



The Excitement of Expert Testimony!

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Aims

- What is the role of the expert?
- Where does the duty of the expert lie?
- What can we comment on?
- What if we disagree with another expert?
- What is the ethical responsibility of the expert?
- Practical tips – what if we do not know/ cannot answer/ do not wish to answer?

What do the courts want?

- Court wants facts not opinions
- Trial by judge and jury
- Judge and jury infer from facts
- Exception to this = Expert Testimony
- Here the role of the expert is to provide an opinion as topic is beyond Court's knowledge
- This exception to the rule is the foundation for expert testimony

What do they want? - Civil and Criminal Courts

- Trial by Judge/ Jury not by experts:
- Jury swayed by Poor Science? e.g. Cot Death/ Prof. Sir Roy Meadows
- Influenced by Expert's Reputation
- Trial by best science or by luck of expert chosen
- Role of expert in cases being brought before Court - esp. Civil Procedures

Role of the expert:

- Presenting evidence - subjective opinion vs. factual evidence - e.g. extent of psychological disorder/ dangerousness vs. X-Ray of broken limb
- 'Factual Information' means less questioning about subjective interpretation
- Expert should educate the Court, explain fact and theory and application to the case
- Expert should 'assist' the Court
- Experts should remember to KISS!

Kiss!

- Keep
- It
- Simple
- Stupid!

The expert in the dock

- Lawyers choose appropriate experts
- Can be chosen on reputation and persuasiveness
- Judge and Jury can accept or reject evidence based on the persuasiveness of the expert
- Expert must be an authority on the topic

Experts and the law (1)

- **Expert evidence:** testimony, including opinions of someone with special skills or experience.
- **Expert Witness:** brought in to give opinion
- **Professional Witness:** someone who works with litigant and has continuing responsibility - e.g. forensic psychologist

Experts and the law (2)

- Opinion admissible:
 - if from specialised source - disputes about relevant discipline, e.g. psychiatrist vs. psychologist in dim. resp. or dangerousness
 - on topics beyond the knowledge and/or experience of the judge and jury
- Not on ultimate issue

Experts and the law (3)

- ‘... the courts adopt a notably liberal and flexible approach to the issue of expert competence/ qualification, which adds little if anything to the basic test of relevance, and operates in practice to facilitate the reception of most expert evidence’ (Roberts, P. and Zuckerman, A, (2004). *Criminal Evidence*, p.308)
- Judge and Jury entitled and expected to use commonsense approach and own experience.
- Do not need to be told how the ordinary person not suffering from mental illness reacts to the stresses and strains of everyday life.

Examples of Expert Input

- Case study exercise and introduction to functional analysis
- A, B, C model
- SORC framework
- Pay attention to factors which influence risk
- Pay attention to offence *related* and offence *supporting variables*
- Consider consequences beyond victims

SORC Framework (after Lee- Evans, 1994)

- **Situational** variables (*settings and trigger events*)
- **Organism** variables (*physiological factors, behavioural skills, cognitive skills, beliefs, needs, values*)
- **Response** variables (*frequency, intensity, duration, relationship to other behaviours, 'organism' aspects during the chain of events*)
- **Consequent** stimuli (*immediacy, probability*)

NB **Antecedents, Behaviour, Consequences**
(ABC)

Some quotes

- “ Functional analysis constitutes not a psychological theory but a strategy for problem solving, and as such may be adopted whatever the problem under discussion” (*Owens & Ashcroft, 1982, p188*)
- “Functional analyses do not attempt to completely explain behaviour, rather, they simply assist the assessor to develop hypotheses as to what *controllable* factors are at work” (*Westrup, 1998 p.280*)

Experts and the law (4)

- Experts should not give opinion on ultimate issue - that is for the court to decide e.g. *describe* abnormality of mind w/o stating 'he had no mental responsibility'
- **Problems:** reliability of expert evidence
 - Is it scientific?
 - is it 'junk' science
 - is it recognised scientifically?
 - specialised literature, general acceptance
 - Verification of data/ other experts validation

Experts and the law (5)

- Law operates in dichotomies
- Psychology operates in probability or degrees of relativity
- Epistemological conflict
- Experts independent but can be instructed by either/ all parties
- Who is paying? Who sees report? To whom is your highest duty?

Case law and the expert (1)

- ***R v Bowman (CA) [2006] EWCA Crim 417. Duties of expert witnesses:***
- (1) The duties of an expert witness in a criminal trial, whether instructed by the prosecution or defence, are those set out in *R v Harris*... Any developments in scientific thinking and techniques should not be kept from the court, simply because they remain at a stage of a hypothesis. Obviously, it is of the first importance that the true status of the expert's evidence is frankly indicated to the court... If this guidance is borne in mind and the directions are made clear and adhered to, it ought to be possible to narrow the areas of dispute before trial and limit the volume of expert evidence that the jury will have to consider.....

Case law and the expert (2)

- ***R v Bowman (CA) [2006] EWCA Crim 417.***
Duties of expert witnesses:
- (i) 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 litigation.
- (ii) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of advocate.
- (iii) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts that might detract from his concluded opinions.

Case law and the expert (3)

- ***R v Bowman (CA) [2006] EWCA Crim 417. Duties of expert witnesses:***
- (iv) An expert should make it clear when a particular question or issue falls outside his expertise.
- (v) 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.
- (vi) If, after exchange of reports, an expert witness changes his view on material matters, such change of view should be communicated to the other side without delay and when appropriate to the court.

Case law and the expert (4)

- ***R v Bowman (CA) [2006] EWCA Crim 417. Duties of expert witnesses:***
- ‘It is emphasised that these duties are owed to the court and override any obligation to the person from whom the expert has received instructions, or by whom the expert is paid. Experts should maintain professional objectivity and impartiality at all times.’

Courtroom drama!

**Some practical
tips for going
to court...**

Courtroom drama (2)

- Usually called to be questioned about your report
- Make your report good!
- Be familiar with your conclusions
- Remind yourself about the case
- Review Case papers
- Be aware of any developments since your report

Courtroom drama (3)

- Familiarise yourself with the formal setting and procedures
- Dress appropriately
- Be ready to swear oath/ affirm - judge acoustics
- Talk to the judge/ jury
- 3 phases of evidence: examination in chief, cross-examination, re-examination

Tricky Barristers

- Unsettling - e.g. light/ voice projection
- Esoteric Questioning - designed to fluster e.g. 'what is reliability?'
- Jumping - giving evidence in an unpredictable order
- Interrupting - interrupting before qualification: counter-strategy = qualify before definitive answer
- Hypothetical Questioning -e.g. Royal Society and IQ
- Prefatory Remark - statement before a question implying agreement or concession to the statement - disagree first!

And Finally

- Enjoy it!
- This is your moment!