

**EXPERT EVIDENCE IN REGULATORY AND DISCIPLINARY
PROCEEDINGS**

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FOR A LECTURE GIVEN BY HIM ON 10 MARCH 2009**

Introduction

1. Although things have considerably calmed down since the hysteria caused by the fallout from the evidence given by Professor Meadow in the ***Sally Clark*** case, the use of expert evidence in courts and tribunals continues to be the subject of judicial scrutiny, discussion in the professions themselves from which experts come and, indeed, comment by the regulators who seek to maintain the highest standards of their members, including those who choose to put their head above the parapet and give expert evidence.
2. It is also clear that, particularly in regulatory and disciplinary proceedings, there is a huge difference of approach between regulators as to their use of experts and, when used, the procedures which govern that evidence. Even in this room, considering the regulators who are represented by in-house and external solicitors, there is, I know (from my own experience) a very different approach to the use of experts. Some of you use them in nearly all cases where there is some deficiency alleged and others of you rarely use experts relying still on what was once called the "due regard" expertise of Committee members sitting in judgement.
3. It is not possible to cover in any depth all of the issues which we as practitioners need to be aware of in the selection, instruction and use of experts but I hope that this short presentation will remind the more

experienced of you and inform others of the sorts of issues about which we need to be aware when working with experts.

4. It is, perhaps, appropriate to remind ourselves that we who instruct experts have an important role to play in the process. On a lighter note before we begin to look at the issues in more detail, the expert consultants **Bond Solon** in an article in the New Law Journal in January of last year revealed that, of their respondents to a survey of expert witnesses, only 50% thought that lawyers encouraged experts to be truly independent, 51% thought that they were instructed only "just in time" and 41% thought that their instructions were only "adequate". It won't surprise you to hear that 80% of the respondents thought that their fees were paid either "late" or "very late".

5. It has become increasingly common for expert evidence to be relied upon in regulatory proceedings. This is particularly the case when tribunals are asked to look at the issue of competency, rather than conduct. However, even matters relating to conduct may properly require the admission of expert evidence to help tribunals make an informed decision as to whether or not in a given set of circumstances a registrant's act or omission can properly be said to amount to misconduct.

6. There are a number of reasons why there has been an increase in the use of experts before regulatory and disciplinary tribunals. These reasons include:

(a) The fact that more tribunals have lay membership on them than once was the case. Indeed, some disciplinary committees are moving towards a lay majority. Clearly, lay members may require more explanation of issues than a member of the profession might.

(b) Most regulators find that they are dealing with increasingly more complex and technical issues, such that even members of the profession may themselves not be fully competent to understand, without receiving expert opinion on those issues. This is particularly so for those regulators which have a variety of specialisms within them and those which have different sections of a register in which membership may be recorded.

(c) The use of expert evidence, rather than relying upon committee expertise assists the promotion of "transparency" which is one of the five principles of best regulation. There has, for some time, been a concern that the professional members of a disciplinary committee may persuade the lay members of a particular view, without that opinion being properly canvassed in a hearing which affords the protection of challenge. To put it another way, there is a fear that the expert evidence would come from a committee

member but "behind closed doors" and out of hearing of the parties who cannot properly comment upon it. By calling expert witnesses to the hearing, committee members obtain truly independent evidence and all parties have the ability to question that evidence and, most importantly, the basis upon which it is given.

What is expert evidence?

7. The general rule is that opinion evidence is inadmissible because although a fact that a witness can prove is relevant his opinion is not. This goes to the issue of admissibility, rather than simply to the amount of weight which should be attached to the evidence.
8. Expert evidence can be defined as evidence which is outside the knowledge and experience of the tribunal upon which an expert is competent to give evidence. Other than the rule against opinion evidence, the rules requiring the evidence to be relevant and admissible still, of course, apply.
9. It can be seen from this definition that there are two limbs to the definition of expert evidence. The first is that it must be evidence which is outside the knowledge and experience of the tribunal and the second is that the chosen expert must have the relevant competence to give that evidence.

Matters calling for expertise

10. In the disciplinary context, expert evidence will almost always be potentially admissible, certainly in complex cases because:
- As I have mentioned already the presence of lay members on the tribunal means that explanations of technical matters will be necessary as indeed it will where the evidence is outside of the knowledge even of the professional members of the committee.

Decisions in two cases remind us of the importance of testing whether or not expert evidence is actually required. Bearing in mind the often persuasive nature of expert evidence (even in these times when experts are less trusted than they once might have been) it is crucial to ask the first question: "is expert evidence actually necessary?".

11. In *R v Loughran (1999) Crim L R 404*, the Court of Appeal reviewed the decision in *R v Turner (1975) 60 Cr.App.R 80* that if the jury were capable of deciding an issue for themselves without expert evidence, then such evidence was not admissible. In *Loughran*, it was argued before the Court of Appeal that, on an appeal against a conviction for rape, expert evidence concerning the 15 year old defendant's ability to achieve an erection should be admitted, which evidence had not been before the lower courts. It is an essential element of the offence that the

prosecution prove penetration. Although the defendant admitted some sexual activity had occurred, he denied penetration on the basis that he could not achieve an erection because he had suffered from an early age with a condition that caused him to develop breasts and that the consequence of this was that he felt anxious around girls which meant that he could not engage in full sexual activity.

Lord Justice Auld referred to the proposed expert evidence as content which would be "*with respect pretty obvious to any jury of adults*" saying: "*at its highest, Professor Green's evidence is an opinion based on a common place phenomenon that a young boy in puberty and with an embarrassing physical characteristic may have feelings of anxiety and insecurity which could have prevented him from achieving an erection with a young woman... A jury would not need a psychiatrist to tell them that. It is... plain common sense*".

12. In ***R v Bonython (1984)***³⁸ ***South Australia Supreme Court Reports*** **45**, King C J said that the Court should look not just at the competence of the proposed expert and the reliability of the information upon which he sought to rely but also: "*...whether the subject of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgement on the matter without the assistance of witnesses possessing special knowledge or experience in the area...*".

What I take from these cases is the need for all of us to be vigilant as to whether or not we should seek to rely upon expert evidence or challenge it when it is sought to be relied on by another party. It is all too easy, in the midst of running a case to rush to assume that an expert is needed to prove a particular point or to obtain expert evidence to consider matters raised by another party without remembering to test whether or not such evidence is necessary and therefore admissible in the first place.

Competency of Expert

13. It is also rare to see challenge made against the particular expertise of an expert. Sometimes, however, this has to be dealt with as a preliminary issue at a hearing. Assuming that the matter upon which evidence will be given is one which is susceptible to the receipt of expert evidence, the issue becomes whether or not the proposed expert is competent to give that evidence.

14. In ***R v Bonython (supra)*** the South Australian Supreme Court went on to say: "*(Has) the witness...acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the Court...generally speaking, once the qualifications are established, the methodology will be relevant to the weight of the evidence and not to the competence of the witness to express an opinion*".

15. This case is important not just for reminding us of the various routes by which a witness's expertise may be established but the fact that the methodology they use to present the expert opinion should properly be examined (although this concerns the amount of weight which should be attached to the evidence rather than its admissibility). On a practical point, practitioners should remember that the decision as to admissibility and competence is a matter for the tribunal rather than the Legal Adviser and the decision has to be made on an individual case basis whether or not it would be helpful to take such points on admissibility rather than simply attack the credibility of the evidence in terms of weight.

16. These are some practical considerations that you might want to take into account when selecting an expert. You will have your own databank of experts but if you are in need of an expert in a new area and there are no personal recommendations which you are able to act upon, a good starting point might be the registers held by the Academy of Experts, the Expert Witness Institute and the Society of Experts. All these things remind us of the importance of choosing the right expert for a particular case and in establishing that that expert is sufficiently well qualified and eminent in his or her field not just to pass the "competence" test but to produce an opinion which will truly assist the tribunal. A CV will paint part of the picture but relevant practical experience is likely to be at least as important and useful as academic study. This is particularly so in

those cases where the expert is assisting the tribunal in what a reasonable practitioner might do in the circumstances in which the registrant found himself. It may be more difficult for an academic, however well qualified, to comment upon matters of practice than it would somebody who is genuinely in practice.

17. It is clearly essential once the selection of the expert has been made to ensure that the expert is sent all relevant material upon which he is asked to comment and that the questions required of the expert are made clear as well as all the other duties imposed upon an expert as set out in Part 35 of the CPR. My own view is that the letter of instruction apart from any commercially confidential matters such as fees is discloseable in addition to the material contained within it so that the other party to the proceedings can be clear as to the questions asked of the expert witness and the basis of the instructions.

This raises an interesting practical point. Most regulatory procedures do not require the respondent to the proceedings to disclose any evidence other than expert evidence upon which they wish to rely. I frequently receive expert reports which have included within them a number of conclusions reached from a factual matrix which has not been disclosed. At the very least, the approach I take is that the expert witness must make clear in his report the facts which he has assumed (and which have been presented to him) which form the foundation of the analysis and conclusions which follow.

Challenging the use of expert evidence or a particular expert

18. Bearing in mind what I have already said about the two limbs of admissibility (namely is expert evidence admissible and does the proposed expert have a required expertise) it follows that there are two potential challenges which can be made.

19. The question then becomes how such disputes should be resolved?

In *R v G*, the applicant applied for leave to appeal against the trial judge's rejection of a defence application that the evidence of a Crown expert witness should be excluded on the grounds that he lacked the requisite expertise to give expert evidence. The Crown's case was that the defendants had conspired to sell for a fee commercial documentation which the buyers could use in arrangements to obtain funds from third parties. The Court of Appeal ruled that the evidence was admissible because an ordinary person would not be able to form a judgment on the commercial feasibility of the transactions without such expert assistance. The defence had also complained that the judge had refused to determine this issue on a *voir dire* (ie a trial within a trial) which would have allowed them to cross examine the expert. The Court of Appeal ruled that it would be rare for a *voir dire* to be

necessary and that although the judge had a discretion to direct that one take place no voir dire was required in circumstances where the evidence was admissible and the purported expert eminently well qualified to give such expert evidence.

In the Doughty case magistrates had refused to hear a proposed defence expert in a case concerning speed measuring equipment, comparing the proposed defence expert with the prosecution expert and forming the view that his experience was not of the standard of the prosecution expert. In allowing the application, the Divisional Court was critical of the magistrates saying that what they did was to rely on matters that went to the weight of the defence expert evidence as a reason for preventing him from giving that evidence at all. The court said that the magistrates finding that the defence expert did not have an equivalent expertise to that of the prosecution expert was the clearest of indications that the magistrates were relying on matters that went to comparative weight in considering the issue of admissibility.

There was a voir dire in the Hodges case in which the Recorder during a Crown Court drugs trial allowed in the evidence of a DC who gave expert opinion concerning issues which related to whether or not drugs found on the defendants were for personal use or supply. He gave evidence concerning the bags used, the method of transfer of the drugs and the amount of drugs found as being inconsistent with personal use.

The Recorder stated that the officer had built up an enormous body of knowledge after a long career in drugs investigation and although he could not produce individual sources for his knowledge that did not invalidate his expert evidence. Indeed the Recorder said "... his experience in general is such and his answers during the voir dire specifically such that he satisfies me that he is qualified to be called as an expert... notwithstanding that the evidence itself was hearsay and some of it opinion evidence".

Conflicts of interest and independence.

20. The role of the expert has been examined recently in the well publicised case of *Meadow v General Medical Council (2007) 1 All ER 1* and has received judicial, political and public scrutiny as a result of that and other high profile case. Mr Justice Cresswell's comments in the Ikarian Reefer case sets out very well the requirement of the expert witness to give independent, unbiased evidence to the tribunal.
21. Practitioners may find that expert witnesses are seldom burdened by self doubt and can sometimes stray into giving evidence which is outside their own experience and sometimes, as was the case here, in what may be regarded as unhelpful, colourful language.
22. So far as independence is concerned, this is generally a matter concerning the weight of the evidence rather than its admissibility. In *R*

v Gokol (1991) 6 Archbold News, the Court of Appeal held that a proposed expert witness who had been part of the investigating team which looked into the allegations could still be a witness. This case is, I think, particularly relevant to those of you who call performance assessors who may have been involved at an early stage in proceedings or forensic accountants who are part of the investigation team.

In this case the Vice President, Lord Justice Rose dismissed suggestions that a chartered accountant seconded to the SFO could not give expert evidence to the court because he had been part of the investigation team by commenting: "it was common ground at the trial that Mr Davis was an expert. The extent of his independence could go only to weight not admissibility".

23. A very helpful approach to the court's attitude towards independence and conflicts of interest may be found in *Toth v Jarman (2006) 4 All ER 1276*. Although a conflict or potential conflict of interests did not automatically disqualify an expert, the court must still be mindful of whether or not the expert could give independent evidence as a result of that conflict. If he could not, then he could not give evidence because of the duty to be independent. Matters such as this are likely, however, to affect the weight of the evidence rather than the admissibility of it. Either way, the party calling the expert must disclose any conflict or potential conflict of interest early on so that the other party can decide how to deal

with it. There is of course a duty also on the expert to make the instructing lawyer aware of the conflict.

Legislative framework

24. It is now well recognised that whatever rules of evidence are used by the tribunal, regulatory and disciplinary proceedings are civil and not criminal in nature. Part 35 of the Civil Procedure Rules 1998 sets out the responsibilities of expert witnesses and those who rely upon their evidence. A similar provision can be found in Rule 33 of the Criminal Procedure Rules 2005. It is vitally important that, in addition to a knowledge of the tribunal's own rules and procedures, that practitioners always bear in mind Part 35 of the Civil Procedure Rules which sets out the duties of an expert, the use to which expert evidence can be put and the content of experts reports. In addition to the rules themselves, practitioners need to be aware of the practice direction which supplements the rules and the Protocol for the instruction of experts to give evidence.

The role of the expert – Extent of their duty

25. This is well set out in Part 35 CPR and also in the Protocol. At the very outset of the Protocol the importance of the role of the expert witness is acknowledged: *"Expert witnesses perform a vital role.... It is*

essential that both those who instruct experts and experts themselves are given clear guidance as to what they are expected to do...."

26. Paragraph 4 of the Protocol states, *"Experts always have a duty to exercise reasonable skill and care to those instructing them and to comply with any relevant professional code of ethics.... They have an overriding duty to help the court on matters within their expertise. This duty overrides any obligation to the person instructing or paying them. Experts must not serve the exclusive interest of those who retain them.... Experts should be aware of the overriding objective that courts deal with cases justly. This includes dealing with cases proportionately, expeditiously and fairly...."*

27. The Meadow case which is well known to all of you is a very good example of where an expert can stray from his own area of expertise. Since experts are seldom troubled by self doubt, it is important to ensure even where it has been accepted or established that expert evidence is required and that an expert is competent that that expert does not stray into territory in which he is not an expert or which does not require his expertise.

Both of the cases that I have referred to here (R v Abadom and R v Hodges) are authorities for the proposition that it is quite acceptable for an expert to draw upon the opinions and work of others, so long as that is made clear in the report so that the tribunal or jury can assess this in

determining what weight should be attached to a particular opinion and the foundation for it.

Disclosure of expert evidence

28. This may be something dealt with by a committee's Rules of Procedure but in the absence of such rules and to supplement those rules where they do exist the following principles may be helpful. Both the Civil Procedure Rules and the Criminal Procedure Rules (Part 24) deal with the disclosure of expert evidence. Although not directly applicable, practitioners might also find helpful in terms of principle and argument the Crown Court (Advanced Notice of Expert Evidence) Rules.
29. Since regulatory tribunals vary in their use of criminal and civil rules of evidence (and some appear to have no real rules of evidence at all) an understanding of the approach taken in both civil and criminal jurisdictions is of assistance to practitioners.
30. In so far as timescales are concerned, it is crucial that particularly expert evidence is served in sufficient time to ensure that the party receiving it can consider it and whatever evidence may be required as a result. All practitioners will have been involved in cases where the late receipt of expert evidence causes difficulty. Some regulators, through case management hearings, direct that evidence be served by a certain date. Committees' Rules of Procedure sometimes require

that evidence not served in accordance with a particular timescale be the subject of an application to the tribunal making the receipt of such evidence only possible with the leave of the tribunal. If the Rules are silent, practitioners may find helpful the following provisions in the Criminal and Civil Procedural Rules:

31. "A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the Court gives permission."

Civil Procedural Rules 35.13

"A party who seeks to adduce expert evidence in any proceedings and who fails to comply with Rule 24.1 shall not adduce that evidence in those proceedings without the leave of the Court."

Civil Procedural Rules 24.3

In practice, however, the real difficulty is that whatever the Rules may say tribunals are understandably very reluctant to refuse to admit expert evidence, however late that expert evidence may have been served. In view of the tribunal's primary function to ensure that a registrant has a fair trial, it is easy to understand the Court's hesitation. The effect, of

course, is that the other party has to form a judgement as to whether or not to apply for an adjournment or do the best that can be done in the circumstances. In the absence of a cost jurisdiction or an ability to impose "wasted cost" orders there is little that can be done in practice to meet this concern although case management hearings do at least concentrate the mind of the parties as to the expectation of the tribunals.

What to disclose?

The leading case is *Rajan v General Medical Council* (2000) *Lloyds Rep.Med.153*. Just as in criminal cases, there is a duty to disclose relevant and material evidence. This is not limited to evidence upon which a regulator might seek to rely. It includes the disclosure of evidence which might weaken the regulator's case or strengthen the registrant's case. This test may not, however, be as easy to apply as might at first seem. There are generally no corresponding provisions in regulatory proceedings for defence disclosure (other than in relation to expert evidence) and so it may not always be easy for the regulator to determine what evidence may strengthen the registrant's case. However, what is important, is to be able to establish that an analysis of the issues has been carried out and that disclosure and that the reasons for disclosure or non-disclosure are properly made and can be justified. Most regulators tend to adopt a fairly liberal attitude towards disclosure, even if it is not immediately apparent that disclosure might weaken the regulator's case or strengthen the registrant's case.

It is easy to fall into the trap of forgetting to serve evidence which an expert might produce in written correspondence or telephone calls which are not put in the form of an addendum report. Such material should be disclosed if it meets the tests of disclosure set out above. Good practice suggests that such further opinion (which is often obtained as a result of the disclosure of the other party's expert report) be submitted into the form of an addendum report making service easier.

For a full narrative of the issues raised by the duty to disclose see the judgements in *R v Maguire* (1992) 1QB 930 CA, *R v Keen* (1994) 1 WLR 746 and *R v Ward* (1996) Cr.App.Rep1CA.

"Shopping around" to obtain a report from an expert which will assist the regulator is to be avoided. Even from a practical point of view, such an approach is never likely to be of assistance in view of the fact that the regulator should disclose previous "adverse" expert reports which would weaken any case going forward even with new expert evidence. It would also, in any event, seem wrong in principle that a registrant should be brought before his professional body when even expert evidence obtained by the "prosecutor" suggested that his actions or omissions were not ones which would justify such action.

The "ultimate issue"

32. Although experts can now comment on the ultimate issue for the committee to determine, such comment can only properly be made when it remains in the expert's area of expertise and even then it remains entirely a matter for the tribunal as to whether or not to accept that evidence. In the *Ove Arup* case which I have referred to here, the court stated: "*it is admissible for an expert to express his opinion as the ultimate question (ie the question that the court has to decide) although all that matters in most cases are the reasons given for the opinion*".
33. In *R v Gokal*, an accountancy expert concluded, having reviewed the evidence, that arrangements demonstrated a collusion which had no legitimate purpose. The expert's report appeared to go directly to the issue of the honesty of the defendant. In that case, the evidence was found to be admissible where the integrity of the arrangements was not directly relevant to the issue of the defendant's guilt in the particular circumstances of this case.
34. It is always important to remember the test of relevancy and the need for some evidential foundation for the admission of expert evidence, at whatever stage of the proceedings to which it relates. The Court of Appeal in *R v JP* (1999) Crim L R at page 401 restates the importance of refusing to admit evidence unless a factual basis for its relevance was established. This case concerned an allegation of indecent

assault by a father upon his daughter. The defence was that the daughter had undergone some form of deliverance ministry as a result of which she was affected by a false memory syndrome and that she had perhaps been influenced in making the allegation she did as a result of that. The need for a proper factual basis for the admission of any expert evidence is clear from the judgement of the Court which was that such a basis would exist if there was evidence that the daughter had received such deliverance ministry, that such ministry included counselling on sexual abuse and that such counselling involved the suggestion to her that she had been sexually abused.

What should the committee make of expert opinion?

35. The reality is that, even in these days where we are more minded to challenge expert evidence, such evidence is often very persuasive. That is rightly so bearing in mind the very reason why the committee is allowed to hear such evidence.

36. The real difficulty comes where two apparently equally eminent experts, looking at the same facts, form different views as to the matters before the tribunal. In many respects, though the task may be harder, the tribunal is in the same position as it is with any evidence. It must determine the amount of weight to attach to the evidence and this is primarily, in expert evidence, informed by the basis upon which

the expert comes to the conclusion he does, the reasons for his opinion and the expertise he brings.

37. It follows, therefore, that disciplinary committees do not have to accept expert evidence and clearly must sometimes favour one expert's view over another. However, it is important that the tribunal make clear the basis upon which they have made that decision.

In their book *Fitness to Practice Healthcare Regulatory Law Procedure and Practice*, David Gomez and Joanna Glynn refer to the Judicial Studies Board model direction to juries on expert evidence which is very helpful and which can be used by practitioners in crafting their own submissions to tribunals as to the way in which members of those tribunals should approach the evidence of an expert as part of the whole evidence which has been adduced.

Single joint experts

38. None of the regulatory tribunals for whom I act use single joint experts although I understand that they are more commonly being used in civil proceedings. I am not therefore competent to say much if anything about this area although I know some regulators have begun to think

about encouraging SJs to identify issues at an early stage and to keep costs down. Even if the use of SJs does not catch on in regulatory tribunals, I believe there is much more work that can be done by those of us who practice in the area to ensure that areas of dispute between experts are narrowed by encouraging early exchange of expert reports and, where appropriate, meetings of experts to clarify issues.

When it all goes wrong

39. It is clear that the duties upon experts are onerous. There was a suggestion following the Meadow's judgement that it might be difficult to find experts willing to give such evidence bearing in mind the potential implications. Certainly, the referral of an expert to his professional regulatory body where he appears to have fallen below the standard expected of an expert is an option available to the tribunal. In the Ove Arup case, Jacob J said, "I see no reason why a judge who has formed an opinion that an expert has seriously broken his...duty should not, in an appropriate case, refer the matter to the expert's professional body." Although, I understand that the referral to the Architects Registration Board which followed that judge's comments did not uphold any of the allegations which clearly had caused Jacob J such concern.

40. For an interesting case concerning the potential liability of experts in costs, see *Phillips v Symes* (2004) EWHC 2330. However, this case has to be approached with some caution in the regulatory context because of the varying cost jurisdictions available to disciplinary committees.

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