

Compass Chambers




Expert Witness Update

Kay Springham KC

Donald Mackay, Devil



Expert Witness Considerations

- Admissibility of expert evidence – issues in relation to expert’s instructions.
 - Court’s approach to considering expert evidence.
 - Parties’ obligations in respect of presenting and challenging expert evidence.
 - Preparation for joint meetings of experts.
 - Taking expert evidence concurrently during proof.
- 



Certification of Experts

- Rules 5.3. and 5.4 Act of Sederunt (Taxation of Judicial Expenses Rules) 2019/75.
- Retrospective certification of skilled persons or sanction for counsel (in the Sheriff Court) no longer allowed in any actions other than Personal Injury actions under Chapter 43 or 36, except on cause shown for why it was not done earlier.
- Certification/Sanction can be retrospectively sought for the proceedings to date at the time an action is transferred to case managed procedure – *Finlay v Borders Health Board* 2020 Rep LR 22
- The court considers pre-litigation instruction of experts as cause shown for retrospective certification once the action is raised – *Philip v Scottish Ministers* [2021] CSOH 52



Refresher on *Kennedy v Cordia Services LLP*

- Admissibility of expert evidence depends on:
 - Whether the expert evidence will assist the court;
 - Whether the expert has the necessary knowledge and experience;
 - Whether the expert is impartial;
 - Whether there is a reliable body of knowledge or experience to underpin the expert's evidence. [Para. 44]
- Solicitors and counsel are responsible for assessing whether the expert has the necessary expertise and whether their evidence is admissible [Para. 57]

Citation: 2016 SC (UKSC) 59



Marshall v Berkshire Hathaway International Insurance Co Ltd

- Pursuer's medical expert confirmed he did not receive payment for his reports if the pursuer lost their claim.
- Sheriff followed *Armstrong v ERS Syndicate Management Ltd* 2019 SC (SAC) 15 in holding the expert evidence was inadmissible.
- However, Sheriff Appeal Court upheld the Sheriff's decision to make an award based on the pursuer's own account of his injuries.

Citation: [2024] SAC (Civ) 13





Manley v McLeese

- Pursuer appealed loss at first instance on both Sheriff's approach to expert evidence and QOCS disapplication.
- Pursuer and Defender gave conflicting accounts of the road traffic accident, including different lanes and different angles of collision.
- Sheriff reached a view on relative credibility and reliability of the pursuer and defender on their evidence alone, without regard to the expert evidence.
- Sheriff Appeal Court held that was an error, albeit not 'plainly wrong' so substantive outcome was not overturned.

Citation: [2024] SAC (Civ) 16



TUI UK Ltd v Griffiths

- What is the scope of the obligation to cross-examine a witness you intend to criticise in submissions? [Para. 34]
- A party is required to challenge witnesses, both factual and expert, on any material points which they wish to submit to the court ought not to be accepted [Para. 70 (i)]
- Integral part of a fair trial, which includes fairness to the parties and to the witness [Para. 70 (ii)-(v)]
- Not limited to accusations of dishonesty against a witness [Para. 70 (vi)]

Citation: [2023] 3 WLR 1204



Kidd v Lime Rock Management LLP

- Commercial action against multiple defenders.
- Three objections raised re admissibility of evidence – two in advance.
- Pursuer’s legal practice expert reached conclusions as to dishonesty of other witnesses – objection partially upheld [Para. 75]
 - Held not part of his function to do so.
 - Was an erroneous assessment of how to assist the court, not a lack of impartiality.
 - Court held on balance it would not be appropriate to exclude his whole evidence.
- Defenders’ EU sanctions regime experts commenting on domestic law – objection repelled [Para. 77]
 - The experts were not making findings on the law, but providing necessary context to opinion on business practicalities.
- Defender’s share valuation expert identified to have conflict of interest – evidence not led [Para. 78-79]
- Also a case where concurrent evidence of experts featured.

Citation: 2024 SLT 347



Concurrent Expert Evidence

- First used in Scotland in *SSE Generation Ltd v Hochtief Solutions AG* [2016] CSOH 177
 - ‘There were several sessions in the proof where I heard concurrent evidence from the experts. This procedure, known colloquially as ‘hot-tubbing’, involved several experts being present in court at the same time. I chaired a discussion between them with a view to crystallising their respective positions. I found it a valuable way of focussing on the main issues and assessing the quality of their contributions.’ [Para. 156, per Lord Woolman]
- Lord Tyre issued guidance for concurrent evidence to counsel for the *Kidd* proof:
 - Limited examination in chief was permitted given prior lodging of reports and statements.
 - Counsel then took turns cross-examining their opposing experts. During that cross-examination, counsel was permitted to ask their own expert to respond to points raised by the opposing expert.
 - During re-examination, the other experts are again limited from responding unless asked to do so by the court.



Preparing for Joint Meetings of Experts

- Reported Issues in England and Wales
 - Experts producing a very lengthy joint statement that was of no use in agreeing and narrowing the issues – *Saunders v Central Manchester University Hospitals NHS Trust* [2018] EWHC 343.
 - Expert failing to engage constructively at joint meetings – *Mayr & Ors. v CMS Cameron McKenna* [2018] EWHC 3669 (Comm)
 - Parties struggling to or failing to agree a joint meeting agenda – *Welsh v Walsall Healthcare NHS Trust* [2018] EWHC 1917 (QB)

Compass Chambers



Parliament House

Edinburgh

EH1 1RF

DX 549302, Edinburgh 36

www.compasschambers.com

Gavin Herd

Practice Manager

Phone: 0131 260 5648

Fax: 0131 225 3642

gavin.herd@compasschambers.com