EXPERTS AND WHAT JUDGES WANT

The Rt Hon Sir Ernest Ryder

Opening Keynote Speech

McDermott KC Law - Enhancing Expertise Seminar 2025

Every advocate knows that to engage the court you must tell a story. The best advocates often begin with the simple but irresistible line: '*this is a case about…'.* My psychology and anthropology colleagues in Oxford would tell you that is because humans are hard wired to listen to narratives. The recognition of stories is one of the ways we learn to strengthen our innate intuition, i.e. the behavioural mechanisms we inherit[1] which together with our ability to reason provide both the philosophical and scientific basis for the rule of law.

What is more, as every advocate should know, once you have the ear of your audience, you have the chance to persuade.

This is our story.

To understand the expert's story i.e. the evidential function an expert performs, we have to go back to the beginning. Our modern day rules have long roots in history. But in essence, the expert is held to be capable of giving an opinion born of their skill and expertise that fills the gap when disputed factual recollections cannot be reconciled and where there is no direct evidence of one or more of the facts in issue. The expert is permitted to extrapolate from the known facts to inform the judge and jury of the inferences that might be permissible in order for them to come to a conclusion.

This is all about the speed and quality of decision-making. *You*, the expert, give the court the means to make a decision that is no longer dependent solely on the factual evidence of the parties. *You* help the court hold the ring and assess the risk of what is happening or has happened to give clarity, coherence and consistency to decisions about the same issues in the future. In commercial terms, the arrival of the expert was one of those light bulb moments that helped to change history during the first Industrial Revolution when the court under Lord Mansfield began to entertain the use of free trade principles rooted in the Enlightenment. It was also the moment where the courts developed what they did to underline the rule of law and provide a service to citizens, most particularly those who could invent things that were practically and financially important.

Ironically, those early experts were regarded as highly partisan and were themselves a departure from a long established but slow and inconsistent system of the judge convening special juries to try issues of fact. That was a practice that went back to 1299. Perhaps the most well known were the special juries used in shipping cases (for example, the Elders of Trinity House) and those used in medical and coronial cases

[1] See for example: Professor John Duncan, The Animal and the Thinker, WH Allen, 2025.

including the jury of matrons. The tension remains to this day: how to be effective and bring clear, coherent and consistent professional skill and expertise to decision making without being partisan (either in the sense of being paid for by one side of the litigation or in the general sense of being closed in your mind to advances in knowledge or the existence of issues of fact that have no known solution).

One of my doctoral dissertation students is a constitutional historian who has charted the history and role of the expert[2]. He would tell you that the origin of the expert witness in court arose out of a decision by the Privy Council on the 23rd June 1753 to permit the then common law courts to adjudicate on patents, a form of licensed monopoly or commercial restrictive practice previously governed by the 1623 Statute of Monopolies and the use of the Royal Prerogative.

You will no doubt remember from your own knowledge of history that in that Century there were innovators whose names resound to this day: people like Richard Arkwright (who invented the spinning machine in Bolton, the town adjacent to here) and James Watt (who invented the condenser that made the modern steam engine). They were also among the first expert witnesses. It is commonly thought to be the case that Lord Chief Justice Mansfield set the precedent for the future in the case of *Folkes v. Chadd*[3] when in 1782 he ruled that a civil engineer's evidence was admissible as the opinion of a man of science to provide the court with information outside its experience. The expert was John Smeaton, FRS, a post Newtonian natural philosopher who extrapolated beyond what the senses could detect. The requirements of admissibility were twofold: in modern parlance professional skill and expertise beyond that held by the court (and that answers the conundrum posed by specialist courts and tribunals where such knowledge is a requirement of the judges and members who sit) and an ability to make the decision less difficult and that is, I would suggest, the key to your discussions today. How to do the job well to make the quality of decision-making better including, more comprehensible, certain and swift for the court and for the public.

In order to understand what judges want from experts, you have to ask the question 'what is the court's function in justice systems based on the rule of law'. Judges do not work in a vacuum, they are, of course, bound by legislation, precedent, Rules and good practice. Their jurisdictions may be adversarial or inquisitorial with everything in between; they may have long established principles and guidelines revealed in the way evidence is marshalled, controlled and used for example those summarised in CPR Part 35 and its case law, or just as importantly, they may, like my former colleagues the Tribunals judges, have rather different concepts requiring the judge themself to be expert, specialist, swift and engaged in innovative justice delivery.

In June 2017 the late Lord Etherton looked to the future of civil justice systems (i.e. civil, family and administrative courts and the Tribunals) and said this of the developing approach to the delivery of civil justice including online justice:

"[the delivery of justice]…will be problem-solving in the sense that the [court]…will help the parties find the appropriate solution to their dispute. A problem-solving purpose is

[2] Alex Aizenman, Pembroke College, Oxford University to whom I express my sincere thanks for his contribution to this paper.
[3] *Folkes v. Chadd* (1782) 3 Doug. 157, 99 Eng. Rep. 589

the next step in the evolution of the Overriding Objective, which lies at the heart of modern case management."

I do not suggest we are there at the moment. What he was envisaging is a world beyond the approaches to Lord Woolf's reforms that may yet be necessary to reinforce public perceptions about the delivery of justice by greater emphasis on proportionality, clarity and comprehensibility of language both in concepts and issue identification to increase consistency and minimise backlogs and reduce delay.

So what is the answer to the question that I have been set?

The best advocates provide answers to the issues that a court has to address to make a decision.

The best experts provide the evidential reasons for those answers without straying into the judicial function.

What in practice do we want:

I shall take adherence to your duties to the court as a given, just as I can assume that you are well acquainted with recent case law on experts, for example that highlighted in the casebook that you have in your materials for today. That is because the expert's agency, the permission to use your opinion is in support of the court's function not the party who instructs you.

What the court needs from you is encapsulated in the first and second parts of Lord Mansfield's formulation: professional knowledge and the ability to apply that so that your evidence makes decision-making more effective. As Professor Jolowicz once said:

"we cannot demand of the judges that they have knowledge of every branch of science, of every art and of the mysteries of every profession"[4]

The court wants your collaboration and here are some of the common observations of judges about that:

Is your opinion:

- Timely: that is, delivered to the court's timetable: delay is expensive and usually inimical to justice
- Informed by having read all the papers asked of you, flagging up things you think are missing
- Within your trained and regularly appraised skill and expertise,
- Evidence based,
- Tested by reference to counter-factual examples and/or analogous circumstances,
- Restricted to the agreed facts in issue i.e. the issues of law and fact that the court has to decide and most particularly, in accordance with modern case

[4] J. Jolowicz, *On Civil Procedure,* at 225

management protocols, answering the questions and only the questions that the court has permitted.

Have you identified:

- Any conflict that you may have or have had, for example by being a consultant adviser used by anyone related to the case or a practising professional, for example a clinician, in the case.
- For yourself, the need to avoid cognitive bias and heuristics? Just because something is familiar does not mean your gut reaction is a sufficient basis for your opinion. It is not.
- That the opinion is your own and not someone else's who is coming to the case with different skills and expertise.
- The fact that your opinion, even though evidence based, might be regarded as outside the mainstream opinions of a responsible body of professionals – do not forget, a scientist always has to take a leap to be at the cutting edge and change our knowledge, but when you are that person, the court needs to know that, the reasoning underpinning your opinion and why previous knowledge should now be disregarded or treated with caution.
- That this a case where there are real options: a case where a small change in the apparent facts would lead you as an expert down a different path. The court may have real decisions to make about primary facts that can be on a knife edge and your guidance about how your opinion as a secondary evidential tool would be changed can sometimes make all the difference.
- That this a case where you doubt a particular agreed fact or one party's recollection of fact for good expert reasons? It is not for you to assume that a fact is wrong but you are entitled to flag-up your concerns and what difference a different finding of fact would make to your opinion.
- That this is a case where there are unknowns which may include the question you have been asked to answer.
- That you have changed your opinion: flag that at the earliest opportunity not during cross examination!

And keep your opinion short. There is a strong judicial view backed by senior judges that 20 to 25 pages is sufficient. It is of course all very well to be told that and then have to wade through first instance judgments that are themselves over 100 pages long. For my own part, I would counsel focus and summary on everyone, judges included.

There are cases in everyone's career that help put these good practice points into perspective. For me one of those was a challenge to a judicial decision that followed agreed expert opinion in a Children Act care case that not only led to the wrongful removal of a child but the termination of a pregnancy to avoid the loss of a second child into care. The case is reported in the Court of Appeal as *Re W (a child) (non-accidental injury: expert evidence)*[5]. I did not hear the first trial nor the appeal but rather the subsequent re-hearing in 2007. The press wrongly described the case as the first admission by the Court of Appeal of a miscarriage of justice in that jurisdiction. Essentially what happened is that there was a medical consensus because various

[5] *Re W (a child) (non-accidental injury: expert evidence)* [2005] EWCA Civ 1247 and the subsequent re-hearing is at [2007] EWHC 136 (Fam)

specialists deferred to a senior colleague. They gave the impression that they were in agreement but in fact were agreeing only to expert opinions that were outside their expertise. The dominant opinion was, as it happens, wrong. The reason the dominant expert was wrong is that he had strayed from his expert role into the role of that court which includes balancing the risks of harm which was not his expert skill nor his function in that case.

I gave advice that can be paraphrased as: an expert should conform to the training and good practice of their profession. For example, if your professional discipline necessitates you taking a history, then that should be reflected in your expert practice as a witness. The implication of what I held is sometimes missed and it is one of the most important messages of the conference today: if you do something as an expert witness that you would not do in your ordinary clinical or professional good practice then you should ask why you are doing it. Your professional registration and insurance may depend on it; you may be breaching both professional good practice and in some expert disciplines your fiduciary duties and you are likely to be exposing yourself to liability. You are also as likely as not going to stray from both your duties as an expert witness and the very protections that Lord Mansfield's approach hard-wired into the system.

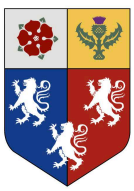
In parentheses, I would now add that includes not practising as an expert after annual training and compulsory professional evaluation has ceased unless that can be substituted for by courses like this and specialist refreshers / CPD in your professional discipline.

In the case of *Re W* the experts conflated their role with that of the decision-maker. One can see in a world that promotes single joint experts how careful one must be to avoid that or indeed any other of the problems I have highlighted. I have to emphasise that the experts in *Re W* abided by their duties and answered the questions asked by the court but neither they nor the court realised that the true answer in the case was that the question was outside their expertise and accordingly the answer of each expert should have been "I don't know" or "I cannot answer that".

You are going to spend the day looking at the detail of your obligations and how to avoid the problems highlighted by the courts. I hope at the end of the day you remain enthusiastic. We need our experts to help us deliver justice in an effective and efficient way.

Thank you.

5th September 2025



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