibiting experts from giving an opinion on an ultimate issue, '... it has long been more honoured in the breach than the observance'. Indeed, in the light of recent case law, there can no longer be any doubt that an expert witness is able to give his opinion on an 'ultimate issue' in criminal proceedings, so long as that opinion is within the area of his expertise and the judge makes it clear that it is for the jury to decide the issue. In other words, the jury can hear the expert's view but choose to ignore it.

The leading authorities on evidence, too, have suggested that the rule is effectively dead. *Archbold* (2004, 10–66, p.1287) states that:

> *'... an expert is now permitted to give his opinion on what has been called 'the ultimate issue', but the judge should make it clear to the jury that they are not bound by the expert's opinion, and that the issue is for them to decide'.*

This is echoed in *Keane on Evidence* at pp. 507–508, which notes that:

> *'... the prohibition against ultimate issue testimony has become largely irrelevant.'*

The rule has, however, been a fairly tenacious one and is still capable of exerting some residual force. Mark Twain said, upon learning that his obituary had been published in the *New York Journal*, '... the reports of my death have been greatly exaggerated'. One is left to wonder whether the same might be said for the ultimate issue rule.

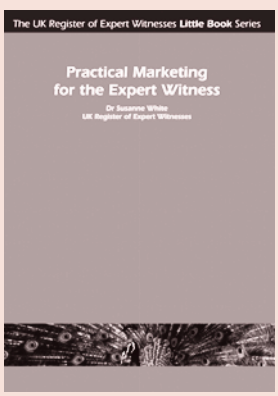
More honoured in the breach than the observance

New Little Book on Promotion

Due out early in 2011 (we're waiting for detail of the ruling in *Jones -v- Kaney*) is a new title in our *Little Books* series. With well over 200 pages of useful advice about assessing and expanding your marketing programme, *Practical Marketing for the Expert Witness* will make essential reading for anyone wishing to develop their client lists.

This is *not* a book about marketing theory. It's been written as an easy-to-read practical guide to the expert witness market, full of insights into managing your marketing data and prioritising your strategies. All examples are drawn from the expert witness arena, focusing on how best to get in touch with instructing lawyers.

Chapters include getting your service right, damage limitation, marketing strategy and pro-active marketing initiatives, while appendices include revealing tables of fee rates, useful lists of local law societies and lawyer associations, and vital information about tailoring on-line searches for lawyers.



To learn more about this *Little Book* – or its siblings – surf to *www.jspubs.com* and follow the *Little Books* link on the right-hand side of the screen. Each *Little Book* costs £35.00 + P&P, with bundle discounts available.

References

[1] *DPP -v- A and BC Chewing Gum* [1967] *3 WLR* 493 *(DC).*

[2] *National Justice Compania Naviera SA -v- Prudential Assurance Co Ltd (the Ikarian Reefer)* [1993] *2 Lloyds Law Reports* 68.

[3] *Pride Valley Foods Ltd -v- Hall and Partners* [2000] *ABC LR* 05/04.

[4] *R -v- S:R -v- W* [2006] *EWCA Crim* 1404.

[5] *R -v- Gray* [2003] *EWCA Crim* 1001.

[6] *R -v- Mitchell* [2005] *EWCA Crim* 731.

[7] *R -v- Atkins* [2009] *EWCA Crim* 1876.

[8] *R -v- Stockwell* [1993] 97 *Cr App R* 260.

Dressing up guesses as science

Use of likelihood ratios comes under scrutiny

In *R -v- T*[1], the Court of Appeal has looked again at the use by experts of mathematical formulae for calculating likelihood ratios. In this case, the appellant was tried for murder. The sole issue was that of identification.

Following conviction, he appealed on three issues. One concerned the extent to which evaluative evidence on footwear marks is reliable and the way in which it was put to the jury. This raised an issue of some importance in relation to the use of *likelihood ratios* in the provision of an evaluative opinion where the statistical data available are less than solid.

Mark of a marque

The facts in the original trial were these. A footwear expert from the Forensic Science Service (FSS) attended at the scene of a murder and recovered footwear marks. He carried out a comparison with a pair of Nike training shoes that were found at the appellant's house following his arrest. In accordance with current practice in England and Wales, the expert carried out his examination based on a comparison of four factors: the sole pattern, the size, the degree of wear and the presence or otherwise of any damage. In his reports, he summarised the general approach that was taken to the evaluation of footwear mark evidence. He said:

> *'... when assessing the significance of any correspondence or difference between a shoe and a mark resulting from a comparison, the likelihood of obtaining a correspondence or difference is considered against two alternative propositions: firstly, the shoe in question has made the mark it has been compared with, and secondly, that it has not made the mark. When the results of an examination are not conclusive the strength of assessment of the scientific evidence is normally expressed as a level of support for one or other of the above propositions. In attempting to convey the level of this support, the most appropriate expression is selected from among the following progressive verbal scale: very limited, limited, moderate, moderately strong, strong, very strong, extremely strong.'*

The expert's examination had revealed that the sole pattern and the size of the trainers were a match for the marks found at the scene. The sole pattern was, however, one of the most frequently encountered sole patterns on Nike trainers. The trainers were more worn than those that had made the marks, but the expert thought that additional wear might be explained by their use in the intervening period. He acknowledged that there was uncertainty about this because the amount of wear would depend on the extent to which they had been used. Furthermore, the marks at the scene indicated that there might have been damage to the trainers that had not been found on the pair recovered. A possible explanation for this might have been that the 'damage' marks had been the result of an artefact on the surface of the floor; that the area of damage had been worn away by subsequent use; or that the damage mark was caused by a stone lodged in the tread that had subsequently fallen away.

In relation to the correspondence found between the marks and the examined trainers, the expert considered it unlikely that these were attributable to coincidence. He concluded that there was 'moderate scientific evidence' to suggest that the appellant's trainers had made the marks found at the scene.

Court critical of 'hidden' use of a Bayesian approach

A hidden formula

After the trial, the papers of the FSS scientist were examined by another expert and some of these showed the use of a formula to calculate a numerical value for the likelihood embodied in the progressive verbal scale. Although not referred to in the expert's report, this *likelihood ratio* had been calculated according to a widely used formula – the Bayesian approach. It resulted in a numerical value that could be used to ascribe the data to one or other of the expressions in the progressive verbal scale. The formula used produces results that range between <10 (equating to weak or limited support for the hypothesis that a given shoe made the mark) up to >1,000,000 (extremely strong support). The number is a ratio of two probabilities, i.e. the probability that the proposition (that the shoe made the mark) is true divided by the probability that the alternative proposition is true.

In this case, the expert had applied this approach to each of the four indicators using the formula Pattern x Size x Wear x Damage with values of 5 x 10 x 2 x < 1 giving a likelihood ratio of ~100. This was given in evidence using the verbal equivalent of 'moderate support'. The values ascribed had been reached by the expert's use of his own skill and judgment as well as by reference to statistics stored on a database recording information such as the numbers of particular makes and design of shoe sold over the course of a specific year.

Once it became apparent that the expert had used likelihood ratios, counsel for the appellant sought to appeal the conviction on the ground that the Court of Appeal had previously rejected Bayesian-type evidence in non-DNA cases.

On appeal

The Court of Appeal studied statements from principal scientists at the FSS, and also considered a note from the Forensic Science Regulator. The court, in its redacted judgment, referred to the paper *Standards for the Formulation of Evaluative Forensic Science Expert Opinion*, published in 2009, which contains the clearest statement of the approach adopted by the expert in this case. The paper defined 'evaluative opinion' as being:

> *'... an opinion of evidential weight (evaluation of likelihood ratio) based upon case specific*

propositions and clear conditioning information (framework of circumstances) that is provided for use as evidence in court. An "evaluative opinion" is an opinion based upon the estimation of a likelihood ratio.'

The paper sets out the procedures to be adopted and what it terms 'the guiding principles' that justify this approach – the duty of the expert to base his opinion on the four principles of balance, logic, robustness and transparency.

It has been claimed that one of the advantages of the Bayesian approach is that it provides a safeguard against an expert understating or overstating the significance of scientific evidence. The court identified a difficulty in that this approach is not used by all forensic examiners. Some simply base their assessment on their own experience and 'have scant, if any, regard to databases'. Unless the report refers specifically to the evaluative techniques and likelihood ratio calculations, it is unclear whether an expert has employed a Bayesian approach to his evidence or whether he has based it simply upon his own assessment.

The Tsar goes too far?

The Regulator offered the opinion that the methodology set out in the 2009 paper provides a structured approach to the provision of an evaluative opinion that would make it clear the factors that had been considered and how these factors had been evaluated. He advocated this for *all* expert forensic evidence based on an evaluative opinion, and it should not, he said, be limited only to certain types of expert evidence.

Counsel for the appellant argued that an examiner of footwear marks could assess how a mark could best be enhanced or recovered, prepare test impressions for comparison, assess the degree of match by pattern, size, wear and damage, and take into account the time elapsed since the mark had been made and the date of comparison. He did not accept, however, that such an expert could go on to interpret the degree of match and assign a specific level of probability. The expert's evidence, he suggested, should be limited to a statement of whether the mark could or could not have been made by a particular shoe.

A distinction was made between shoe marks and the evaluative evidence in a facial mapping case. In the latter, there are distinguishing characteristics that can be applied to faces, but in the case of a shoe there are mostly just 'class' characteristics – features that are common to many thousands of shoes and will not readily differentiate one shoe from another of the same make and age. Without some identifying characteristics, e.g. a unique damage mark, the appellant's counsel argued that the expert should not be permitted to give evaluative evidence at all.

The court felt this was going too far. It said that an opinion that a shoe 'could have made a mark' was not the same as saying there was 'moderate scientific support for the prosecution case'. The court said that in some circumstances an expert examiner could go no further than saying the mark could have been made. In that case, this was a phrase that would be a more precise statement of the evidence and one that would be better understood by the jury. However, in some cases the expert should be able to go further and give a more definitive evaluative opinion, even in cases where there were purely class characteristics.

So, the court turned its attention to whether it is permissible to use mathematical formulae and likelihood ratios based on statistics to arrive at that evaluative opinion in footwear mark cases. It rejected the Regulator's view that a similar approach is justified in all areas of forensic expertise, saying that '... each area requires a separate analysis because of the differences that there are in the nature of the underlying data.'

Forensic Science Regulator's view not followed by the court

Data quality is key

In deciding this question, the Court considered the present state of knowledge and also looked at the practices elsewhere in Europe, the USA and Australia. It concluded that an approach based on mathematical calculations was only as good as the reliability of the data used.

In DNA cases the match probability is based on the reliability of a large and statistically sound database. In footwear cases, however, the underlying numbers aren't accurately known.

For example, the sales figures for Nike trainers were based on Nike's own figures. They did not take into account those sold by other distributors or the presence on the market of unknown quantities of counterfeits. Neither did the statistics take into account other factors such as the increased number of shoes in a certain area due to discounting by a particular retailer, local fashion, etc. Indeed, the FSS's own shoe database contained information relating to 8,122 pairs of shoes, a tiny sample given that around 42 million pairs are sold in the UK each year. Clearly, unless the FSS database happened to be a perfectly selected representative sample of the total shoe dataset, the likelihood ratio calculated from the FSS database would be different from that calculated by using national figures. Furthermore, the FSS database was not routinely available to all examiners.

The key is the quality of the underlying data

The Court held that there was no sufficiently reliable basis for an expert to be able to express an opinion based on the use of mathematical formulae. Any attempt to assess the probability that a given shoe could have made a particular mark based on figures relating to shoe distribution was inherently unreliable.

The Court quoted the judgment of Rose LJ in the case of *R -v- Adams*[2]. Whilst Bayesian theory

Don't dress up expert guesswork as pseudo-science

might be an appropriate tool for statisticians to establish a mathematical assessment of probability, the 'apparently objective numerical figures used in the theorem may conceal the element of judgement on which it entirely depends' and would be entirely inappropriate in jury trials. Juries would, he said, be plunged into inappropriate and unnecessary realms of theory and complexity, deflecting them from their proper task. Calculating a probability according to a likelihood ratio formula may well have the effect of elevating the opinion evidence in the eyes of a jury or a judge who might not fully understand the science behind it. The Court considered it clear that, outside the field of DNA, likelihood ratios should not be used, unless there was a firm statistical base.

An expert, it seems, can give an opinion based upon a statistical database by simply using that database and expressing an opinion by reference to it (*R -v- Abadom*[3]). Similarly, he can make use of a scale to express an opinion, where this is permitted by the court.

In *Atkins & Atkins -v- R*[4], the Court approved the use of a scale to express an expert opinion (see *Expressing shades of opinion*, *Your Witness* 59). In that case, however, the scale was based solely on the judgment of the expert and did not involve any calculation based on a mathematical formula. There was no question in *Atkins* of using a likelihood ratio because there was no statistical database upon which to base any calculation.

Don't give scientific credibility to guesswork

In allowing that an expert in a footwear mark case could give a more definite evaluative opinion (than the shoe could or could not have made the mark), the Court of Appeal said it was essential that the report made it clear that the expert's view was subjective and based on his experience. It thought it best that the word 'scientific' should not be used in this context because it would give the jury an impression of precision and objectivity that is not currently present in this area of expertise.

The effect of the judgment appears to be that an expert can give an evaluative opinion based on a verbal scale of values. He can even refer to a statistical database, where such a database exists, and can make reference to it in his report. But he must make it clear in his report that the view is a subjective one. What he *cannot* do is make use of a Bayesian or similar mathematical formula in calculating a likelihood ratio unless there is a trusted and accepted database upon which to base such an analysis.

Currently, the courts have only agreed to this approach being used in cases involving DNA identification evidence.

Nowhere to hide

Given all this, what is to prevent an expert from making use of a Bayesian approach to arrive at his 'subjective' opinion and simply not referring to the fact in his report? The answer would lie in the Court's insistence on transparency under Part 33 of the Criminal Procedure Rules. Where the mark could have been made by the footwear, the factors that enable the expert to express a more definite evaluative opinion must be set out, including any data that have been relied upon.

In *R -v- T*[1], the expert had justified his exclusion of the formula and statistics from his report by the explanation that these might have confused the jury. He said, in any event, that he had not relied only on the formula but had simply used it in accordance with the then emerging practice within the FSS as an aid to 'standardising' evaluative opinions across the board. This, said the Court, could be no justification because the Court must know what had been done.

The decision of the Court in *Abadom* explains the importance of referring to all material so that '... the cogency and probative value of the conclusions can be tested and evaluated by reference to it'.

The Court allowed the appeal and quashed the conviction on the grounds that it was unsafe. In doing so, it attached no blame to the expert in the case, saying he had merely followed what was then standard practice in the FSS. However, the Court found that the statistical evidence was inherently unreliable, that the basis on which the calculation had been made was not put before the jury, and that the process had not been transparent. Due to these factors, the defence had been unable to mount a proper challenge to the statistical evidence. It was clear upon hearing the new evidence on these statistics that the figures given to the jury based upon the limited FSS database had been more favourable to the prosecution case than would have been the case if national data had been used.

Supporters of Bayesian theory argue that there is nothing wrong with the technique but that jurors are confused by the way in which its use must be explained to them. It has been likened to explaining a simple mathematical sum on a calculator by reference to a sequence of binary functions through logic gates.

Some supporters argue that all the jury needs to know is that a value has been arrived at by a trusted formula for calculating probabilities. This is a hopeless over-simplification of the problem of likelihood ratios in expert evidence. If the courts were to allow the increased use of such formulae and extend it, albeit with appropriate warnings to the jury, to scientific areas where statistical records are incomplete or unreliable, or where statistical analysis is open to differences in interpretation or scientific disagreement, this would be to lend a degree of certainty to an expert opinion that was wholly unjustified. The Court of Appeal has got it right in this case. Justice is not served by dressing up an expert's guesses as pseudo-science.

References

[1] *R -v- T* [2010] *EWCA* 2439.

[2] *R -v- Adams* [1996] *Crim LR* 898.

[3] *R -v- Abadom* [1983] 1 *All ER* 364.

[4] *Atkins & Atkins -v- R* [2009] *EWCA Crim*. 1876.

TCC guidance for experts

The Technology and Construction Court (TCC) has a reputation for being groundbreaking in its procedural rules and guidelines. This has been particularly apparent in the way it has dealt with the presentation of expert evidence.

The TCC is part of the Queen's Bench Division of the High Court. It is a specialist court that deals with technology and construction disputes and other technically complex disputes. In addition to the Civil Procedure Rules and, in particular, CPR Part 60 (Technology and Construction Court claims) and its Practice Direction (PD 60), proceedings in the TCC are governed by the *Technology and Construction Court Guide* (The Guide). The Guide covers, amongst other things, procedural matters relating to the presentation of expert evidence.

On 1 October 2010, the second revision of the 2nd edition of the Guide came into effect (see *www.hmcourts-service.gov.uk/docs/TCC Guide.pdf*). This revision contains several changes that will affect experts and their evidence.

Service and disclosure

The Guide encourages the electronic service of documents (section 11.3.1). The term 'documents' includes pleadings, schedules, witness statements, expert reports, disclosure lists and other documents. It states that service of such documents can be instead of or in addition to service of hard copies.

Although specific provisions relating to electronic disclosure were first introduced into the CPR as long ago as 2005, many parties still ignore these requirements. The Court will now expect the parties and their representatives to consider at an early stage the use of technology in both the management of documents and the conduct of proceedings.

Appointment of experts

Annex C of the CPR Practice Direction – Pre-action Conduct (PDPAC) no longer applies in relation to the appointment of experts. Instead, this is now governed by paragraphs 3 and 5 of the Pre-Action Protocol for Construction and Engineering Disputes. This amendment reflects Jackson LJ's recommendation in his final report that parts of the PDPAC, including Annex C, should be repealed.

Amending an expert's report

Section 13.7.2 sets out the circumstances in which lawyers may *suggest* amendments to an expert's report. They can invite amendments that ensure accuracy, internal consistency, completeness, relevance to the issues or clarity of the report.

Amending the experts' joint statement

Section 13.6.3 contains guidance on the exceptional circumstances in which legal advisors may suggest amendments to the experts' joint statement. It provides that, whilst the parties' legal advisors may assist in identifying issues that the report should address, they should not be involved in the drafting of the joint statement. They should only invite the experts to consider amending the statement in exceptional circumstances where there are 'serious concerns that the court may misunderstand or be misled.' Any such concerns should be raised with *all* experts involved in the joint statement.

Witness coaching

A guide to distinguishing between discussing a witness's evidence with him (which is permitted) and witness coaching (which is not) is contained in Section 15.5.6. This applies to original and supplementary evidence and includes expert witnesses as well as witnesses of fact.

Preliminary presentation of expert evidence

With a view to reflecting a growing practice amongst experts to offer the court a short preliminary presentation, including slides, Section 13.8.1 provides that, particularly in large or complex cases where the evidence has developed through a number of experts' joint statements and reports, experts may give a short presentation at the start of their evidence with a summary of their views on the main issues. It is stressed, however, that this should not be taken as an opportunity to introduce new evidence.

Concurrent evidence or hot-tubbing

To accommodate increasing instances of experts giving concurrent evidence, Section 13.8.2 gives guidance and makes suggestions on a number of ways that expert evidence may be presented, including 'hot-tubbing' (see *Getting into hot water*, *Your Witness* 60). The Guide suggests that, particularly in cases where there are a large number of issues to be dealt with, it is often useful for the court to have the expert evidence on each issue dealt with in turn, rather than have the evidence divided into the separate testimony of each expert. This amendment reflects Jackson LJ's recommendation in chapter 38 of his final report that there was support among experts, practitioners and judges for a pilot on the use of concurrent evidence.

Love–hate relationship

It is perhaps true to say that the TCC has had, over the years, something of a love–hate relationship with expert witnesses. It is an area of law that has come to depend more and more on the evidence of experts, but it is one that has also been associated with excesses of time and expense, both for the court and litigants. Consequently, the TCC has been at the forefront of reforming measures in the way expert evidence is presented.

Where the TCC leads, other courts do not necessarily follow. But the TCC guidelines for expert evidence are often a good precursor of what is to come, and a useful barometer for current judicial thinking.

Revised Technology & Construction Court Guide...

... offers precursor of what may be to come

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