Bearing false witness: the regulatory effect

Chris Pamplin shines the spotlight on 'false' expert evidence cases, but finds that proposed changes to the regulation of expert witnesses may still leave the courts fumbling in the dark with scientific opinion

- unearthing bogus experts: who checks the checkers?
- the better regulation of expert witnesses

Within the context of expert evidence, cases of bearing false witness fall into two distinct classes: the bogus expert and the expert who legitimately claims expertise but who provides evidence that is wrong.

The lesson of Barian Baluchi

Barian Baluchi PhD, consultant psychiatrist, was nothing of the sort. The former taxi driver and dry-cleaner admitted 30 charges, including obtaining a false medical registration and perjury, in January 2005. Among other activities, he had written hundreds of 'expert' reports in asylum cases.

Mr Baluchi set about reinventing himself in the late 1990s with the purchase of a PhD from the USA and assumed the identity of Abdul Doshoki, a former trainee doctor who had let his provisional registration lapse. Despite the ploy involving two name changes in less than a year, and the fact that one of his victims sent a warning letter to the medical authorities, the General Medical Council (GMC) failed to react.

It has been suggested that the case of Mr Baluchi supports calls for the accreditation of experts as expert witnesses. This must surely be rejected because of the distinction between an expert witness who falls below some measure of quality and a criminal who impersonates an expert witness.

How can any professional body be expected to prevent criminals from committing crimes? The GMC's revalidation scheme, put on hold because of severe criticism by the Shipman inquiry, is incapable of preventing, or detecting, a future Shipman because revalidation was designed as a way of testing whether a doctor is fit to practise medicine. That has nothing to do with a doctor's propensity to commit murder.

Likewise, it must be highly unlikely that any system of expert witness regulation could have stopped Mr Baluchi. Take, for example, the accreditation scheme being constructed by the *Council for the Registration of Forensic Practitioners* (CRFP). Once Mr Baluchi had fraudulently gained GMC registration, his job was done. Any CRFP checks at the GMC would have come back positive. To trap him at that point would require the CRFP to check the authenticity of the GMC records. They may 'check the checkers', but as Alan Kershaw, CRFP chief executive says, you have to trust someone.

The regulatory fault that gave Mr Baluchi the freedom to commit his fraud surely lies with the GMC. It is for that body to ensure false medical registrations aren't possible, and the GMC appears to have learnt this particular lesson. A GMC spokeswoman, reported on the BBC (see: *http://news.bbc.co.uk/1/hi/england/london/4209509.stm*), said: "We have made changes to our systems since this individual first sought registration to strengthen our registration checks. We have controls in place that enable us to identify individuals who are attempting to commit identity fraud, including asking for a doctor's passport or ID card and their medical certificates."

The lesson of Jessica Rees

Jessica Rees, who is profoundly deaf, has been involved in hundreds of criminal trials using lip reading to analyse silent CCTV or police tapes. She has worked for both defence and prosecution lawyers over many years.

Ms Rees' credibility was challenged in a case at Snaresbrook Crown Court in 2004 by defence barrister Edward Henry. He accused her of misleading the court in her CV, which he felt suggested she had a BA in English from Balliol College, Oxford. Ms Rees accepted she had not completed her degree and said her CV was meant to show only that she had finished the first two years of the course.

Following a review of her role as an expert witness in prosecution cases, a Crown Prosecution Service (CPS) spokeswoman said: "The CPS has decided not to rely on Jessica Rees as a prosecution witness in current or future cases. As a precaution, the CPS is contacting defendants or their representatives in those cases where Jessica Rees gave evidence for the prosecution and which resulted in a conviction. They will be provided with a disclosure package to enable them to advise their clients."

This case is entirely distinct from that of Mr Baluchi. Here we have a person who, through a life-time's experience, can honestly lay claim to a skill in lip reading that is beyond that of the layman. The concerns expressed by the CPS appear not to be about Ms Rees' ability to lip read—how does the possession of a BA in English have any bearing on that skill?—but on her general credibility, given the misleading impression Mr Henry was able to take from her CV.

The lesson for expert witnesses, and those who instruct them, is clear: a CV must tell the truth, the whole truth and nothing but the truth. Unlike expert witnesses, barristers have a partisan role to play in our system of justice. They are expected to put forward the very best case they can for their clients, and one element of this is attacking the credibility of experts. Barristers will test the logic of the expert's conclusions, probe any part of the evidence that appears to consist of generalisations and explore alternative hypotheses. It is far better to discredit an expert on the evidence itself than by personal attacks on professional reputation or credibility. But sometimes, needs must.

In Ms Rees' case, the wily barrister was faced with an expert opinion that, being subjective at its root and provided by a practitioner drawn from a very small field, was difficult to challenge of itself. So he resorted to demolishing her credibility in lieu of demolishing her opinion. That Mr Henry was able to make such hay from a CV that gave an accurate chronological account, yet was open to misinterpretation, is a salutary warning to all experts. Be careful what you say in your CV.

Pseudo-endorsement

The dangers are ever present. For example, the Law Society of England and Wales entered into a relationship with commercial publishers in the late 1990s to create the 'Law Society Checked' logo for expert witnesses. By paying to be listed in a directory, and offering up a couple of favourable solicitor references,

experts could gain kudos by displaying the 'Law Society Checked' logo. In 2003, the Law Society, perhaps recognising the danger in providing such pseudo-endorsement for experts, pulled the plug. An expert should consider carefully whether any reference to having been Law Society Checked should remain. To leave such a claim in a CV can import little benefit, such checking having been disavowed by the Law Society, but can open the expert to the same style of attack as that suffered by Ms Rees. Why take the risk?

The better regulation of expert witnesses

There is an ongoing debate, fuelled by cases such as these, about whether the way expert witnesses are regulated needs changing. This debate falls into two parts:

- How to decide who can offer their services as expert witnesses?
- How to deal with expert witnesses who are thought to have fallen below some measure of quality?

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Fit for purpose

The first part of the debate can be characterised as the choice between maintaining the status quo, on the one hand, and introducing accreditation or registration of experts as expert witnesses on the other.

Mr Baluchi was ultimately caught by a vigilant lawyer. Quality assurance for expert witnesses cannot, as implied by last year's Legal Services Commission consultation paper (*The Use of Experts: Quality, Price and Procedures in Publicly Funded Cases*, November 2004), come from any scheme of accreditation. It can only come from a system that looks carefully at each expert, in each case, from many angles. That is precisely the system we have in place already—the lawyers, the judge, the other experts—and probably the reason why no one has put forward evidence of a general problem with the quality of expert evidence.

However, if reasons unrelated to the current system's effectiveness create pressures for change, for example a political perception of public disquiet, then ideas such as registration and accreditation need to be considered.

The difference between the two lies in their cost and proportionality.

Accreditation requires every expert to 'jump through the hoop' before being allowed to offer expert witnesses services, in the hope of catching the tiny proportion who are unsuitable. This imposes a big administrative and cost burden. Yet, since it can't stop an expert getting it wrong on the day, it is incapable of assuring quality.

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Registration, on the other hand, can be set up so that entry to a professional body's list is open to all who would apply, with no preconditions attached. This, of course, imposes very low upfront costs. Crucially, though, if one of these experts becomes the subject of criticism in relation to their expert witness work, then the registration body concerned can investigate the matter as one of professional competence.

Thus the existing professional bodies, with disciplinary powers already in place, can provide a point of reference to any complainant through a system that is both cheap to set up and proportionate. And the system can act against only those experts who are actually found wanting.

Better regulation

The Better Regulation Task Force was set up in 1997 as the independent body advising government on effective regulation. It has defined five principles that embody good regulation:

- *proportionality*—regulators should only intervene when necessary and remedies should be appropriate to the risk posed, and costs identified and minimised.
- *accountability*—regulators must be able to justify decisions, and be subject to public scrutiny.
- *consistency*—rules and standards must be joined up and implemented fairly.
- *transparency*—regulators should be open, and keep regulations simple and user-friendly.
- *targeting*—regulation should be focused on the problem, and minimise side effects.

When measured against these principles, registration can be seen to be a far more proportional, accountable, transparent and targeted regulatory approach than is accreditation. And the status quo is better still.

Dealing with deficiency

The criminality in cases such as Mr Baluchi tells us nothing about the way in which expert witnesses ought to be regulated—once he had gained GMC registration his job was done. Cases such as Ms Rees' simply highlight the importance of openness and clarity when working with the court. But the case of Professor Sir Roy Meadow—who appeared before the GMC in July 2005—highlights a real problem in the current regulatory framework for expert witnesses.

A notable point about the Professor Meadow hearing at the GMC was that it was Sally Clark's father who made the complaint. An expert witness, instructed by whoever, owes an overriding duty to the court. Professor Meadow was instructed by the prosecution, so his duty to the court outweighed his duty to the CPS. Both outweighed his duty to Sally Clark who hadn't instructed him. But even that duty must have outweighed his duty to her father.

The point is, the GMC has shown that without guidance from the courts as to where the regulatory boundaries lie, the professional bodies run the risk of side-stepping the immunity to suit the courts extend to expert witnesses.

We are now in the situation where any doctor who, as a minor adjunct to a primary medical career, assists the criminal court by offering his or her honestly held opinion with no intention to mislead runs the risk, especially if thought of as eminent, of having all rights to earn a living as a doctor removed if, subsequently, the opinion is seen to have been wrong. Moreover, this risk arises even when the opinion being expressed is on the value of peer-reviewed statistical data published by others.

The ability to be wrong is a defining characteristic of the human condition. In matters of science, being wrong is virtually inevitable. When the criminal justice system invites scientific opinion into its courts it ought to be able to handle it in an appropriate manner. The Court of Appeal in *R v Cannings* [2004] EWCA Crim 01, [2004] 1 All ER 725 found the real problem in these cases was a systemic failing of the criminal courts properly to handle prosecutions based almost exclusively on conflicting expert opinion evidence.

It seems only right that Professor Meadow should appeal to a real court since the GMC, with its combined prosecutor, judge and jury functions, does not appear to have carried through the logic of its findings of fact into its decision on what sanction to apply. And, most importantly, none of this deals with the actual problem, which is the criminal court's handling of scientific opinion evidence.

Wither immunity?

The CRFP's chief executive Alan Kershaw, speaking at the recent *Society of Expert Witnesses* conference, on 21 October 2005, reported that last year the GMC had wanted to adopt the position that it would only deal with complaints against medical expert witnesses referred to it by a court. This would have been a completely logical and appropriate way to proceed. Instead, the GMC decided on an alternative course, and we now see the result.

If the current confusion on where the regulatory boundaries lie is allowed to continue, the existing downward trend in the number of experts willing to offer opinion evidence in court will accelerate. This will bring closer the time when expert witnessing becomes a profession in its own right—precisely the outcome the judiciary wants to avoid.

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EXPERT CVS: THE WHOLE TRUTH

The lesson for expert witnesses, and those who instruct them, is clear: a CV must tell the truth, the whole truth and nothing but the truth. Cases such as Ms Rees' highlight the importance of openness and clarity when working with the court. To leave misleading or false claims in a CV can only leave the expert open to attack. Remember that an expert can now no longer claim to be 'Law Society Checked' following the withdrawal of Law Society endorsement.