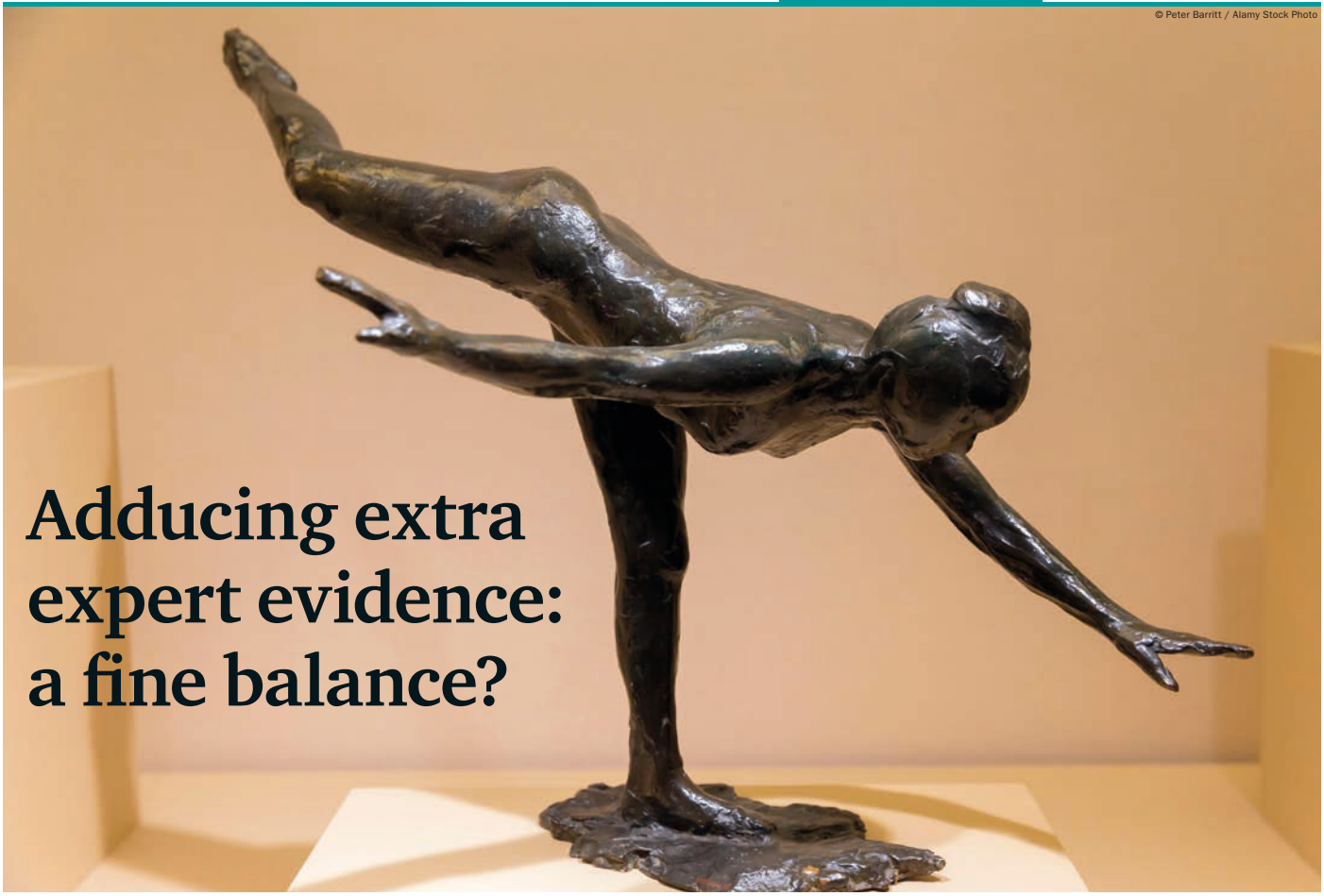

Adducing extra expert evidence: a fine balance?

How many experts are required? Timing may be relevant to the answer, writes Chris Pamplin

IN BRIEF

- In two recent cases that involve requests to adduce expert evidence late in the day, the court allowed it in one case, but not the other.
- The deciding factors seem to be the timing of the requests and cost proportionality.

The duty of an expert witness is to help the court to achieve the overriding objective by giving opinions that are objective and unbiased in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions. The rule is that witnesses should only testify in relation to matters within their knowledge.

Court's power to limit expert evidence

It is important that expert witnesses do not stray beyond the scope of their particular areas of expertise. To do so may render their evidence inadmissible or seriously reduce its value in the eyes of the court. Expert witnesses should always make it clear when a particular question or issue falls towards the periphery of, or outside of, their area of expertise.

An expert report must set out the expert's qualifications, both academic and professional. Where the case calls for highly specialised expertise, details of the training or experience that qualifies the expert to provide such evidence must also be included.

Where there is any suggestion that a given expert witness has strayed beyond their particular field, the expert is likely to face vigorous cross-examination. The opposing side will seek to call into question the knowledge, skill, capability, training and education of the expert, as well as the reliability of the opinions contained in the report and presented in the courtroom.

In complex cases involving many different but related scientific or academic fields, it will be necessary to have instructed many expert witnesses on both sides. However, the courts have to be conscious of the necessity to limit and control expert evidence and thus regulate the duration and expense of court proceedings. They must therefore perform a balancing exercise when it comes to giving permission for an expert witness to be instructed.

While cost is an increasingly important issue, it should not be the sole determining factor when the court is deciding whether to give permission for expert evidence to be adduced. Sometimes the interests of justice will require the appointment of an expert witness in circumstances in which the cost of so doing does not ostensibly seem justified.

The Civil Procedure Rules (CPR) introduced the requirement that expert evidence is: 'restricted to that which shall reasonably be required to resolve the proceedings.' (CPR 35.1)

The Rules also place limits on the nature and extent of the evidence (CPR 35.4(3)). The parties must consider the issue of expert evidence in a timely manner. This includes giving thought to whether expert evidence is likely to be needed at all. If it is, then the parties have to think about the relevant disciplines, the number of expert witnesses and whether oral evidence will be needed at trial. Of course, they must also obtain permission in good time to rely on expert evidence.

Two recent cases highlight how these considerations are currently being applied by the courts. They might, at first glance, seem somewhat contradictory.

Valuing paintings & statues

In *Borro Ltd v Aitken* [2021] EWHC 1902 (Ch), the claimant was a company providing loans secured against luxury assets including fine art and real property. The defendant was chief executive officer of the company.

The core of the claim was that the defendant failed to implement or adhere to the underwriting policies. Complaint was made of several loans in particular, the first being in the sum of £1.05m secured on a painting said to be by the artist JMW Turner. Two of the other loans were secured on sculptural artworks (US$181,000

for a bronze casting of an Edgar Degas sculpture, and US$3,412,500 secured on an architectural model known as the Tatlin Tower).

It was common ground there would need to be expert evidence as to the value of the property on which each of the loans was secured. In the course of the proceedings, the claimant proposed that there be one expert witness on each side to deal with the real property valuations and one other expert witness on each side to deal with the valuation of the artworks. The defendant, however, contended it would be necessary to instruct both an expert witness on the valuation of paintings and another expert witness to value the sculptures.

Judge Johns QC gave directions for two expert witnesses on each side to value the specific artworks and gave his reasons as follows. He said it was necessary to strike the right balance between the general and the particular. The valuation of the sculptures looked set to be a difficult exercise and one with a very significant range of opinion. He would not expect a person also instructed on the basis of expertise in valuing paintings to be able to give the court the best help with that exercise. Indeed, an order directing just one expert witness would run the risk of tempting an expert witness outside their area of expertise. In any event, the evidence overall would be likely to be too general. But to direct different expert witnesses for each of the two sculptures could well result in evidence reflecting an unnecessarily specific expertise. The court did not need a treatise on the Tatlin Tower or on Degas castings, but it did need reliable valuation evidence from someone experienced in the market for sculptures.

The judge recognised he had a duty to limit expert evidence to that which was reasonably necessary. The claimant had submitted the defendant's proposal involved a proliferation of expert witnesses resulting in additional costs.

However, the judge considered that the significant point was the proposal did not really involve extra expert evidence, and so should have only a limited impact on costs. This was not, he said, like a case where a further layer of expert witnesses was proposed, dealing with the same subject matter. An example of such a case might be both surveyors and structural engineers commenting on the condition of a building. Here, if there was evidence from expert witnesses in sculpture valuation, that would mean the other art expert witnesses would not report on the value of the sculptures and would not be cross-examined on those topics at trial. The proposal was not one for extra expert evidence, it was concerned only with the identity of the expert witnesses.

A plethora of medical experts

This case should be compared with *Lavender v Liverpool Victoria Insurance Co* [2021] 7 WLUK 506, which was a personal injury claim.

The claimant was a motorcyclist who had been in a collision with a car and suffered knee, head, shoulder and psychological injuries. Liability was admitted and the proceedings were concerned only with quantum. Each side was permitted to rely on five expert witnesses and a trial date had been set.

There were, clearly, already a large number of expert witnesses and differing fields of expertise. Directions were given for the provision of expert evidence from both sides by:

- a consultant orthopaedic surgeon;
- a consultant psychiatrist;
- a consultant neuropsychiatrist;
- a consultant oral and maxillofacial surgeon; and
- a consultant neurologist.

Further directions were given for those expert witnesses of like discipline to meet and provide joint statements. These directions provided a timetable that would result in a finalised schedule of loss and damage.

Following the directions hearing, the claimant instructed a new legal team. His new solicitors made application to the court contending that a pain specialist was also required in respect of ongoing issues. They suggested such expert evidence would assist the court in terms of prognosis, the pain treatment provided to date, and the likely pain treatment required in the future. They also sought permission to adduce evidence from care and physiotherapy experts. By way of explanation for the lateness of the application, the claimant said he had been let down by his previous solicitors who failed to enable him to put forward his case in the manner he wished. The defendant objected to the application and argued the pain issue had been known about since the beginning and if an expert witness was needed, that should have been flagged at an earlier case management conference by the previous solicitors.

Refusing permission for the additional expert witnesses to be instructed, Judge Simpkiss said the overriding objective was that all cases need to be dealt with fairly, and that was the principle that ran through all litigation. But fairness did apply to both sides, and it was necessary to deal with a case proportionately and in light of the evidence that had already been put before the court in the case.

Judge Simpkiss made the point that the claimant's previous legal team had been aware of his pain issue and had not suggested that an expert would be required. The matter had not been raised until recently. His Honour acknowledged the new legal team was trying to do its best for its client, and indeed the application was not an unusual one. However, it was felt that the existing orthopaedic and psychiatric expert witnesses would be able to address issues in respect of the claimant's rehabilitation. The introduction of a pain specialist at the instant stage would inevitably disrupt the trial date. It was far too late to bring the application. Indeed, the court would be able to assess whether amounts claimed for care were excessive and to deal with what sort of care would be required without the assistance of a specific care expert witness. The orthopaedic expert witness would be able to consider the claimant's physiotherapy. It was therefore ruled that the additional expert witnesses sought were unnecessary, especially at such a late stage.

It will be apparent that, unlike the judge in *Borro*, Judge Simpkiss did not consider that allowing the issues in relation to pain, care and physiotherapy to be dealt with by one of the five other medical expert witnesses on each side who were already involved in the case might tempt them to stray into areas outside their particular areas of expertise. This may have been because he considered the medical fields were sufficiently close and related to each other. This would follow the reasoning in *Borro* regarding the narrowness between expertise in relation to the two separate but distinct forms of sculpture. However, on the face of it, the expert disciplines, although related, do appear to be quite separate. He did not take the same view expressed in *Borro* that to allow the application would not create extra expert evidence but only concern the identity of the expert giving that evidence.

One wonders what the position might be if one or other of the expert witnesses declined to offer an opinion on the additional matters on the grounds these were beyond their specific knowledge or abilities, or if that expert witness was challenged by one or other of the parties on their qualification to opine on the matter.

Conclusion

The difference between the two cases appears to hinge on questions of timing and proportionality. If leave is to be sought to adduce additional expert evidence, it should be sought at the earliest possible stage. NLJ

Dr Chris Pamplin is the editor of the *UK Register of Expert Witnesses* and can be contacted on *nlj@jspubs.com*. Website: *www.jspubs.com*.