EXPERT EVIDENCE: SEMINAR 2

PRACTICALITIES OF EXPERT EVIDENCE

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1.1 This paper is the second in the series of lectures and follows on from the previous seminar, but can stand alone as guidance. But for those not attending the prior seminar, the following summary might be of assistance derived from the prior seminar on the theory of expert evidence.

1.2 The leading case in the UK on Expert evidence is **Kennedy v Cordia,** a decision of the UKSC in 2016 a copy of the relevant parts being attached. It is essential reading when expert evidence is being presented or is being considered. The case has been followed and referred to repeatedly throughout this jurisdiction, and south of the Border. The decision has been used in efforts to persuade a court to reject an expert's evidence after evidence has been heard; or to exclude parts of evidence from proof; and of course in cross examination of the experts.

1.3 From Kennedy:

[57] It falls **in the first instance to counsel and solicitors who propose to adduce the evidence** of a skilled witness to assess whether the proposed witness has **the necessary expertise** and whether his or her evidence is otherwise admissible. It is also their role **to make sure that the proposed witness is aware of the duties imposed on an expert witness.** The legal team also should disclose to the expert all of the relevant factual material which they intend should contribute to the expert's evidence in addition to his or her own pre-existing knowledge. That should include not only material which supports their client's case but also material, of which they are aware, that points in the other direction, *viz* the court's concerns about one-sided information in R v Gilfoyle . The skilled witness should take into account and disclose in the written report the relevant factual evidence so provided.

[58] It is not the normal practice of the Scottish courts to hold preliminary hearings or proofs on the admissibility of the evidence of skilled witnesses. Considerations of cost and practicability may often make such a course unattractive. Where the court has significant powers of case management, as in certain actions based on clinical negligence or relating to catastrophic injuries (Act of Sederunt (Rules of the Court of Session 1994) (SI 1994/443 (S 69)) (as amended), Ch 42A), commercial actions (Ch 47), and intellectual property actions (Ch 55), a judge can address concerns about the evidence in the report by a skilled witness at a case management hearing and discuss with counsel how they are to be resolved. Wider opportunities for such case management in personal injury actions are likely to result from the implementation of Lord Gill's *Civil Courts Review* .

The Takeaway points

(i) There are heavy duties *on the solicitors and counsel* to make sure the expert knows what to do.

(ii) Case management powers exist to allow for the matter to be regulated in advance of a hearing.

1.3 As was emphasised in the first lecture, expert evidence is often the most important aspect of any litigation. Cases will stand or fall on the expert evidence. You can never spend too much time ensuring that your expert is well briefed and that you understand the issues and what he or she is saying.

1.4 This guidance is intended to give guidance of practice to those conducting proofs whether as solicitors or as counsel. Getting it right is a team effort. All members of the team should liaise to ensure that things go according to the best plan.

INSTRUCTING YOUR OWN EXPERT

2. Instructing the Expert is a critical point in the proceedings. The first task is to choose the correct expert. The following issues may arise.

(i) What is the field of expertise that is required?

This might seem to be a rather stupid question, and in many cases it is obvious what the type of expertise is that is in issue. For example, if you are dealing with the valuation of a pension, then an actuary is the obvious and possibly only expert that is required. But, what if you are dealing with (as I am presently) an issue of whether fumes being pumped in to an aircraft cabin are toxic to the occupants.

The case is awaiting judgment but there is no agreement as to what type of "toxicologist" is required. There is no agreement even as to what makes a "toxicologist". Surprisingly, the evidence is that Doctors are not taught "toxicology" as a generality. The pursuers instructed a medically qualified toxicologist; the defenders a toxicologist who is not medically qualified. Both are eminent in their field and appeared to have a differing view of the level of risk to the pilots. This is a huge challenge to counsel and the judge. But it emphasises that there is a necessity of working out what the specialism is that requires the expert evidence.

This example is one of many that I have encountered. Challenges on the correct expert on valuation of businesses (accountancy or specialised valuers); whether a psychologist or psychiatrist should be instructed in an injury claim; and whether a fire expert or metallurgist should be instructed have all arisen in practice. Particular

challenges exist when the question crosses over between expertise. Do you instruct two experts? Or is one capable of covering both? The answer to the question is not easy and is case specific. It requires careful planning.

(ii) Having identified the correct discipline, Has the expert been subject to criticism by the court or otherwise in public?

Check Westlaw, and Lawtel, Academic articles, popular press and also check with the expert himself. Arguably an expert should disclose to you if he has been subject to any adverse criticism either before or after the initial instruction. If not, and this impacts upon the case, then you should at least have an argument for return of the fees and even, perhaps, argue that the expert should be liable in damages. Experts as we know have a duty of care to the client: Jones v Kaney [2011] 2 AC 398, and can be found liable in damages. They enjoy no immunity from suit.

Against that background, when instructing an expert should you check whether they have professional indemnity insurance? If they do, it shows that they have taken care to know their responsibility and may give you better confidence in him than otherwise might be the case.

(iii) Does the expert have a knowledge of what is required of an expert?

You should make sure that they are familiar with the core duties of experts as outlined in Kennedy. If they do not know, then that should be ringing bells of warning. But, do not think that a "new" expert is not a good expert. Some of the best experts I have seen have never given evidence before: they take extra care in preparing for their evidence and often outshine the "old hands".

I have on several occasions commenced cross examination of the other side's expert by asking them to explain what they understand the duties of experts to be. Usually this is on the back of a statement they have cut and pasted, but without actually reading it and knowing what it means. For example "I am aware of the provisions of Part 35 of the Civil Procedure Rules and confirm I have complied with them." That is a requirement in English procedure. So the cross examination goes like this: "What

are the requirements of Part 35?" and "does Part 35 apply in Scotland?" It is amazing how often this causes a witness to stumble before you get anywhere near the issues in the report.

It is helpful to provide a template to experts for Scottish cases. Usually I am engaged early to assist in the instruction of experts. I provide them with guidance. It invariably includes "I am aware that Part 35 of the CPR does not apply in Scotland, but I have read the rules and practice directions and insofar as they can be adapted to Scotland, I have complied with them. I have also read the observations of the Court in the case of Kennedy v Cordia and have taken them into account.

I confirm that I understand that my primary obligation is to the Court and not the party paying me. I confirm that I have disclosed all relevant information that in my opinion affects my views, and that if I change my opinion I will advise those instructing me immediately. I confirm that I do not have a personal interest in the outcome and that my fee is not dependent upon the outcome of the case.

I confirm that I understand that issues of fact are for the court and where I express any opinion that appears to make judgment on disputed fact, I of course defer to the court on that matter. I only do so where my expertise assists in determination of the facts, or it is necessary to provide context to my opinion."

It is also important to ensure that the expert does actually read the information referred to, and understands it. It is unfortunate if he is quizzed about it and it turns out that he has not in fact done what he says.

(iv) Is the format of the report as it should be?

Again, there is a specific requirement in the English CPR for format of reports and it is helpful if it is followed.

A good expert report in my opinion is laid out as follows:

(a) Who the expert is: "I am an orthopaedic surgeon and my CV is as laid out below."
(b) The terms of Instructions e.g. "I have been asked to provide an opinion addressing the following questions: What caused or contributed to the fire that occurred on [date]? Was any fire suppression equipment present at the site sufficient to reasonably suppress a fire? Was the risk of a spreading fire obvious to any person in charge of the premises?"
(c) A summary of the opinion: "In my opinion, for the reasons outlined below, the answer to the first question is……." Etc.
(d) A list of documents considered: "I have been provided with the following items for consideration of my opinion: x, y, z…. If further documents become available, I reserve the right to alter or modify my opinion."
(e) Analysis of the information: "The following facts appear to be not disputed. That there was a fire that occurred on …… whereby the factory was burned to a total loss. The cause of the fire was either a dropped cigarette or a static spark caused by the operation of the equipment. I have considered each possible cause and conclude as follows, for the following reasons."
(f) Declaration as above
(g) Appendix containing CV and information received.

(v) Further comments:

Ensure that all sources of information are disclosed: "I met with solicitors and counsel on xxx. At that meeting we discussed my preliminary views. I confirm that all opinions in this report are based upon my own opinion and are uninfluenced by anything suggested to me by counsel or solicitors."

This avoids the suggestion that the witness was coached.

3. PRACTICALITIES

Certification of experts: it is now necessary to obtain early certification of experts. The test is whether it is reasonable to instruct the expert, but this is given a rather loose feel to it. Unlike in England where permission is required to instruct experts, you can still

lead a witness in Scotland and no doubt the only risk is not getting paid. If the expert turns out to be accepted by the judge, it is likely that certification retrospectively will be given.

Act of Sederunt (Taxation of Judicial Expenses Rules) 2019: certification is required ***prior to instruction of the expert. "Cause shown" for retrospective certification of skilled witnesses is far from a "given"***

Consulting with Experts: it is worthwhile consulting early to test whether your expert is the right one or not. Are they up to the job? What will they be like in the box? Test them hard on their opinion. Is it likely to be balanced or are they a rent an expert???

4. TESTING THE OTHER SIDE'S EXPERT

This is essentially the opposite of what you have just been doing for your own expert. Research the other side's expert: Westlaw, Lawtel, Google. Is there anything about their evidence which was highly criticised?

See for example Muyepa v MOD [2022] EWHC 2648, Cotter, J.

> 284. Experts should constantly remind themselves through the litigation process that they are not part of the Claimant's or Defendant's "team" with their role being the securing and maximising, or avoiding or minimising, a claim for damages. Although experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code, as CPR 35.3 expressly states they have, at all times, an overriding duty to help the Court on matters within their expertise. That they have a particular expertise and the court and parties do not (save in some professional negligence claims) means that significant reliance may be placed on their analysis which must be objective and non-partisan if a just outcome is to be achieved in the litigation.

5. PARTICULAR PROOF/TRIAL PRACTICALITIES

Objecting to the other side's expert: As observed by Lord Reed, some procedures in Scotland can allow for prior objection to be taken either to the entirety of an expert's evidence or to parts of the opinion.

Commercial Actions; Group Proceedings and c. 42A proceedings all allow for aggressive case management.

In commercial rules, it is far from unheard of for prior objection to be intimated by Note of Objection. Usually the court will allow the evidence to be led with a written objection being lodged, but hear the objection at the end of the case and rule upon it. However, it may well be that in the right case a judge will exclude all or part of the evidence of an expert on Kennedy bases.

Joint Reports: Agenda or no agenda?

Again when procedures allow for it, there is a drive for courts to order joint reports of like minded experts. Sometimes agendas are prepared and sometimes ordered. These seem to be growing arms and legs now, and some judges are against such agendas being prepared, preferring a short order for the experts to meet to produce a joint report saying where they agree and where they disagree and if they disagree to explain why they do so.

Concurrent evidence: "Hot tubbing"

There are many examples of concurrent evidence being heard, which has many advantages and disadvantages. In favour, it allows a more open discussion but it requires careful control by the advocates. On occasion, experts can treat the matter too informally and end up in an argument with each other. Disadvantages are that it is sometimes hard to deal with objectionable evidence and to take objection. But in the modern day of inquiry into the evidence, rather than old fashioned trial by ambush and combat, it is likely to be the way forward.

The backroom expert: in some cases it might be a good idea to have an advisory expert. There are differing views on whether once your expert has finished their evidence, they can sit behind you to give you ammunition to cross the opponent. The optics of this look very, very bad as it shows that an expert is too much in favour of one side. Indeed, Lord Penrose on one occasion practically threw an expert out his court for feeding lines…..

6. MISCELLANEOUS COMMENT

In the matter of what type of expert to instruct, the following from the Muyepa case is interesting:

> 287. Some care experts have a (full time) private practice solely preparing reports for either Claimants or Defendants. Given that the compilation of a care report often requires a significant amount of subjective judgment, there is an obvious risk of contravention of Cresswell J's first principle and CPR 35.3. (2) through a lack of true independence arising from the need to maintain a source of instructions and the pressure to prepare a report which is favourable to the instructing party.
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> 288. There is also often, if not usually, a very marked aversion shown by those conducting higher value personal injury or clinical negligence claims to the use of single joint care experts, despite the fact that there is often no principled reason against such an instruction. In my view the common working assumption within these fields of litigation that it is axiomatically the case that each party will have a care expert is misplaced, helps perpetuate polarised expert opinions and often greatly increases the cost of litigation.
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> 304. After I asked (her report contained no breakdown[34]) Ms Kerby revealed that she has been preparing reports solely on behalf of Claimants for nine years. She recognised the understandable concern a Court will have as to the risks that arise when an expert's workload (and income) is solely for one side to litigation. In my view the risk came to fruition and the reports she prepared contained some partisan views designed to maximise damages for the Claimant rather than recommendations made, as they should have been, after balanced and objective application of the relevant principles.
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> [34] Such a breakdown should be set out in any report by any expert whose income is largely if not solely derived from giving expert evidence

Suing your expert? As noted above, if the expert makes a complete mess of his opinion, there is always the option of suing that expert. This must be made clear in the terms and conditions of engagement.

7. CONCLUSION

Instruction of experts is vital to success. Choose your expert carefully and appreciate how important an expert is. Do not assume that they know what they are talking about. For the advocates cross examining, you **must invest time** understanding their speciality. You must be confident to challenge the other side, and your own expert.

Finally, experts choose to be experts: unlike other witnesses. But if they are constantly attacked and criticized there is a danger that they will not submit to that inquiry. Don't abuse the position you hold. You can get far more out of a person by gentle inquiry than aggressive criticism.

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