

**EXPERT EVIDENCE – THE ROLE, DUTIES AND RESPONSIBILITIES
OF THE EXPERT WITNESS IN LITIGATION¹
By Robert Sutherland, Advocate**

An expert has been defined as ‘a person with the status of an authority (in a subject) by reason of special skill, training or knowledge; a specialist’². An expert witness has been described as ‘one who has made the subject upon which he speaks a matter of particular study, practice or observation: and he must have a particular and special knowledge of the subject’³. This article looks at the question of what it is that makes an ‘expert’ an ‘expert witness’ for the purposes of litigation, and why it is necessary for a witness to be more than knowledgeable in order to be considered an expert witness.

Where a client is involved, or is likely to become involved, in litigation there can be two reasons for consulting an expert. One reason is to have a knowledgeable person act as an adviser and advocate for your own side. Such a person might be used to comment on the strengths and weaknesses of the parties’ respective positions, or to act as a sounding board to test different theories or advise on lines of inquiry. In that situation the person who is looking for a specialist wants someone with particular and special knowledge, but they are looking to that person to help develop or advance a particular argument on their behalf. What is being looked for there is someone to help the client promote their interest over any other interest.

However a person who takes on the role of an ‘expert witness’ has a different function. The job of the ‘expert witness’ is not simply to articulate their client’s position; it is to assist the decision maker (a court, tribunal or other similar body) with the information about the specialist area which is necessary before a decision can be made. This was discussed in *Davie v Magistrates of Edinburgh*⁴. In that case an action was brought for damage done to the pursuer’s house by blasting operations associated with the construction of a sewer tunnel some three hundred yards from the house. The defenders led a civil engineer, who gave evidence as to the effect on houses of underground blasting and, in particular, stated that the shock of explosion lessened according to the square of the distance from the point of explosion, and that the blasting complained of would not have caused the damage complained of owing to its distance from the house. They also led the evidence a mining engineer and adviser on blasting, who had made a special study of the effect of blasting vibrations on structures. His evidence was of similar effect and also that the amount of explosive used

would not have caused the damage complained of. This evidence was concurred in by a third witness who was cross-examined as to his qualifications and experience, but gave no independent evidence. The defenders sought to argue that as no counter evidence on the science of explosives and their effects was led for the pursuer the Court was bound to accept the conclusions of the mining engineer who had given evidence. The court rejected this, saying that an expert witness, however skilled or eminent, can give no more than evidence. The expert cannot usurp the functions of the jury or judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court. It was held that the duty of the expert witness,

“... is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury. In particular the bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.”⁵

It is these two limitations on the role of the expert witness which therefore define what the duties and responsibilities of an expert witness are. The primary duty of the expert witness is to the court and not to the client. The specialist skill, knowledge and experience of the expert witness is therefore to be used to assist the court. That gives rise to a number of consequences. If the witness is putting themselves forward as an expert it follows that the opinions that person expresses should be within that individual's area of expertise. They must be satisfied that the information they present is accurate and complete, that they have taken into account all relevant matters and not taken into account irrelevant matters. So far as taking into account all relevant matters is concerned, this also includes matters which might be contrary to the opinion they have formed. The factual information underlying any opinion evidence must be based on actual knowledge or on identifiable source of information. Where it is possible for there to be a range of reasonable opinion on any matter this should be acknowledged. The opinions the expert expresses should be the expert's own, formed independently, and not the views of either the client or of any other person. Where an expert witness is being asked to express a view about the actions of another professional or specialist then the expert witness must also understand the correct legal test which the court applies to that professional or specialist's acts.

The principle duties and responsibilities of an expert witness have been summarised by Mr. Justice Cresswell in *National Justice Compania Naviera SA v Prudential Assurance Company Limited*⁶, (also known as the “Ikarian Reefer” case). This summary has received approval in Scotland in the cases of *Elf Caledonian Limited v London Bridge Engineering Limited*⁷, and *McTear v Imperial Tobacco Ltd*⁸. In the *Ikarian Reefer* case Mr Justice Cresswell said that he believed that a misunderstanding on the part of certain of the expert witnesses in the case as to their duties and responsibilities contributed to the length of the court proceedings. It was for these reasons that in the course of his judgement he set out the following:

“THE DUTIES AND RESPONSIBILITIES OF EXPERT WITNESSES

The duties and responsibilities of expert witnesses in civil cases include the following:

- 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 (Whitehouse v. Jordan, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).*
- 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 Co. Plc., [1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and Re J, [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.*
- 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J sup.).*
- 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
- 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J sup.). 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 (Derby & Co. Ltd. and Others v. Weldon and Others, The Times, Nov. 9, 1990 per Lord Justice Staughton).*
- 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 change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.*

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 (see 15.5 of the Guide to Commercial Court Practice).*”⁹

In *McTear v Imperial Tobacco Limited* the widow of a smoker sued the tobacco company which manufactured the brand of cigarettes smoked by her late husband. The extent to which there was medical evidence to support the proposition that smoking caused lung cancer was disputed. The section of the case report which deals with the expert evidence runs to 861 paragraphs over some 289 pages. Having regard to the case law concerning the functions of experts, Lord Nimmo Smith said:

“[5.17] ... I conclude that it is necessary to consider with care, in respect of each of the expert witnesses, to what extent he was aware of and observed his function. I must decide what did or did not lie within his field of expertise, and not have regard to any expression of opinion on a matter which lay outwith that field. Where published literature was put to a witness, I can only have regard to such of it as lay within his field of expertise, and then only to such passages as were expressly referred to. Above all, the purpose of leading the evidence of any of the expert witnesses should have been to impart to me special knowledge of subject-matter, including published material, lying within the witness's field of expertise, so as to enable me to form my own judgment about that subject-matter and the conclusions to be drawn from it. As will be seen, this is of particular importance in the field of epidemiology, since it is generally agreed that where an association is found, such as that between cigarette smoking and lung cancer, it is ultimately a question of judgment whether the evidence is sufficient to establish a causal relationship. I shall of course return to this theme later.

[5.18] Another matter which I propose to mention at this stage, and to which I shall also return, is the need for expert witnesses to be independent. I must decide in relation to each of the expert witnesses whether, and if so to what extent, he may have been acting as an advocate rather than providing independent assistance to the court. As I understand it, all the expert witnesses for the pursuer provided their services without remuneration. Three of them (Prof Friend, Prof Sir Richard Doll and Prof Hastings) were or had been connected in one way or another with ASH, and were clearly committed to the anti-smoking cause; and no doubt for this reason were prepared to give evidence gratis. This is not in itself a criticism of any of them, but it does in my opinion justify scrutiny of each of their evidence, so as to see to what extent they complied with their obligations as independent expert witnesses and how soundly based their views were. By contrast, all the expert witnesses for ITL charged fees for their services. This is generally the case: expert witnesses are usually professional people who would normally be expected to seek appropriate remuneration for research, preparation of reports and attendance at court. Senior counsel for the pursuer put it to three of these witnesses that they were being ‘handsomely’ paid for giving evidence. I have no basis for saying that any of their fees were not properly charged. In discussion at the hearing on evidence, counsel maintained that I had to be very careful with witnesses whose research was funded by the tobacco industry and who were paid handsome fees. There was the danger that

this might induce bias, and I should look critically at such evidence. I do not accept as an a priori assumption that funding from the tobacco industry is tainted. Everything depends on the independence of the researcher and the quality of the research; and it may well be that ample funding leads to sound research. The question, however, remains for consideration whether the expert witnesses for ITL complied with their obligations as independent expert witnesses and how soundly based their views were.”¹⁰

One point that should be considered as a result of the above discussion is whether an expert who has been hired before any litigation in order to provide advice to a client about how best to advance a client’s case should be instructed on behalf of the client if the dispute results in litigation. The short answer is that they probably should not take on the role of expert witness for the purpose of the litigation. Once it is known that the expert has acted in such a role their independence and ability to fulfil their duty to the court is compromised.

The problems of an expert witness who does not understand the duties and responsibilities arising from that position are well illustrated by the case of *Snowie v Stirling Council*¹¹. The case concerned an attempt to prevent the public from exercising access over land owned by the pursuers. To this end they obtained the services of a former police officer as a security consultant. Sheriff Cubie’s reasons for rejecting this witness’s evidence are instructive:

[26] The evidence which he gave purported to be by way of an independent assessment of the risk to Mr Snowie presented to the court as an objective aid. I am afraid that it did not impress me as such. It was clear that some of the bases upon which the report was prepared were factually incorrect. He had also been told by Mr Snowie that there had been no genuine recreational walkers in the estate since the Snowies had moved in, a matter which Mr Snowie accepted was not true; this was plainly not Mr Holden's responsibility.

[27] However, I was not impressed by the recording of the incident which Mr Snowie had reported, whereby he came across a couple described in the report as having a torch and a “baton”. Mr Snowie's evidence was that the baton was more of a walking stick; Mr Holden's evidence, that the word “baton” was neutral rather than indicative of a weapon, was as incredible as it was surprising from a former police officer.

[28] The terms of the report were driven by Mr Snowie's wish for privacy, rather than the wish for privacy being driven by a genuinely objective report.

[29] The information contained in the report seemed to have been entirely based upon what he had been told by the pursuer, with the exception of the crime statistics upon which he relied to which I will return. For example, he did not make inquiries about the disease “strangles”, but took Mr Snowie's report of what the vet had said; he made no real inquiry but made observations in the report about the danger presented by this disease.

[30] *The report did make a number of sensible and useful recommendations as security precautions, although little that would have not occurred to the layman; however, in relation to the value of the rest of the report I felt that Mr Holden did no more than maintain a patina of objectivity; he did not make a good impression. There were a number of reasons for reaching that conclusion.*

[31] *In the first place he was inexperienced in this particular role. This was the first time he had given evidence in this capacity and was in relation to his first report.*

[32] *Secondly, he relied on statistics which were out of date and sought to extrapolate misinformation from them; he relied on the crime report of 2000, when there was one from at least 2005/2006. His report invited the reader to multiply recorded crime by three to obtain real crime figure, a suggestion he had to (rightly in my view) depart from when it was pointed out to him; when confronted by up to date figures he sought refuge in evidence of a conversation with the chief constable at a social event as to the “real” statistics. Additionally, he appeared to equiperate a low detection rate with a high crime rate, at one stage seeming to suggest that groups of criminals scoured the crime statistics to determine the lowest detection rates.*

[33] *Thirdly, he had jumped to conclusions about the drunkenness of the access takers spoken to by Mr Snowie and in relation to the frequency of such incidents. He also as I have recorded had used the word “baton” in evidence and in his report in circumstances when it can only have been to characterise it as a weapon; his attempts to suggest baton was a neutral word was disingenuous. He sought to portray all access takers as not genuine.*

[34] *Fourthly, he thought that someone climbing into a field or across a wall through a hedge in the countryside would be sufficiently noteworthy to cause anyone viewing it to alert the police (3/11C). I preferred the account of Mr Morris (at 4/155D) whereby he gave evidence that it was accepted by the government that it was a “perfectly normal part of the exercising of statutory access rights.”*

[35] *Finally, he did not think to record in his report that a right of way crossed the east drive way. In circumstances where he had chosen to record the miniscule and peripheral risk caused by the storage of fertiliser (saying “[I]t would be a wonder if I had not included it in a security audit” at 3/69C), I found it extraordinary that he omitted this reference to a right of way. Either he did not appreciate its importance, or he did and deliberately omitted it as it did not sit well with the thrust of the report. Either explanation undermines materially the usefulness of the report.*

[36] *When he was being cross examined, perfectly properly and fairly, about this omission he dissembled before trying to suggest that the defender's counsel was “sniggering and shaking his head” (at 3/71F), a comment both unwarranted and unworthy. At the very least Mr Holden showed a sensitivity which would not accord with his years' experience in the police force. At most, he was involved in a strategy which tried to avoid answering questions which he felt might be unhelpful to the pursuer.*

[37] *I considered whether all of these criticisms could be explained by his lack of experience, but the impression of favouring the Snowies is fortified by the fact that*

each of his acts and omissions had the effect of bolstering the Snowies' position. If these were a catalogue of naïve and careless errors made by an inexperienced security consultant, one might expect that some resulted in a worsening of the Snowies' position but, from mis-remembering the date of the burglary suffered by the Rosses to the anecdotal evidence of the chief constable's "true" crime figures, to the omission of the right of way (but inclusion of the fertiliser risk and the risk of strangles being introduced), the whole of his evidence was given in a way that demonstrated a commitment to giving evidence entirely favourable to the pursuers, whatever the factual position. I find the evidence of the perceived security threat to be wholly unreliable.

*[38] I dwell on Mr Holden's evidence for two reasons; in the first place it is clear from the Gloag judgment [*Gloag v Perth and Kinross Council*,] that the independent security evidence was material in relation to the ultimate decision in so far as it related to the property, the type of person likely to own such a property and the risks to security and privacy which such persons might face; in the second place Mr Holden was, on one view, the only wholly independent witness from whom the court heard. (Mr Morris, whilst having no direct connection with this case can hardly be described as disinterested.) However he failed to approach the matter with the objectivity which the court is entitled to expect from a purportedly independent expert.*

[39] The report was clearly prepared with view to the litigation, and Mr Holden was determined that both the report and he would be entirely supportive of Mr Snowie.”¹²

A further example of a court rejecting as unreliable the evidence of a witness put forward as an expert is *Watt v Watt*¹³. Again issues arose as to mistakes made in the rationale for the opinions given in evidence. More damaging was a concern that the existing business relationship between the witness and the client he was giving evidence for meant that a question was immediately raised as to whether the witness was truly independent. That question combined with the flaws in the approach gave rise to the impression that the witness had in fact sought to act as an advocate for his client. This was reinforced by the witness's apparent discomfort when being cross-examined.

It is critical that the expert witness understands the correct legal test which is to apply, particularly if the expert is commenting on the actions of another specialist. The best known example is in the context of professional negligence. The case of *Hunter v Hanley*¹⁴ was an action of damages against a doctor arising from injuries suffered when a hypodermic syringe broke and part of it lodged in the pursuer. It was alleged that the needle which was used was not intended for the particular purpose for which it had been used and that a stronger type of

needle ought to have been used. In the context of an alleged deviation from normal professional practice Lord President Clyde said that:

*"To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care."*¹⁵

Another consideration to bear in mind is the context in which the specialist is providing advice. In the case of *South Australian Asset Corporation v York Montague*¹⁶ the plaintiff lenders had made loans for the purchase of commercial properties in London at a time when the property market was rising, on the basis of negligent overvaluations provided by the defendant valuers. In each case, the lenders would not have advanced funds if they had known the true value of the property, and a fall in the property market after the date of the valuation had greatly increased the loss which the lenders actually suffered following the borrower's default. In giving the only reasoned speech in the House of Lords, Lord Hoffman distinguished between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take:

"... a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.

*... If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong."*¹⁷

Although it is the function of the lawyer to advise what the correct legal test is in any particular case, the expert witness who is asked to comment on the negligence or otherwise of

another professional or specialist requires to be familiar with the legal standard against which that professional or specialist is being tested.

An expert witness will not necessarily be an expert in all aspects of the issues which require to be considered. There will be many occasions when an expert has to rely on the knowledge of others on a matter outwith his own particular expertise in order to form a view on the matter which he is asked about. In *Main v Andrew Wormald*¹⁸ there was a dispute about the extent to which the pursuer's medical witnesses, who were consultant physicians, expert in chest disorders, were entitled to rely on published work by epidemiologists in a case about asbestosis. All three judges in the Inner House agreed that it had been proper for the judge to take account of such evidence. Lord MacDonald expressed matters thus:

*"It is, in my opinion, clear that an expert witness may in the course of his evidence, make reference to passages from a published work and adopt these as part of his evidence (Davie v. Magistrates of Edinburgh, 1953 S.L.T. 54). There are, however, limits to this practice. One is that the expert witness must first have testified specifically to his own direct experience in the field in question. Having done that he is entitled to supplement his evidence by reference to recognised published works (R. v. Abadom [1983] 1 W.L.R. 126). It is essential, however, that the introduction of the literature be preceded by firm evidence from the expert as to his personal experience in the specialist field concerned. If this is not so there is a real danger that the literature becomes the primary evidence and is given a status it should not acquire unless spoken to by a witness directly responsible for its contents."*¹⁹

The need for published material to be within the field of expertise of the witness is one of the matters emphasised by Lord Nimmo Smith in *McTear v Imperial Tobacco Limited*²⁰. An important practical consideration is also that the expert witness must also use their skill or expertise in preparing any reports or giving evidence. A report which does nothing more than recount factual information given by other people is not acting as an expert witness, and they will not be certified as a skilled witness for the purpose of preparing an account of expenses²¹.

In conclusion, it can be said that the key principles to be borne in mind and which allow an 'expert' to be considered as credible and reliable 'expert witness' are:

- the expert witness's primary obligation is to the court [whatever form it may take];
- the expert witness requires to be independent, impartial and objective – this requires the expert witness not to be selective in the materials drawn upon to support the

conclusions reached, and to take into account any matters which might be contrary to that conclusion;

- the expert witness should do nothing to compromise his integrity;
- an expert witness is entitled to, and probably should, charge a proper professional fee for their services;
- the fee should not be dependant upon the outcome of the dispute, nor should the expert witness seek or accept any other benefit over and above their normal fee and expenses;
- the expert witness should avoid a conflict of interest;
- the expert witness's work should be properly informed and done to a proper standard, having regard to all appropriate codes of conduct, codes of practice and guidelines;
- the expert witness should therefore have a high standard of technical knowledge and practical experience;
- the expert witness should keep up to date through work experience, and appropriate continuing professional development and training.

¹ This article is based on a presentation which was first delivered at an Expert Witness Training Seminar hosted by Terra Firma Chambers on 20 April 2009.

² See the Shorter Oxford English Dictionary.

³ Stroud's Judicial Dictionary (7th edition) referring to the case of *Dole v Johnson*, 50 N Hamp 454.

⁴ 1953 SC 34.

⁵ Lord President Cooper, page 40.

⁶ [1993] 2 Lloyds Rep 68.

⁷ Lord Caplan, 2 September 1997 (unreported).

⁸ 2005 2 SC 1.

⁹ [1993] 2 Lloyd's Rep 68 at pages 81-82.

¹⁰ 2005 2 SC 1 at pages 141-142.

¹¹ 2008 SLT (Sh Ct) 61.

¹² At page 65.

¹³ 2009 SLT 931.

¹⁴ 1955 SC 200.

¹⁵ At page 206.

¹⁶ [1996] 3 All ER 365.

¹⁷ At 372g-373a.

¹⁸ 1988 SLT 141.

¹⁹ At page 143J-L.

²⁰ 2005 2 SC 1 at page 141, paragraphs 5.15 and 5.17.

²¹ *Fallon v Lamont*, Court of Session, Lady Smith, 13 July 2004.