CHAPTER 1

Nature and duties of an expert witness

> The dependence of the Court on the skill, knowledge and above all, the professional and intellectual integrity of the expert … cannot be overemphasized. (Wall J in *Re AB (Child Abuse: Expert Witnesses)* [1995] 1 FLR 181)

For over 600 years at least, medical experts have assisted the courts. In 1345, a court summoned surgeons for an opinion on the freshness of a wound (*Anon* (1353) Anon Lib Ass 28, pl.5). In 1664, Dr (later Sir) Thomas Browne of Norwich gave an opinion as to whether or not certain Lowestoft women were witches, relying on the type of fits suffered by the children upon whom they had cast spells (*Witches' Case* (1665) 6 Howell's State Trials 687). In 1760, Dr John Monro, Physician Superintendent of the Bethlem Hospital, gave evidence at the trial of Earl Ferrers, who was charged with the murder of his former steward and pleaded insanity (*R v Ferrers* (1760) 19 State Trials 886).

Experts and expertise

Why do courts need experts?

Courts need experts when dealing with matters which are outside the experience of a judge or jury. If they can draw their own conclusions on the proven facts without such help, expert assistance is unnecessary. In order to receive such assistance, the courts make an exception to the general rule that opinion evidence is inadmissible and witnesses may speak only of facts they have personally perceived.

What is an expert?

An expert is someone recognised by the court as 'qualified' to give expert opinion evidence. It is for the court to decide whether or not someone is qualified to come within the exception to the rule regarding the inadmissibility

of opinion evidence. Case law has established how someone might become so eligible. If the Criminal Evidence (Experts) Bill (Law Commission, 2011) becomes law, it will put on a statutory basis the meaning of being 'qualified': 'a person may be qualified to give expert evidence by virtue of study, training, experience or any other appropriate means' if the court is satisfied as to such on a balance of probabilities. To some extent it does not matter that the Bill has not been enacted or that it will apply only to criminal proceedings. When issues arise as to the admissibility of expert evidence in criminal proceedings, the contents of the Bill may be persuasive without being determinative of the issue. If it is enacted, the Act will not be binding on proceedings other than criminal proceedings but again it may influence a court's approach.

First, experts must have *relevant experience*:

> if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is an honourable and commendable thing in our law. (*Buckley v Rice Thomas* (1554) 1 Plowd 118)

Second, experts' opinion must come from *within their own area of special knowledge and experience*. Third, the opinion must be *based on the facts*: 'The opinion of scientific men upon proven facts may be given by men of science within their own science' (*Folkes v Chadd* (1782) 3 Doug KB, 157). Fourth, the test of expertise is *skill*:

> The test of expertness … is skill, and skill alone, in the field of which it is sought to have the witness's opinion. …I adopt, as a working definition of 'skilled person', one who has by dint of training and practice, acquired a good knowledge of the science or art concerning which his opinion is sought. (*R v Bunnis* (1964) 50 WWR, 422)

What is an expert witness?

In short, an expert witness is an expert whose evidence is *relevant* to the case being tried by the court and whose evidence is *admitted* by the court. The critical test of *admissibility* was established in a case in which psychiatric testimony was given in a murder case:

> An expert's opinion is admissible to furnish the court with the scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. (*R v Turner* [1975] 1 All ER 70)

The court may further consider whether or not the proposed expert has the experience, expertise and training necessary, having regard to the value, complexity and importance of the case. Judges in the Chancery Division are advised that:

> The key question now in relation to expert evidence is the question as to what added value such evidence will provide to the court in its determination of a given case. (Her Majesty's Courts Service, 2009)

At present, unlike in the USA, there is no requirement, or procedure, to test the *reliability* of expert evidence, although *R v Gilfoyle* [2001] 2 Cr App R 57 has indicated the approach under case law. It was held that psychiatric evidence as to the state of mind of a defendant, witness or deceased, falling short of mental illness, might be admissible in some cases when based on medical records and/or recognised criteria, but the present status of 'psychological autopsies' was not such as to permit such evidence as expert opinion before a jury.

At least for criminal cases, however, there may soon be legislation that sets out the requirements and procedures (Law Commission, 2011). If the Criminal Evidence (Experts) Bill is passed into law, judges will have to decide whether the proposed expert is qualified to give expert evidence. Impartiality, the requirement to give objective and unbiased expert evidence, and a duty to the court that overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid, will be put on a statutory basis. Expert opinion evidence will be admitted as being of sufficient reliability only if it is (1) soundly based and (2) strong enough having regard to the grounds on which it is based. Specific grounds for determining that the evidence is not sufficiently reliable will be spelled out, for example if the opinion relies on an inference or conclusion that has not been properly reached. Generic factors to which the court must have regard will be listed, such as whether or not the expert's methods followed established practice in the field, or, if not, the reason for the divergence. There will be a provision for the Lord Chancellor to set out, in a statutory instrument, other factors relevant to specific fields of expertise. The proposed schedule to the Bill sets out factors to which the court must have regard when considering the reliability of expert opinion evidence. One of these is 'Whether there is a range of expert opinion on the matter in question; and, if there is, where in the range the opinion lies and whether the expert's preference for the opinion proffered has been properly explained'. Professor Nigel Eastman, a member of a Law Commission working group looking at the Bill, has suggested that this factor, in tandem with the need for the expert to provide an opinion as to why his or her opinion is sound, summarises 'particularly well what should be the approach to medical evidence which is psychiatric in nature' (Law Commission, 2011, p. 67).

It seems likely that in criminal cases the reliability of expert evidence will be decided at a pre-trial hearing and this may mean experts having to give evidence at such a hearing if the court cannot decide from the reports themselves whether or not they meet the statutory requirements for reliability.

The *expert witness* will be distinguished from the *professional witness* and from the *witness to fact*, although an *expert witness* may give evidence of facts as the basis for his or her opinion evidence. For example, a senior house officer witnesses one patient attack another. She is a *witness to fact*. A visitor to the ward also witnesses the attack and may give similar evidence as to the facts of what happened. As to what was seen and heard, the fact that one

witness is a senior house officer in psychiatry is irrelevant. The specialist registrar who documents the assailant's mental state immediately afterwards is a *professional witness* because she is using her professional knowledge and experience to ascertain relevant facts. So, the professional witness is also a witness to fact. The consultant psychiatrist engaged by the assailant's solicitors to give an opinion on whether or not the assailant has a defence of insanity is an *expert witness*. She derives her opinion, in part, from the evidence of the witnesses to fact and she may also use her expertise to give evidence of facts within her own knowledge, such as the assailant's mental state at the time she examined him. Her opinion may support the defence of insanity. Another consultant psychiatrist engaged by the prosecution may not support the defence of insanity. The material facts are the same but the opinions may differ.

If the issue is tried in court, the specialist registrar may be called to give evidence as to the assailant's mental state at the time of her examination. She does so as a *professional witness*. Once in the witness box, counsel or the judge may ask for her opinion as to insanity. If she does not think that her training and experience qualify her to give an opinion on this issue, she should say that she is giving evidence as a *professional witness*, not as an *expert witness*, and she cannot assist the court with an expert opinion on the issue. If she thinks that she is qualified to give an opinion on this issue, she should preface her response by reminding the court that she has attended as a *professional witness*, that she may not have heard all of the relevant evidence, but, if the court allows her to do so, she is now about to assist the court as an *expert witness*.

What are the duties and responsibilities of a psychiatrist acting as an expert witness?

A psychiatrist who acts as an expert witness is:

- a *citizen*
- a *doctor*
- a *psychiatrist*
- an *expert witness*.

All of these roles carry responsibilities. The responsibilities of doctors are underpinned by the four basic principles of medical ethics:

- autonomy
- beneficence
- non-maleficence
- justice.

There are also the two subsidiary principles of:

- consent
- best interests.

Sometimes two or more of these principles may clash.

Duty as citizen

A psychiatrist has a *duty as a citizen* to assist in the administration of justice:

> It is a complaint made by coroners, magistrates and judges, that medical gentlemen are often reluctant in the performance of the offices, required from them as citizens qualified by professional knowledge, to aid the execution of public justice. (Percival, 1803: p. 120)

Duty as a doctor

The *duties of a doctor* are set out by the General Medical Council (GMC). *Good Medical Practice* (General Medical Council, 2006) states as core guidance:

> You must be honest and trustworthy when writing reports, and when completing or signing forms, reports and other documents. (para. 63)
>
> If you have agreed to prepare a report, complete or sign a document or provide evidence, you must do so without unreasonable delay. (para. 66)
>
> If you are asked to give evidence or act as a witness in litigation or formal inquiries, you must be honest in all your spoken and written statements. You must make clear the limits of your knowledge or competence. (para. 67)

In *Acting as an Expert Witness* (General Medical Council, 2008) the GMC explains how this guidance applies to the medical expert witness. Also, the Academy of Medical Royal Colleges (2005) has made recommendations that derive from the GMC's core guidance.

Duty as a psychiatrist

The *duties of a psychiatrist*, who is a Member (or Fellow) of the Royal College of Psychiatrists, derive from the College's Charter as well as from the GMC. The psychiatrist who acts as an expert witness should be mindful of the objects and purposes of the College's Charter. As a Member or Fellow, in giving written expert opinion or oral testimony, she should advance the objects and purposes of the College, by furthering public education as to the science and practice of psychiatry (3(1)(a) and (b)), and she should adhere to the highest possible standards of professional competence and practice (3(2)(b)) (Royal College of Psychiatrists, 2008*a*).

The College has complemented the GMC's *Good Medical Practice* with *Good Psychiatric Practice* (Royal College of Psychiatrists, 2009), which advises that it should be read in conjunction with *Court Work* (Royal College of Psychiatrists, 2008*b*), which makes 14 recommendations with regard to 'Duties of a psychiatric expert witness' (Box 1).

Box 1 Duties of psychiatric expert witnesses

The Royal College of Psychiatrists (2008*b*) states that expert witnesses should:

- Ensure that they have had an induction in expert witness work.
- Have relevant knowledge of court procedures.
- Act with honesty, impartiality, objectivity and respect for justice, regardless of the party who instructs them.
- In criminal matters, show a willingness and ability to be instructed by either defence or prosecution.
- In Children Act cases, recognise that the interests of the child are paramount.
- Decline instructions that go beyond psychiatric expertise.
- Where advised that a report is not to be disclosed to the court, seek advice as to whether or not disclosure is in the public interest.
- Make clear to the subject of a report that:
  - the expert's role is to provide an opinion to the court
  - they may refuse to cooperate
  - the report is not confidential and may be seen by a number of different professionals
  - they may refuse to answer certain questions
  - the expert is not there to provide treatment, except in an emergency.
- Develop a pro forma addressing consent and confidentiality and devise a model consent form.
- With regard to recommendations:
  - make clear the evidence base
  - have some knowledge of the facilities available and discuss the recommendations with the relevant services
  - make evidence-based recommendations if no local facilities are available
  - if it is unlikely that they will be carried out, state why and what a second, less desirable plan might be
  - where appropriate, attribute evidence to other professionals and provide details of their qualifications and experience.
- Where there is concern about the conditions in which a subject is held, report these.
- Be prepared to provide evidence of continuing professional development (CPD) and peer group review geared to maintain competence as an expert.
- Be clinically active, belong to a CPD group (peer group), have a relevant personal development plan and be appraised at least once a year.
- Be ethical:
  - do not give evidence beyond their expertise
  - undertake CPD to maintain expertise
  - have an awareness of the possibilities for the treatment and placement of subjects
  - declare any conflicts of interest
  - rely on the evidence and specialist knowledge uninfluenced by the exigencies of the litigation and regardless of who has commissioned the report
  - be cognisant of funding arrangements and ensure value for money
  - have the integrity to resist pressure to 'adjust' the report to suit the needs of instructing lawyers or their clients
  - be clear about timescales so as to minimise delay
  - retain all notes.

Duty as an expert witness

The *duties of an expert witness* in general have been refined over the years by judges who have commented on them in particular cases. A case involving the sinking of a merchant vessel, the *Ikarian Reefer* (*National Justice Compania Naviera SA v Prudential Assurance Co Ltd 'Ikarian Reefer'* [1995] 1 Lloyd's Rep 455, CA) (Rix, 1999), remains a landmark case and guidance therein has become increasingly embodied in rules made by the courts and in protocols made, or endorsed, by the courts. The three most important sets of rules in England and Wales are the Civil Procedure Rules (SI 1998/3132) (CPR) Part 35, the Criminal Procedure Rules (SI 2010/60) (CrPR) Part 33 and the Family Procedure Rules (SI 2010/2955) (FPR) (collectively 'the Rules'). The most important protocol is the *Protocol for the Instruction of Experts to Give Evidence in Civil Claims* (Civil Justice Council, 2005) (hereinafter the *Protocol*), much of the core guidance of which is applicable to non-civil proceedings. The guidance evolves, however, as case law supersedes what is set out in the *Protocol*; indeed, guidance in the use of experts in criminal trials given by Gage LJ in *R v Bowman* [2006] EWCA Crim 417 goes further than ever previously. By the time this book is published, it is likely that there will have been further guidance issued with which experts will have to comply. The *Expert Witness Year Book*, published each year by the UK Register of Expert Witnesses, is a useful means of keeping up to date in this regard; at the time of writing the latest edition was Pamplin (2011).

The Rules make it clear that:

- the paramount or overriding duty of the expert is to assist the court on matters within his or her own expertise
- this overrides any obligation to the person from whom the expert has received instructions or is paid.

Psychiatric expert witnesses should be aware that they are accountable to the GMC as well as the courts. They owe a responsibility to those who instruct them, to the person upon whom they are reporting and to the College. The responsibilities to those instructing them and the person upon whom they report are:

- to identify weaknesses as well as strengths in their case
- to recommend any further treatment that is advisable
- to suggest any other expertise that may be required.

They have a responsibility to the College, because those whose reputation as experts in psychiatry is based on Membership or Fellowship of the College must at least uphold, preferably enhance, and certainly do nothing to damage, its reputation.

The *Protocol* sets out seven duties of experts (Box 2).

Not surprisingly, there is considerable overlap between the various sets of guidance. This book incorporates as much as possible of the guidance. Readers are referred to the original sources and should note that College recommendations in *Court Work* go further than any other rules or general guidance.

Box 2 Summary of the 'Duties of experts' set out in the *Protocol*

The *Protocol for the Instruction of Experts to Give Evidence in Civil Claims* (Civil Justice Council, 2005) states that experts have the following duties:

- A duty to exercise reasonable skill and care to those instructing them and to comply with any relevant professional code of ethics. Overriding duty to help the court on matters within their expertise.
- Be aware of the overriding objective that courts deal with cases justly. This includes dealing with cases proportionately, expeditiously and fairly. Assist the court so to do.
- Provide opinions which are independent, regardless of the pressures of the litigation. Useful test: the expert would express the same opinion if given the same instructions by an opposing party. Do not promote the point of view of the instructing party or be an advocate.
- Confine opinions to matters material to the disputes between the parties and only in relation to matters within their expertise. Advise without delay if questions or issues are outside their expertise.
- Take into account all material facts, set out those facts and any literature relied upon, indicate if opinion is provisional or qualified or if further information is needed before giving final and unqualified opinion.
- Inform those instructing them without delay of any change of opinion on any material matter and the reason.
- Be aware that failure to comply with Rules or court orders or any excessive delay for which they are responsible may result in a financial penalty to those instructing them and may lead to their evidence being debarred.

Rewards and penalties for the expert witness

Fulfilling the duties of a psychiatric expert witness will enhance the confidence which the courts have in admitting and relying on psychiatric evidence and enhance the professional standing and public understanding of psychiatry. Failure in discharging these duties will undermine the professional standing of psychiatry, risk injustice in cases where the courts need psychiatric expertise and set back the public understanding of psychiatry.

It is common for experts to be asked to change their opinion. If you are asked to change your opinion for no other reason than to improve the case being put forward by those instructing you, you should refuse, as this is unethical and unprofessional. Your first duty is to the court and not to those instructing you. If you do change your opinion to please your paymaster, and get away with it, remember that the solicitor and barrister will not forget. Your next contact with the same barrister may be in a case where she is instructed by the other side. Do not be surprised if she gives you a hard time and do not be surprised if she does not recommend you for other cases. If you acquire a reputation among barristers as a 'hired gun' you may have some short-term gains but when the barristers are sitting as recorders or have been elevated to the bench you should not be surprised if your opinions carry

little weight with them. If, but only with good reason, you refuse to budge, this will enhance your reputation as an expert and judges who have known you when they were barristers will be more likely to respect your opinions.

Do not be afraid to provide an opinion which those instructing you wish that they had not obtained. Your report may go in the confidential waste or the shredder and never see the light of day in court, but when the solicitor or barrister wants an opinion upon which she knows that she can rely, she will come back to you.

If you are asked to change your opinion on the basis of new information or because you have misunderstood the legal test or have misinterpreted the facts, this is a different matter. As John Maynard Keynes said, 'When the facts change, my opinion changes'. However, your opinion has to remain your opinion and not that of those instructing you. If you change your opinion, the basis for doing so should be crystal clear. If it is not and if the earlier version of your report has already been disclosed, or is disclosed inadvertently, or otherwise falls into the hands of the other side, any change of opinion, especially if it suggests partiality to those instructing you, will be put under the microscope and, if the reason for the change is not crystal clear and justified, you will be accused of being biased, partisan or even a 'hired gun'.

It is worth bearing in mind that expert reports are often filed by barristers under the name of the expert, so that an expert's reports can be compared. The expert whose opinion has been 'black' when instructed by the claimant's solicitors and 'white' when instructed by the defendant's solicitors in similar cases, or where the facts and issues are similar, should expect a hard ride under cross-examination in the witness box.

I once witnessed the cross-examination of a psychiatrist who had prepared his first report in the mistaken belief that he was being instructed by solicitors acting for the defendant. His second report was very different, as by this time he had realised that he was instructed by the claimant's solicitors. By the time the case came to trial, it was too late to avoid what counsel for the defendant described afterwards as 'the iron fist in the velvet glove'. Lest it be thought that this book is a vehicle for poking fun at some psychiatric experts, let me admit at this stage being forever haunted by an early cross-examination of my own, as an expert witness instructed by the prosecution, at the end of which Mr Norman Jones QC turned to the psychiatrist instructed by solicitors for the defendant and whispered 'game, set and match'. It just so happened that on this occasion there were half a dozen of our fellow consultants in court and many more of our trainees. Perhaps 'haunted' is the wrong word but when my cross-examiner became the Recorder of Leeds, it was salutary, every time I gave evidence before him, to reflect on our meeting many years previously, when I was lower down on my learning curve.

There are other potential penalties if the expert witness falls short.

In extreme cases, the expert's name may be erased from the Medical Register. This happened to a professor of microbiology who indicated an

intention to mislead the Legal Services Commission in order to obtain financial advantage and expressed a willingness to provide a false estimate of the number of hours likely to be worked in the preparation of an expert report in order to obtain an enhanced fee from the Commission.

There may be a financial penalty of a 'wasted costs order' where, by their evidence, psychiatrists have caused significant expense to be incurred through flagrant disregard of their duties to the court. In the case of *Phillips and Others v Symes and Others* [2004] EWHC 2330 (Ch), an application was made for the psychiatrist who had given evidence to be joined to the proceedings as a respondent for the purposes of costs only. The basis of the application was that the psychiatrist 'was in serious breach of his duties to the Court by acting recklessly, irresponsibly and wholly outside the bounds of how any reasonable psychiatrist preparing an opinion for the Court could properly have acted having regard to his duties'. In this case the psychiatrist had given evidence that Mr Symes, a bankrupt, not only lacked capacity to participate in the Chancery proceedings but had lacked capacity since a stroke in 1980, thus rendering null and void every transaction in which he had participated since then. However, the court had found that he did not lack capacity and there was criticism of the psychiatrist for five reasons. First, he had formed his initial opinion on a wholly inadequate basis. Second, he had not considered the manner in which Mr Symes had actually been able to conduct his business and legal affairs since his stroke. Third, he refused to reconsider his opinion in the light of further material sent to him and, indeed, refused to look at the material until directed by the judge to do so at the trial (after doing so, he was forced to admit that Mr Symes was capable of managing his affairs and that his original opinion could not be sustained). Fourth, in verifying his two reports as his evidence in chief, the psychiatrist failed to act in conformity with his expert's declaration (1) to mention all matters which he regarded as relevant to his opinions, (2) to draw attention to matters of which he was aware that might adversely affect his opinion and (3) to comply with his duty to correct or qualify his report when necessary. Fifth, by ignoring and disregarding any evidence or material which was inconsistent with his position, and actively trying to find material to support it, he assumed a role as an advocate for Mr Symes.

Smith J did not reach a decision as to whether or not the psychiatrist was guilty of a breach of his duty but he held that he did have a case to answer and he found that a wasted costs order could be made against an expert in the event that his evidence was 'given recklessly in flagrant disregard for his duties'. A wasted costs order has the effect of making the person against whom it is made pay costs wasted by their misconduct, default or serious negligence.

A penalty need not be financial. It may be in the form of a judicial criticism of the psychiatrist, for example as irresponsible for expressing views at the end of long-running personal injury litigation which are not easy to reconcile with his recent examination of the plaintiff for family proceedings and in the course of which he indicated that there had been a dramatic improvement

in the plaintiff's health (*Vernon v Bosley (No. 2)* [1999] QB 18, CA). Judicial criticism can in fact have far-reaching consequences. In his lecture at the 2006 Grange annual conference, a lawyer specialising in mental health tribunal cases quoted criticism of the independent psychiatric expert in a reported case before a mental health tribunal (*R (on the application of PS)* [2003] EWHC 2335 (Admin)). The judge devoted four paragraphs to his criticism, under the heading 'Misgivings about Dr [Z]'s evidence' and ended with references to his 'evasive and overdefensive approach in answering questions when cross-examined' and 'his continuing willingness to base an unqualified and dogmatic opinion on limited evidence'. After the lecture, the speaker had to be almost physically separated from the expert, whom he had not named, but who happened to be in the audience and who took exception to the speaker's reference to him.

In *Rhodes v West Surrey & North East Hampshire Health Authority* [1998] 6 Lloyd's Rep Med 246, an obstetrician was found not to have told the truth on two matters – his experience as a surgeon and as an expert witness. Margaret Puxon QC MD FRCOG, commenting on the case, asked whether the GMC had an interest in these matters. It does.

It has now been suggested that a judge may have powers under the CrPR to require an expert instructed by the defence to disclose any past adverse criticism by a judge and, although this may not be a ground for refusing the admission of the expert's evidence, it might lead to second thoughts about the advisability of calling the expert (*R v Henderson and Others* [2010] EWCA Crim 1269).

A psychiatrist was reported to the GMC for organising covert surveillance of a police officer he had examined in a police pension case.

Professor Sir Roy Meadow strayed outside his field of paediatrics into statistics, making an honest error without any intention to mislead (*Meadow v General Medical Council* [2006] 1 WLR 1452, CA). Although he was successful in appealing against the GMC's finding of serious professional misconduct (by a majority decision, the Master of the Rolls dissenting), Auld LJ found him guilty of some professional misconduct because he fell below the standards expected of him by his profession and Thorpe LJ found his evidence flawed.

One of the experts, albeit not a doctor, in the eighteenth-century Wells Harbour case of *Folkes v Chadd* (Rix, 2006*a*) was threatened with an action for perjury because he got his tides going in the wrong direction.

Further reading

Pamplin, C. (ed.) (for the UK Register of Expert Witnesses) (2011) *Expert Witness Year Book*. JS Publications.
Royal College of Psychiatrists (2008*b*) *Court Work*. RCPsych.