Your Witness

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Issue 98

Expert input to the letter of claim

We had an enquiry on our Helpline from a member who reported receiving requests from solicitors following the submission of his reports that asked him to assist in checking their letters of claim. He was asked to confirm that his opinions were reflected accurately, and to advise on any areas that needed amending. Indeed, in one case, the amendments he might suggest were so extensive that he was effectively being asked to rewrite the letter of claim. He had discussed the matter with colleagues and found that some refuse such requests, while others do as asked without concern. So, the question is, to what extent can an expert assist in this way?

Assuming you are instructed as an expert witness under the Civil Procedure Rules (CPR), then **you must ensure that, whatever you do, your claim to strict independence from those who instruct you is secure**. So we are looking at a continuum here. Exactly how far you go in helping your instructing solicitor draft their letter will depend on the specifics. But it is absolutely right to be aware of the **risk of losing one's claim to independence if you go too far**.

There are, though, two expert roles created by CPR. The expert *witness* role (overriding duty to the court, complete independence and full compliance with Part 35) and the expert *advisor* role, as set out in the CJC Guidance annexed to the CPR 35 Practice Direction. It states:

> *6. Advice from an expert before proceedings are started which the parties do not intend to rely upon in litigation is likely to be confidential; this guidance does not apply then. The same applies where, after the commencement of proceedings, experts are instructed only to advise (e.g. to comment upon a single joint expert's report) and not to prepare evidence for the proceedings. The expert's role then is that of an expert advisor.*
>
> *7. However this guidance does apply if experts who were formerly instructed only to advise, are later instructed as an expert witness to prepare or give evidence in the proceedings.*

The caution to protect one's independence noted above applies to the first of these roles. If you have, though, agreed to be instructed as an expert advisor, you are working purely for the benefit of those who instruct you. You would then be viewed as 'part of the team' and expected to help the team draft its letter of claim in its best interest.

In the normal course of events, experts are instructed as advisors before the claim has formally begun, which is how they come to be involved in drafting letters of claim. Once the claim starts, if a party retains an expert advisor 'behind the scenes', such an expert would not be covered by CPR Part 35 and would remain partisan, advising the client alone. However, some experts make the move from advisor to expert witness proper within a case. Such a role change is not without its challenges, and requires a formal set of instructions. What's more, both the expert and the instructing party must understand the new duties of expert independence that run alongside the transition.

So, with all that in mind, the answer to this question lies in being very clear about whether you are instructed as an expert advisor or an expert witness. If the former, you are 'free' to help draft the best possible letter of claim. However, if instructed as an expert witness proper, you may well feel that you must remain much less involved. If you make the move from advisor to expert witness proper, think very carefully about the role change. Such a transition is, though, clearly anticipated by the CJC's guidance (para 7).

Recommend a lawyer

The printed *UK Register of Expert Witnesses* is distributed free of charge to a controlled list of UK lawyers. First printed back in 1988, it is now the only annually printed expert witness directory. For inclusion on our controlled list, we select firms with the appropriate litigation profile. There is no guarantee that any particular legal firm will remain on the controlled list year on year, but those firms on the list undertake approximately 80% of litigation in the UK.

We are in the process of refreshing our controlled distribution list ready for the mailing in May 2020 of our upcoming edition 33. If you would like to recommend a particular lawyer, or lawyers, to be considered for inclusion on the controlled distribution list, please send their name, their firm's name and their address to us by email to *cdl2020@jspubs.com* before the end of January.

Draft time – new edition

Preparations for edition 33 of the *UK Register of Expert Witnesses* have begun. A draft of your entry for the new edition will be sent in the New Year for you to check, sign and return. **If you will be away during the first half of January 2020** you may wish to contact us now so that we can make appropriate alternative arrangements.

Of course, we are always looking to innovate and add value to your membership. So please do let us know of anything that you think we can do to enhance our service to you.

Meanwhile, everyone here at J S Publications sends their very best wishes to you for a Happy Christmas and prosperous New Year.

Chris Pamplin

Disclosure by experts under Criminal

Past judicial criticism (however unfair) must be disclosed

On 1 April 2019 the Criminal Procedure (Amendment) Rules 2019 came into force. They amend the Criminal Procedure Rules 2015 in a number of ways. For the purposes of this commentary, though, we highlight those that have specific application to expert witnesses.

The rules governing experts are, of course, contained in Part 19 of the Criminal Procedure Rules (CrimPR). The relevant changes and additions in the amendment concern disclosure by expert witnesses. (Visit *www.jspubs.com/crimpr* to access the full text of the CrimPR.)

The changes have been made by the Rule Committee partly in response to recommendations proposed by the Law Commission in its report '*Expert Evidence in Criminal Proceedings in England and Wales*'. This followed concerns expressed by the Forensic Science Regulator in 2018 that some expert witnesses had, on occasion, failed to provide those who commission them, or the courts, with fair and accurate accounts of their qualifications and expertise. Consequently, a review was carried out by the Committee, and this led it to conclude that there was uncertainty among experts as to what they were required to disclose under the Rules, as then drafted, and who had responsibility for disclosure. The Committee found that there was a broad misunderstanding, ranging from experts who had recognised no obligation on them to disclose anything, to experts who thought it necessary to disclose everything, from parking fines to personal matrimonial proceedings!

To our mind, that range of awareness seems rather surprising. The majority of expert witnesses, we suggest, are well aware of the extent of their disclosure obligations. No doubt the Committee managed to find some who were not, and this was considered sufficient to justify an amendment to the Rules.

A new rule 19.9 has also been added to address the procedure for withholding, on public interest grounds, the information an expert witness would otherwise be required to disclose.

New scope to rebut criticism and/or explain improvements

New duty on experts to disclose

Rules 19.2 and 19.3 have been amended to require expert witnesses to **disclose to the parties, and the court, anything that might reasonably be thought capable of undermining the reliability of their opinion or detracting from their credibility or impartiality**.

At first glance, the amendment to Rules 19.2 and 19.3 might appear relatively innocuous. However, it **introduces significant and important changes in relation to expert disclosure**. Under Rule 19.3(c), as drafted originally, there was an obligation on the *instructing party* to disclose anything reasonably thought capable of detracting substantially from the credibility of that expert. The new Rules place a *duty on the expert to make disclosure to those instructing them* of anything of which they are aware that might reasonably be thought capable of undermining the reliability of the expert's opinion or detracting from the credibility or impartiality of the expert (19.2(d)). It should be noted that **the amendment introduces a new and explicit duty on the expert to make disclosure to those instructing them**. The instructing party is, if intending to rely on the expert's report, required to make similar disclosure to the other parties of anything of which it is aware that might reasonably be thought capable of undermining the reliability of the expert's opinion, or detracting from the credibility or impartiality of the expert (Rule 19.3(c) as amended).

To supplement the amendments to the CrimPR, there have also been changes to the associated Practice Directions (PD). CrimPR PD 19A.7 gives examples of matters that should be disclosed pursuant to the new rules. It makes clear that the examples offered are not intended to be a complete and exhaustive list. However, the list is wide ranging and diverse, and is worth setting out in full here:

(a) **any fee arrangement** under which the amount or payment of the expert's fees is in any way dependent on the outcome of the case

(b) **any conflict of interest** of any kind, other than a potential conflict disclosed in the expert's report

(c) **adverse judicial comment**

(d) any case in which an appeal has been allowed by reason of a **deficiency in the expert's evidence**

(e) **any adverse finding, disciplinary proceedings or other criticism by a professional, regulatory or registration body or authority**, including the Forensic Science Regulator

(f) any such adverse finding or disciplinary proceedings against, or other such criticism of, **others associated with the corporation or other body with which the expert works** which calls into question the quality of that corporation's or body's work generally

(g) **conviction of a criminal offence** in circumstances that suggest:

  (i) a **lack of respect** for, or understanding of, the interests of the criminal justice system (for example, perjury; acts perverting or tending to pervert the course of public justice)

  (ii) **dishonesty** (for example, theft or fraud) or

  (iii) a **lack of personal integrity** (for example, corruption or a sexual offence)

(h) **lack of an accreditation** or other commitment to prescribed standards where that might be expected

(i) a **history of failure or poor performance** in quality or proficiency assessments

(j) a **history of lax or inadequate scientific methods**

(k) a **history of failure to observe recognised standards** in the expert's area of expertise
(l) a **history of failure to adhere to the standards expected of an expert witness** in the criminal justice system.

Disclosing adverse judicial comment

The requirement to disclose adverse judicial comment (PD 19A.7(c)) poses its own problems of interpretation. **What exactly is encompassed by 'adverse judicial comment'?** Is this limited to specific criticism of an expert contained in a formal judgment, or does it extend to any throwaway negative remark directed to an expert during the course of a trial?

We have reported in the past on cases in which there has been criticism of experts that was clearly seen to be uncalled-for or otherwise unfair. It might also be noted that experts who have been adversely criticised are very likely to have had no opportunity to defend themselves from such criticism. It appears, however, that there is some scope for this criticism to be addressed.

In a case in which an expert, or a corporation or body with which the expert works, has been criticised without a full investigation, e.g. by adverse comment in the course of a judgment, it would be reasonable to expect those criticised to **supply information about the conduct and conclusions of any independent investigation into the incident**. Any **steps taken to address the criticism** might also be explained (PD 19A.8). On a broad interpretation, this approach would allow the expert to add his own comments regarding the criticism.

In some circumstances, the expert might be **unaware of criticism**, or one or other of the matters listed in PD 19A.7. It must be borne in mind that Rule 19.2(d) limits the expert's disclosure to anything '*of which they are aware*' that might reasonably be thought capable of undermining the reliability of the expert's opinion or detracting from the credibility or impartiality of the expert. **The rules do not require persistent or disproportionate enquiry**, and courts will recognise that there may be occasions when neither the expert nor the instructing party has been made aware of criticism.

However, the expert witness must be very wary in cases when they ought reasonably to have been aware of the criticism. If matters are ostensibly within the scope of the disclosure obligations and they come to the attention of the court without being disclosed by the party introducing the evidence, then that party, and the expert, should expect a searching examination of the circumstances. Subject to what emerges, the court may exercise its power under Section 81 of the Police and Criminal Evidence Act 1984 or Section 20 of the Criminal Procedure and Investigations Act 1996 to exclude the expert evidence (PD 19A.9).

New power to hide sensitive information

The amendments also add an entirely new rule (19.9) to the CrimPR. This makes provision for a procedure whereby permission can be sought from the court to withhold, in the public interest, information that expert evidence might otherwise have been expected to include, e.g. details of criminal investigative techniques. The new provision has been introduced following the ruling of the Court of Appeal in *R -v- Kelly*[1].

In this case, the prosecution gave evidence on the content of encrypted messages extracted from an electronic device. It was considered to be in the public interest that the expert should not be obliged to reveal the techniques used in the decryption, and this approach was upheld by the court. The Court of Appeal said that courts have a power to allow a party who introduces expert evidence to withhold some of the information that otherwise might be revealed if it is in the public interest to do so and, where that party is the prosecutor, so long as it is not unfair to the defendant.

An application under Rule 19.9 must identify the information sought to be withheld and explain why the applicant thinks that it would be in the public interest to withhold it. Obviously, it should omit from the part of the application served on the other party anything that would reveal what the applicant thinks ought to be withheld! The court can determine the application with or without a hearing. However, if there is a hearing, it will be held in private and, if the court so directs, may be wholly or in part in the absence of the party from whom information is being withheld.

New power to hide investigatory methods and techniques

Summary

The amendments to CrimPR **Parts 19.2 and 19.3 place the burden of responsibility on the expert to make relevant disclosure**. They go considerably further than might have been expected. Experts are placed in the position of having to make **objective self-assessments**, and to decide whether they, or the body for which they work, are aware of anything that could affect the reliability of their opinions, or their credibility or impartiality as expert witnesses. Experts will need to give careful thought to this change and to familiarise themselves with the list of examples outlined in PD 19A.7. There might also be a need to keep a sufficiently **detailed record of previous cases** with which they have been involved, particularly when considering the possibility of any conflict of interest, adverse judicial comment or appeals by reason of a deficiency in the expert's evidence.

However, since the position hitherto has been that expert witnesses have had no clear process by which they are able to rebut what they believe is unfair judicial criticism, perhaps these changes are to be welcomed.

References
[1] *R -v- Kelly* [2018] *EWCA Crim* 1893.

Guidance for experts in the Court of

Urgency is common in Court of Protection cases

A common factor in cases where experts get into difficulty is a lack of adequate communication between the expert and the instructing party. Effective case management by the court is the solution because it can ensure timely and full disclosure and exchange of information.

In lengthy or complex cases where circumstances can easily change, and in particular those involving clinical care, poor ongoing communication between the expert, the instructing solicitor and the court can only make matters worse. This is especially true of cases in the Court of Protection. In this court, decisions often need to be taken urgently, so the court does not necessarily follow the normal procedural steps of a typical case in other jurisdictional divisions. These limited case management procedures in the Court of Protection have consequences for experts.

Court of Protection

The functions of the Court of Protection include:

- **deciding whether someone has the mental capacity to make a particular decision for themselves**
- **appointing deputies** to make ongoing decisions for people who lack mental capacity
- **giving people permission to make one-off decisions** on behalf of someone else who lacks mental capacity
- **handling urgent or emergency applications** where a decision must be made on behalf of someone else without delay
- **making decisions about when someone can be deprived of their liberty** under the Mental Capacity Act.

The Court deals mostly with decisions about a person's welfare, property or medical treatment. It can make such decisions itself, or it can give the power to someone else (a 'deputy').

Vulnerable persons may be placed under the protection of the Court by the Official Solicitor, who will assume responsibility for their welfare and protection. Where persons are undergoing some form of clinical treatment, the Court will often hear evidence from the treating clinician when making decisions in relation to the patient or when making any other orders respecting the protection order or persons appointed therein.

Urgency can compromise effective case management

Treating clinicians and their role in the litigation are perhaps atypical of other experts appointed by the court or the parties in other types of proceeding. Indeed, there is often some ambiguity regarding their precise status and the rules governing them. Fortunately, the Court of Protection has recently taken the opportunity to clarify the role and provide guidance for experts.

In *Southwark LBC -v- NP*[1] (24 Oct 2019), a 17 year-old young person (NP) was placed on a child protection plan by Southwark London Borough Council (the LA). NP has cerebral palsy and had been living with her mother. However, the LA was concerned that the mother was neglecting her. NP was hospitalised when she became so malnourished that she was at risk of death. She was diagnosed with atypical anorexia and agreed to a re-feeding programme. But the mother was not supportive and the hospital was concerned that the mother–daughter dynamic was contributing to NP's disorder.

The LA began proceedings in the Court of Protection under the Mental Capacity Act 2005 seeking declarations and best interest decisions in respect of NP under sections 15 and 16 of the 2005 Act. Pursuant to the order of Hayden J, NP was placed in a residential unit. However, due to the urgency of the issues addressed at that hearing, limited litigation case management was possible at the time. Shortly before the matter was due to return to court, the Official Solicitor, acting on NP's behalf, was required to make a without-notice application for permission to file a statement from NP's treating clinician at the respondent hospital, South London and Maudsley NHS Foundation Trust. The application asked whether the court could be placed in a position to make informed decisions for NP's immediate future.

The Official Solicitor considered that it was in NP's best interests to continue living in the residential unit. However, a psychiatrist who had been assessing NP, but who did not have all the evidence on her relationship with the mother, thought it might be appropriate to increase NP's contact with the mother as well as time spent at her home. This proposal was based on the psychiatrist's experience of 'family therapy models' where it was normally helpful to include parents in the treatment of eating disorders. The Official Solicitor felt that such a course might be potentially disastrous for NP and that, had the psychiatrist been made aware of the full history of NP's relationship with her mother and her mother's conduct, the psychiatrist would have expressed a wholly different view.

Hayden J, Vice President of the Court of Protection, was mindful that, at the relevant time, the parties and the court were dealing with a crisis. NP's long-term health and, indeed, her life were in peril. Accordingly, **the orders made reflected the need to act urgently but they did not establish any litigation case management**. Detailed directions, he said, would have been difficult in those circumstances. In the days before the current hearing, the Official Solicitor recognised that nothing had been done in the interim by way of updating the court in a manner that would enable it to take informed decisions for NP's immediate future.

Hayden J identified the danger of what he called 'conceptual silos', in which the parties, experts and professionals fail adequately to share information that will inform their own decision-making. He was at pains to avoid placing the blame on any expert or individual, but said that it was intended as a constructive

observation. The danger was rooted in the difficulty that the Court of Protection has in adhering to established case management processes as a consequence of the dynamic nature of the cases that come before it.

Why aren't experts meeting?

A surprising revelation to come from Hayden J's comments concerned the practice in the Court of Protection regarding meetings of experts. After making inquiries of all the very experienced counsel in the case as to whether they had ever had experience of an experts' meeting being conducted in Court of Protection proceedings, astonishingly only one had, and then only on two occasions! The judge himself said that he did not remember a document reflecting such a meeting being filed in any proceedings. In a court arena where conflicts of expert evidence arise regularly, and in which such evidence is commonplace, this was, to his mind, very odd.

Hayden J also noted that he was rarely called upon to make Disclosure Orders, and had frequently been concerned with poor communication which ought otherwise to have been regarded as integral to informed decision-taking. The judge said that he was convinced that the court and the lawyers could improve case management. To facilitate this, he took the opportunity to set out case management guidance for the Court of Protection, with a particular focus on expert evidence.

New case management guidance

The judge's ruling contained the following advice:

1 The avoidance of delay should be read into Court of Protection proceedings as a facet of Article 6 of the ECHR.

2 Effective case management is intrinsic to the avoidance of delay. Thought should always be given to whether, when and in what circumstances the case should return to court. That will require evaluation of the evidence the court is likely to need and when the case should be heard. Such evaluation should be driven by an unswerving focus on both the protected person's best interests and the ongoing obligation to promote a return to capacity where that is potentially achievable.

3 Where it isn't possible to anticipate what future evidence might be required, parties should monitor development of the case and return to the court for a directions hearing if further evidence is required that necessitates case management.

4 Under the Court of Protection Rules 2017 PD 15A, the use of expert evidence is limited to that necessary to assist the court to resolve the issues in the proceedings.

5 The key elements of an expert's general duties are: (a) the expert has a duty to help the court on matters within their own expertise; (b) their evidence should be independent and uninfluenced by the pressures of the proceedings; (c) they should assist the court by providing objective, unbiased opinion on matters within their expertise, and should not assume the role of an advocate; (d) they should consider all material facts, including those that might detract from their opinion; (e) they should make it clear when a question or issue falls outside their expertise and also when they are unable to reach a definite opinion, e.g. if they have insufficient information; and (f) if they change their view on any material matter, they should let all parties know without delay, and the court when appropriate.

6 The Court of Protection frequently takes evidence from treating clinicians. Such clinicians have precisely the same obligations and duties, when preparing reports and giving evidence, as independently instructed experts. Further, the lawyers must ensure that the clinicians are furnished with all relevant material that is likely to affect their views, conclusions and recommendations. That principle is not merely good litigation practice, but is indivisible from the effective protection of the protected person's welfare and autonomy.

7 Evidence of clinicians, experts, social workers and care specialists are individual features of a broader forensic landscape into which the lay evidence has to be factored. One expert or clinician is unlikely ever to provide the entire answer to the case. It follows that meetings of experts or professionals should always be considered to be a useful tool to share information and identify areas of agreement and disagreement.

8 When evaluating the significance of expert evidence, if the issues being considered are at the parameters or frontier of medical or expert knowledge, that should be properly identified and acknowledged.

9 Witnesses from expert disciplines might be susceptible to 'confirmation bias', meaning they might reach for evidence that supports their proffered conclusion without properly engaging with evidence that might weaken it.

10 Consideration must always be given to relevant, proportionate written questions to an independently instructed expert.

Summary

From the revelations made in this case, you might surmise that the Court of Protection has hitherto been a bastion of resistance to many of the practices adopted by other courts in relation to expert witnesses. The guidelines now issued should return it to the fold.

Management of expert witnesses brought in line with CPR

References

[1] *Southwark LBC -v- NP Court of Protection* [2019] *EWCOP* 48.

Testing statements of truth

Evidential truth is for the jury, not the expert

It is increasingly common for those who have suffered trauma during a crime to receive some form of counselling. This means that counsellors might be party to all manner of information imparted to them by a victim in the course of a counselling session. They are also in a position to note the demeanour of a person at what is often a very early stage in the trauma process and prior to any complaint to the police. While at first sight the reception of such information might seem to be a useful resource for the court, the qualifications of counsellors will vary considerably and their ability to express an opinion on the truth of that information will need testing. **What, then, is the scope of expert evidence from a suitably qualified counsellor?**

This was the question considered by the Court of Appeal in *R -v- (1) SJ (2) MM*[1]. The appellants in the case were the foster parents of two sisters and they were appealing against their convictions for a number of offences of cruelty, assault and rape. The original prosecution evidence came largely from video tapes of police interviews that had taken place over a period of 10 years. Additional evidence was provided by two counsellors who had worked with one of the sisters in the period between her leaving the appellants' home and first talking to the police.

At trial, the court had heard expert evidence from one of the counsellors. In giving that evidence, the counsellor commented on the sister's descriptions of abuse. These, she said, were believable, and she had been deeply convinced of their truth. She gave opinion evidence that the sister's emotional presentation and physical demeanour during the counselling sessions were in keeping with a victim of abuse, and made the comment that she was 'damaged and suffering the effects of abuse'. At the time of the trial, it seems that everyone was prepared, the judge included, to treat the counsellor's evidence as admissible expert evidence.

The foster parents appealed against the conviction on grounds including that the counsellor's evidence had been wrongly labelled as expert evidence. It had been, they said, far too subjective and therefore mostly inadmissible.

The Crown accepted that the evidence was inadmissible in relation to any statements of opinion, any emotive terminology and any references to the counsellor's belief in the truth of the allegations made. It argued, however, that this evidence had not been central to the case and that the directions given to the jury in relation to their assessment of the truth or otherwise of the sisters' statements had been correct.

The Court took the opportunity to explain the status of counsellors as expert witnesses and as witnesses of fact. Coulson LJ outlined the circumstances in which a counsellor might give an expert opinion and when they must not. It's fair to say that the Court had some reluctance in categorising counsellors as experts at all!

Coulson LJ said that the starting point should always be that a counsellor's evidence went to **factual matters only**. The expert opinion of a counsellor might be permissible, for example, if there was some dispute about the counselling techniques used and it was relevant in deciding the value to be attributed to a counsellor's factual evidence. Clearly that would be a rare case!

The Court concluded that there were, perhaps, some limited circumstances in which a counsellor could give evidence about a complainant's demeanour. The Court compared this with, for example, the evidence that might be admissible from a policewoman concerning a victim's level of distress when first interviewed. If such evidence was admitted at all, it was necessary that it should carry little evidential weight and a careful direction to the jury was necessary.

The main reason for allowing evidence from a counsellor is usually to adduce evidence that a complaint was made at the time of an alleged event or shortly thereafter. While the counsellor can give factual evidence as to what was said, they cannot (except as stated above) give their opinion on the demeanour/mental state of the complainant; still less can they offer an opinion on the truth of any statement made. To do so would effectively be saying to the jury that a particular witness was reliable, contrary to the principle in *R -v- Robinson (Raymond)*[2]. It is, of course, for the jury to form its own view on the reliability or otherwise of a witness.

Evidence of the counsellor's opinion in this case was therefore deemed inadmissible. She was not an expert. Not only did her statements offend against the principle in *Robinson*, but they were subjective and contained over-emotive language that should have no place in any witness statement. These statements were not probative, and they ran the clear risk of prejudicing the jury.

The statements of Coulson LJ in this case serve to remind us of the broader principles involved and the need for experts to avoid subjective and emotive language in their reports. Experts should also steer well clear of venturing any opinion on the truth of statements communicated to them by witnesses. The dangers of this were highlighted in *R -v- C*[3].

The case involved historical sexual offences against children. During the course of the trial, two experts were permitted to give their opinion on the truth of statements made by the children, and the judge directed the jury that it was entitled to use those opinions as evidence supporting the truth of the allegations. Quashing the convictions and ordering a retrial, the Court of Appeal said in *R -v- C* that evidence given by experts that tended to convey to the jury the expert's opinion of the truth or otherwise of the complaint was clearly inadmissible. **The truth and reliability of the evidence is a matter for the jury, not for the expert**.

References

[1] *R -v- (1) SJ (2) MM* [2019] *EWCA Crim* 1570.

[2] *R -v- Robinson (Raymond)* [1994] 3 *All ER* 346.

[3] *R -v- C* [2012] *EWCA Crim* 1478.

Mental health in Scottish courts

In most jurisdictions, evidence of abnormality of mind in support of a defence of diminished responsibility must be given by a suitably qualified expert. In recent years, however, there has been some departure from this in the Scottish criminal courts.

Following the hearing of an appeal in the case of *Galbraith*[1] by the Scottish High Court of Justiciary, it was taken that, on a broad interpretation, the court could accept non-expert (lay) evidence expressing an opinion on whether a person suffered from an abnormality of mind and whether it was present at the time of a relevant incident. This interpretation was recognised in *Graham (Wendy) -v- HM Advocate High Court of Justiciary (Appeal)*[2].

That case involved an appeal against a conviction for murder. The appellant had stabbed her partner multiple times having consumed alcohol and drugs. Although the appellant had advanced a plea of diminished responsibility, she did not adduce any medical evidence in support of it, despite having obtained a report from a psychiatrist who believed that the appellant's behaviour was highly suggestive of an emotionally unstable personality disorder.

The Crown adduced two forensic psychiatrists who considered that the most prominent feature at the time of the killing was the appellant's substantial consumption of alcohol and drugs. Accordingly, the judge withdrew the plea of diminished responsibility from the jury's consideration.

The appeal against conviction sought to adduce new evidence from a Chartered Psychologist on the appellant's psychological state at the time of the killing. The Chartered Psychologist's evidence advanced the view that the appellant would not have had the capacity to think rationally or control her reactions, having been driven by years of abuse and trauma. The Scottish Criminal Cases Review Commission had expressed the view that this new evidence might have led a reasonable jury to conclude that the appellant's responsibility for the killing of her partner was diminished.

The appeal court acknowledged that in Scotland there is no prohibition on persons who are not psychiatrists expressing an opinion on whether a person suffers from an abnormality of mind and whether it was present at the time of a relevant incident. However, it is still necessary that such evidence should pass the test in *Kennedy -v- Cordia (Services) LLP*[3].

Kennedy -v- Cordia

We have reported on *Kennedy* previously in *Your Witness* 83. In that case, the UK's Supreme Court gave detailed consideration to the admissibility of expert evidence generally and offered its views, amongst other matter, on the distinction between opinion and expert evidence of fact. The judge in *Kennedy* identified two grounds that must be established before admitting expert evidence.

1. Does the subject matter fall within that class of subjects upon which expert testimony is permissible? (i.e. Is the subject matter such that a person without instruction or experience in that area of knowledge could not form a sound judgment without assistance from those possessing special knowledge? Does the opinion form part of a body of knowledge that is sufficiently well organised and recognised to be regarded as reliable?)

2. Has the expert acquired by study and experience sufficient knowledge to render the given opinion of value in resolving the issues?

Applying the test in *Kennedy*, the court in *Graham* considered that, although a clinical psychologist might well be able to diagnose a personality disorder, it might be a different matter if they were being asked to give evidence about the interaction of the disorder with alcohol or drugs, or if they purported to speak to organic changes in a person's brain, which had not been confirmed by scanning.

Noting that there was no reasonable explanation as to why the psychologist's evidence had not been presented at the trial, the court took the view that the evidence was, in any event, not capable of being regarded by a reasonable jury as reliable. Even if it were, it was not likely to have had a material bearing on the jury's consideration of the issue of diminished responsibility.

Despite the broad interpretation of *Galbraith* that could allow non-expert opinion to be given on whether or not a person was suffering from an abnormality of mind, the court held that, in relation to opinion evidence from whatever discipline, it remains important that the court ensures that the **witnesses called to speak to the state of an accused's mind and its effect on subsequent actions have the appropriate qualifications, by training and experience, to give expert evidence**.

In dismissing the appeal, the court evidently had some misgivings concerning the broad interpretation of the judgment in *Galbraith*. It is, perhaps, unsurprising that concerns were expressed.

Leave it to the experts

As matters stand, there is some danger that opinion evidence can be led in Scottish courts by persons who may not be competent to express such opinions. Giving its decision, the court suggested that the Scottish Law Commission should give consideration to the matter in its current review of the law of homicide, and that it should make appropriate recommendations on the qualifications that should be demanded by the court before a witness is asked to give evidence that might have very important and serious consequences in the context of a murder trial. We find it difficult to argue with that!

Should courts accept lay opinions on abnormalities of the mind?

References

[1] *Galbraith (Kim) -v- HM Advocate (No.2)* 2002 *JC 1* [2001] 6 *WLUK* 455.

[2] *Graham (Wendy) -v- HM Advocate High Court of Justiciary (Appeal)* [2018] *HCJAC* 57.

[3] *Kennedy -v- Cordia (Services) LLP* [2016] UKSC 6.

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Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 71). All are available and searchable on-line. Topics covered include expert evidence, terms and conditions, getting paid, training, etc.

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Now exceeding 100 issues, our regular condensed e-wire is our fast link to you. Containing shortened articles, as well as conference notices and details of urgent changes that could impact on your work, it is free to all members.

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Distilled from three decades of working with expert witnesses, our *Little Books* offer insights into different aspects of expert witness work. Point your browser at *www.jspubs.com/books* to find out more.

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You can choose to submit yourself to regular scrutiny by instructing lawyers in a number of key areas to both enhance your expert profile and give you access to our dated logo. The results of re-vetting are published in summary form in the printed *Register*, and in detail on line.

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