Factsheet 04: The 'Cresswell' Principles of Expert Evidence

Last updated: 21 July 2000

The principles of expert evidence which Mr Justice Cresswell laid down in his judgment in the shipping case known as *The Ikarian Reefer* ([1993] 2 *Lloyd's Rep.* 68) have become widely accepted as a classic statement of the duties and responsibilities of expert witnesses. They were endorsed by the Court of Appeal, commended by Lord Woolf in his report on the civil justice system in England and Wales, and have been cited with approval in several subsequent cases. This is not to say, though, that they have won complete acceptance, as the following discussion shows. It is based on an article by Anthony Speaight QC, which first appeared in the *New Law Journal* and was then abridged, with the author's permission, for publication in *Your Witness*.

The seven principles of expert evidence which Mr Justice Cresswell set out in *The Ikarian Reefer* have several times been cited as the classic statement of good practice for experts, most recently in *Boroughs Day -v- Bristol City Council*. There can be no doubt that the judge's strictures on experts in this case were justified, but before the Ikarian Reefer principles become, so to speak, set in stone as unchallengeable pillars of wisdom, we ought to examine the respects in which they may fail to grapple with unresolved contradictions in the role of the expert in litigation. Let us consider the principles individually.

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

If this simply meant that an expert ought to express the same opinion on a given issue irrespective of which side was calling him, then most of us would warmly agree. However, in stating that both 'form and content' should be uninfluenced by 'the exigencies of litigation' the proposition goes much further.

Consider form first. How can an expert report not be influenced by the fact that it is to be used in litigation? Litigation reports differ from those produced for other purposes in a number of ways, most importantly because they should surely be directed to the matters in issue on which expert evidence is admissible. In my view it is not only proper but desirable for lawyers to identify for experts the issues on which their opinion is sought. To my mind, a crisp expert report will set out the questions posed by the lawyers and confine itself to answering them. Therefore, the form of a useful expert report will be very much dictated by the context of its requirement for a particular case.

The proposition that the content of the report should be uninfluenced by the exigencies of litigation may sound more reasonable. But, in fact, behind this bland statement lies a profound difference of opinion as to the propriety of lawyer involvement in the drafting of reports. Imagine the hypothetical case of an obstetrician accused of pulling too hard on forceps. The defendants receive a report from their medical expert which contains these two passages: (1) 'in my opinion he did not pull too hard but he did pull for too long, and this ultimately produced the same mischief as pulling too hard would have done', and (2) 'in the ensuing Caesarean section operation his stitching was thoroughly careless, causing unnecessary later pain'.

In my view it would be wrong for a lawyer to suggest that passage (1) be modified by, for example, cutting out all the words after 'he did not pull too hard'; for such an excision would do violence to the witness's full expression of opinion on the question as to whether the pulling was negligent. On the other hand, I would consider it perfectly proper for a lawyer to ask the expert to omit passage (2) entirely if the plaintiff had pleaded no allegation of negligence in the performance of the later operation. Parties to litigation are under no obligation to tell their opponents how they could improve their cases, and in such a situation it would be the lawyer's duty to his client to endeavour to have passage (2) removed before the report was served.

Therefore, to the extent that the content of expert reports should be confined to the questions posed to the expert, the content as well as the form may on occasions be influenced by the requirements of litigation.

2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see Polivitte Ltd -v- Commercial Union Assurance). An expert witness in the High Court should never assume the role of an advocate.

Experts should certainly provide objective unbiased opinions, and equally certainly they should not act as advocates. However, the giving of unbiased opinions is not quite the same thing as providing 'independent assistance to the court'. Experts are called by one party or the other, and are paid by one of the parties. They are engaged not only to give evidence in the witness box, but also to give out-of-court advice to the party engaging them. And, indeed, on looking at Mr Justice Garland's judgment in the Polivitte case one finds that he gave a rather more balanced picture of the expert's role: 'I have almost considered the role of an expert to be two-fold: first, to advance the case of the party calling him, so far as it can properly be advanced on the basis of information available to the expert in the professional exercise of his skill and experience; and secondly, to assist the court, which does not possess the relevant skill and experience, in determining where the truth lies.'

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

This statement is fine, so long as the reference to not omitting what could detract from the opinion is limited to the questions actually posed to the expert. As the late and greatly respected Official Referee, Judge John Newey QC, once wrote: 'Since the procedure in both courts and arbitrations is adversarial, an expert is not obliged to speak out, or write in his report, about matters concerning which he has not been asked.'

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

When *The Ikarian Reefer* case reached the Court of Appeal, Lord Justice Stuart-Smith qualified this statement from the judgment of the Divisional Court by saying that an experienced fire expert must be entitled to weigh the probabilities. 'This', he said, 'may involve making use of the skills of other experts or drawing on his general mechanical or chemical knowledge.'

5. If an expert's opinion is not properly researched because he considers that insufficient data are available, then this must be stated with an indication that the opinion is no more than provisional. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (see Derby -v- Weldon).

The remarks of Lord Justice Staughton in the *Derby -v- Weldon* case are worth quoting more fully, because they introduce a different, and more realistic, nuance: 'I do not think that an expert witness, or any other witness, obliges himself to volunteer his views on every issue in the whole case when he takes an oath to tell the whole truth. What he does oblige himself to do is to tell the whole truth about those matters which he is asked about.'

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such a change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

This is a radical idea. I have never had the experience of opponents telling me or my solicitors that their expert had changed his view on something since service of his report. Nor have I ever heard of it happening to others. So this principle hardly reflects existing practice. That is not to say that there may not be good arguments in favour of its adoption, but they require careful examination.

In general, a party to litigation is under no obligation to reveal to the other what his prospective witnesses will say. Quite the contrary: witness statements are privileged. However, rules of court have in practice modified the scope of that privilege, by providing that leave to call experts may be made conditional on the substance of their evidence being disclosed to the other side in the form of a written report.

I can quite see that if an expert changed his mind on a significant matter between writing his report and its service to the other side, the report should be amended before it is served. It could well be argued that service implies that the report currently reflects the witness's view, even if the report had been completed some time previously. Similarly, I would agree that a party ought not to place an expert's report before the trial judge unless at the time of doing so the report is still broadly accurate as to the witness's opinions, and the party genuinely intends to call that expert.

But no recipient of a report could imagine that it constituted the author's final views on the subject, for no author can predict how his opinions may change in the future, especially if additional material comes to his attention. So if an expert changes his mind on a matter during the many months that may elapse between service of his report and trial, is there any obligation to signal that to the other side? I think not, and other lawyers share my view.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

A good statement of practice.

Anthony Speaight, QC

Postscript

Seven years after Mr Justice Cresswell formulated the above principles of expert evidence, a judge in the Technology and Construction Court, Judge John Toulmin CMG, QC, had occasion to update them in the light of the Woolf reforms. The details of the case Judge Toulmin was trying, *Anglo Group plc -v- Winther Brown & Co. Ltd and BML (Office Computers) Ltd*, need not concern us here, but his restatement of the 'Cresswell principles' has relevance for all who practice as expert witnesses.

Judge Toulmin was highly critical of some of the expert evidence he had heard in the case. But before dealing with it in his judgment, he listed the following as duties an expert witness owes to the court:

'1. An expert witness should at all stages in the procedure, on the basis of the evidence as he understands it, provide independent assistance to the court and the parties by way of objective unbiased opinion in relation to matters within his expertise. This applies as much to the initial meetings of experts as to evidence at trial. An expert should never assume the role of an advocate.

'2. The expert's evidence should normally be confined to technical matters on which the court will be assisted by receiving an explanation, or to evidence of common professional practice. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.

'3. He should co-operate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending without-prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely areas of disagreement to be set out in the joint statement of experts ordered by the court.

'4. The expert evidence presented to the court should be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.

'5. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit

to consider material facts which could detract from his concluded opinion.

‘6. An expert witness should make it clear when a particular question or issue falls outside his expertise.

‘7. Where an expert is of the opinion that his conclusions are based on inadequate factual information he should say so explicitly.

‘8. An expert should be ready to reconsider his opinion and, if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity.’

As readers of Mr Speaight’s article will immediately see, three points are common to both sets of principles, and three more correspond closely. What is new in Judge Toulmin’s set are his points 2 and 3. It remains to be seen whether, in this post-Woolf era, his reformulation of the duties and responsibilities of expert witnesses will supersede that of Mr Justice Cresswell.

J S Publications can be contacted at:
PO Box 815, Bury St Edmunds, IP33 9QE
Tel: 01638 561590 • e-mail: ukrew@jspubs.com

