

## Chapter 14

### Expert Evidence

#### KEY MATERIALS

##### Legislation

[Coroners & Justice Act 2009 s.1](#)

[Coroners Allowances, Fees and Expenses Regulations 2013](#) reg.9. reg 10

[Civil Legal Aid \(Remuneration\) \(Amendment\) Regulations 2013](#)

[Civil Procedure Rules – Part 35](#)

##### Chief Coroner's Law Sheet:

[Law Sheet No. 5: Discretion of the Coroner](#)

##### Introduction

1. An expert witness is defined as a witness who provides to the court a statement of opinion on any admissible matter calling for expertise and who is qualified to give such an opinion.
2. The duty of an expert is to provide independent assistance to the court by way of objective and unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.<sup>1</sup>
3. The use of experts must be consistent with the coroner's duty under s.1 of the Coroners and Justice Act 2009 (the Act) to investigate who, when, where and how a person came by their death.

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<sup>1</sup> [R v Harris and Others \[2005\] EWCA Crim1980](#)

4. The coronial legislation does not set down rules or regulations specifically relevant to expert evidence, however coroners may wish to be guided by the principles regarding experts and their evidence set out within [Part 35](#) of the Civil Procedure Rules and the associated [practice direction](#).
5. In particular:
  - The substance of an expert's evidence should be set out in a written report that is made available in advance to all interested persons (IPs);
  - It is the duty of experts to help the court on matters within their expertise;
  - Expert evidence should be the independent product of the expert; uninfluenced by the pressures of litigation;<sup>2</sup>
  - Experts should consider all material facts, including those which might detract from their opinions;
  - Experts' reports should set out those facts and any literature or material on which they have relied in forming their opinions. Experts should indicate if an opinion is provisional, or qualified, or where they consider that further information is required or if, for any other reason, they are not satisfied that an opinion can be expressed finally and without qualification;
  - Experts should make clear when a question falls outside their expertise;<sup>3</sup>
  - There are no closed categories of expert evidence.<sup>4</sup>

### **Whether to instruct an expert**

6. Expert evidence will not be required in every case and the coroner has a wide discretion to decide which witnesses will be called and whether or not expert evidence is necessary to assist with understanding the evidence or answering the statutory questions.<sup>5</sup> The discretion must be exercised reasonably and fairly. There is no requirement to call an expert proposed by an interested person (IP) and the courts will

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<sup>2</sup> [R v Cleobury \[2012\] EWCA Crim 17](#)

<sup>3</sup> [R v Clarke & Anor \[2013\] EWCA Crim 162](#)

<sup>4</sup> *R v Clarke (RL) [1995] 2 Cr. APP.R.425* where, Steyn LJ stated that there were no closed categories of expert evidence that could be placed before a jury. It would "be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and advances in science".

<sup>5</sup> [R \(Mack\) v HM Coroner for Birmingham & Solihull \[2011\] EWCA Civ 712](#), [2011] Inquest Law Reports 17.

be slow to interfere with a coroner's choice of expert, even in an Article 2 inquest.<sup>6</sup> Rather, each case is judged on its own merits:<sup>7</sup> for example, independent psychiatric evidence will not be required in every case of potential suicide where there is an issue regarding the deceased's mental health or mental health treatment,<sup>8</sup> as in many cases the evidence of factual witnesses can appropriately cover sufficient matters to answer the four statutory questions.

7. However, where that matter could not be expected to otherwise be within the knowledge of the coroner or a jury then in the absence of expert evidence on a key issue (such as causation or acceptable professional standards) there may be an insufficiency of investigation.<sup>9</sup> On the facts of some cases independent expert evidence may be needed to meet Article 2 obligations.<sup>10</sup>
8. Where an IP proposes that a coroner should call expert evidence the relevant question for the coroner is likely to be whether such expert evidence is necessary to resolve issues that fall within the scope of the inquest? The IP should be invited to identify not only the professional discipline of the expert proposed, but the issues the IP believes can only be determined/resolved by expert evidence.<sup>11</sup>

### **Identifying an appropriate expert**

9. There are several registers of expert witnesses available on internet sites, listing individuals who are prepared to act as experts in particular fields. However, anyone can apply to be put on such registers and it does not necessarily mean that the individual expert is right for a particular case or has the required level of expertise.
10. Where the coronial area does not have previous knowledge of a suitable expert assistance of coroners in other jurisdictions might be sought to identify an appropriate expert. It may also be appropriate to seek the assistance of those representing the IPs. It

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<sup>6</sup> [R \(Warren\) v Assistant Deputy Coroner for Northamptonshire and others \[2008\] EWHC 966 \(Admin\)](#), [2008] Inquest Law Reports 65.

<sup>7</sup> [R \(Goodson\) v Bedfordshire & Luton Coroner \[2006\] 1WLR 432](#)

<sup>8</sup> [R \(Chambers\) v HM Coroner for Preston & West Lancashire \[2015\] EWHC 31 \(Admin\)](#)

<sup>9</sup> [R \(Wright\) v Secretary of State for Home Department \[2001\] EWHC Admin 520](#)

<sup>10</sup> See *Warren* op cit. at §42 and §45

<sup>11</sup> [R \(Takoushis\) v HM Coroner for Inner North London \[2005\] EWCA Civ 1440](#)

will often be preferable if agreement can be reached with the IPs as to the nature of any independent expert evidence to be sought and the identity of the expert to be engaged, however the final decision is a matter of coronial discretion.

11. Before instructing any expert the coroner should establish that the person in question:
  - a. has the appropriate expertise and experience relevant to the particular case;
  - b. can produce a report, deal with questions and if necessary have discussions with other experts within a reasonable time, and at a cost proportionate to the matters in issue;
  - c. is familiar with their duties to the court in the context of the inquisitorial nature of coronial proceedings;
  - d. is available to attend the inquest if required; and
  - e. has no potential conflict of interest.

### **Experts previously instructed by an IP**

12. Where an IP has already obtained an expert report and presents this to the court, it remains a decision for the coroner whether it is necessary to admit this written evidence and/or to call that expert to give additional oral evidence. Where the expert's evidence is both relevant to matters within the scope of the inquest and not already available from another source, the coroner should be open to such a request. However it may be the case that the coroner has reason to instruct their own expert instead or additionally.
13. The coroner should be cautious of adopting as their own or only expert witness an expert initially instructed by an IP if there likely to be a suggestion of a professional conflict or lack of independence on the part of such an expert. Where an expert report is offered to the court by an IP it would be reasonable to request that any relevant correspondence between the IP and the expert regarding their instruction and any earlier document in which the expert has expressed any opinion is provided to the coroner before the decision is made whether the expert is sufficiently independent of those who initially obtained their report.

14. Once the coroner adopts such an expert it is usual to make a direction that the IP who had originally instructed the expert should have no further unilateral contact with the expert, save where such contact is with the knowledge and agreement of the court.
15. In such cases, the coroner should not be expected to meet the costs of the initial expert report obtained by the IP, however once the expert is adopted by the coroner, they become the court's witness and so from that point forward the court will usually become liable for the expert's fees in respect of any further work (including the expert's expenses if they are called to attend a hearing). As the coroner will wish to be mindful of the public purse the coroner may wish to come to a fresh agreement with the expert regarding the level of fees to be charged in respect of their fresh instruction in these circumstances (the issue of expert fees is discussed further below).
16. Where the bereaved have obtained an expert report there may be circumstances where calling that witness would be appropriate as a matter of practical justice, exploring their opinion in public may be an important aspect of allaying suspicions.<sup>12</sup>
17. Where an IP has obtained an expert report that they do not wish to share with the coroner the situation is more complex. The Northern Irish Court of Appeal<sup>13</sup> has recently confirmed that litigation privilege does not apply to reports obtained by IPs solely for the purpose of an inquest. In theory such a report might, therefore, be obtained from a reluctant IP by means of a schedule 5 notice.<sup>14</sup> However the NI Court of Appeal considered that, in circumstances where the coroner already had a report from an expert that he had felt was a sufficient basis for proceeding with the inquest, then, even in the absence of litigation privilege, the public interest would not usually favour ordering disclosure of a report obtained on behalf of the bereaved. The NI Court of Appeal considered that there was a public interest in encouraging IPs to carry out appropriate investigations in the preparation of their cases and compulsory disclosure of such reports as a matter of course would be likely to discourage such investigations.

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<sup>12</sup> [R \(LePage\) v HM Assistant Deputy Coroner for Inner South London \[2012\] EWHC 1485 \(Admin\)](#), [2012] Inquest Law Reports 31 at §61-63.

<sup>13</sup> [Re Ketcher and Mitchell \[2020\] NICA 31](#), [2020] Inquest Law Reports 76.

<sup>14</sup> See Chapter 12 on disclosure

## How to instruct the expert

18. Instructions to the expert should always be in writing.<sup>15</sup> Instructions should set out the purpose of the report, including a description of the relevant matter(s) to be investigated by the coroner and the issues to be addressed by the expert. The letter should be written in neutral terms, setting out the essential factual background and identifying any potentially relevant dispute of facts. Where there are alternative factual scenarios within the available documentary evidence, the coroner should be careful not to appear to have come to any factual conclusion in their instructions. It should be made clear to the expert that the facts are for the coroner (or jury) to determine at the inquest and that, if the expert would have a different opinion if a different constellation of facts was found, then any alternative opinion should be provided in their report.
19. A letter of instruction will usually set out the terms upon which the instruction is given including:
  - a. the services required of the expert (e.g. provision of an expert's report, answering questions in writing, attendance at court and where relevant, whether this might be facilitated remotely);
  - b. the date for delivery of the report;
  - c. the date of the inquest, with a request that the expert reserve the relevant dates for attendance, if this is already known;
  - d. the basis of the expert's charges (e.g. daily or hourly rates and an estimate of the time likely to be required, or a fixed fee for the services);
  - e. payment of travelling expenses and fees for attending court;
  - f. cancellation charges;
  - g. time for making the payment and who in the coroner's administrative team will be responsible for arranging payment to be made;
20. The letter of instruction will normally be accompanied by the relevant documentary evidence or give details of how to access documents from a cloud based folder. An example of a letter of instruction is [here](#) (Appendix 14.1).

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<sup>15</sup> Usually the substance of the instructions should be reflected in the expert's report and so it will generally not be necessary to disclose the letter of instruction to IPs. However, instructions may be subsequently shared with IPs if a relevant question about the nature of the instructions arises.

21. In some cases it may be appropriate to share with and invite comments from IPs upon a draft of the letter of instruction and/or the specific questions being asked of the expert, however there is no requirement to do so.

### **Format of the expert report**

22. Whilst expert reports can take many forms, it is good practice for an expert reporting to a coroner to follow CPR 35 and the [practice direction to Part 35](#). There are some universally helpful elements that experts might be asked to include:
  - a. a statement of the substance of all material instructions, whether written or oral, on the basis of which the report was written;
  - b. the details of experts' qualifications. This should be commensurate with the nature and complexity of the case. It may be sufficient to state any academic and professional qualifications. However, where highly specialised expertise is called for, experts should include the detail of particular training and/or experience that qualifies them to provide that specialist evidence;
  - c. where tests of a scientific or technical nature have been carried out, experts should state: the methodology used; and by whom the tests were undertaken and under whose supervision, summarising their respective qualifications and experience;
  - d. when addressing questions of fact and opinion, experts should keep the two separate. Experts must state those facts (whether assumed or otherwise) upon which their opinions are based and distinguish clearly between those facts that they know to be true and those facts which they assume;
  - e. where there are material facts in issue experts should express separate opinions on each potential scenario. They should not express a view in favour of one or other disputed version of the facts unless, as a result of their particular expertise and experience, they consider one set of facts as being improbable or less probable, in which case they may express that view and should give reasons for holding it;

- f. where there is a range of opinion experts should summarise this and where that range of opinion is based on published sources, experts should explain those sources and, where appropriate, state the qualifications of the originator(s) of the opinions from which they differ, particularly if such opinions represent a well-established school of thought;
- g. reports should include the reasoning for the conclusions and end with a summary of those conclusions;
- h. experts should be encouraged to format their reports with paragraph numbering to aid questioning about selected parts of their report;
- i. reports should be signed and dated with a statement of truth.

23. There is no standard declaration of truth for experts in the coroner's courts, but experts might be invited to adopt the form used in civil proceedings, which is as follows:

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

### **Dealing with conflicting expert evidence in advance of the inquest**

24. Where more than one expert report is available and these reveal a difference of expert opinion, the coroner may wish to consider directing that there is to be a meeting of the experts at which they might, where possible, reach an agreed opinion on relevant issues or at least narrow down those areas/issues that are in dispute in advance of the inquest. Such expert discussions, usually held by telephone or video link, to narrow issues are now commonplace in the civil and criminal jurisdictions.<sup>16</sup> An example of a letter instructing experts to hold a joint expert meeting is [here](#) (Appendix 14.2).

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<sup>16</sup> See for example: Civil Procedure Rules [35.12](#) and [R v Henderson & others \[2010\] EWCA Crim 1269](#)



25. The coroner may wish to draw up an agenda for that expert meeting having invited input from the IPs. The experts' meeting is a private professional discussion which should take place in the absence of the coroner, the IPs or their legal representatives.<sup>17</sup>
26. The experts will usually be directed to produce a document setting out what is agreed between them and outlining the issues that remain in dispute following the meeting. This should be signed by all of the experts involved and provided directly to the coroner.

### **Concurrent expert evidence**

27. Concurrent expert evidence (or more colloquially, 'hot-tubbing') is where, rather than examining experts individually and sequentially, two experts are sworn in at the same time and effectively sit together in the witness box and are available, simultaneously, to answer questions. The experts are then asked to respond to questions consecutively, most often on an issue by issue basis.
28. Taking evidence in such a way can generate an opportunity for the experts to engage in constructive discussion in the formal setting of a court hearing. This can be a useful and effective way to deal with multiple expert opinions. In an inquisitorial jurisdiction it can also discourage adversarial examination and more easily enable consensus views to be reached by the experts if appropriate.
29. Concurrent experts may be of the same discipline or, particularly where complex issues of medical causation are being addressed, might be of separate but complementary specialist disciplines.
30. Normally the coroner will take the experts through their reports in parallel and will explore any differences between them on each key topic. At the end of the coroner's questioning, or at the end of the coroner's questioning on each issue, the coroner may then invite the respective IPs or their advocates to further question the experts. Whilst this approach may require greater preparation by the coroner, it can often address key

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<sup>17</sup> [R v Henderson & others \[2010\] EWCA Crim 1269](#), at [210] et seq.

issues more efficiently and so not only save hearing time but avoid the need to recall an expert witness to deal with something that has been said by a subsequent expert.

31. During concurrent expert evidence it is even permissible, under the coroner's watchful guidance, for the experts to pose questions of each other. The professional discussion that can then ensue will often reveal and test the relevant opinions far quicker than questions framed by the coroner or the IPs' representatives might do.

### **Experts as an assessor**

32. Rarely a coroner may choose to sit with an expert assessor in cases where they need assistance in asking questions of witnesses who are giving complex technical evidence. The assessor often sits alongside the coroner on the bench and is invited to ask questions of the witnesses, but this must be carefully controlled.
33. The assessor will not give oral evidence or be open to cross-examination or questioning.
34. The coroner must be careful to avoid any suggestion that any decisions, findings or conclusions are being reached by the assessor. At the conclusion of the evidence the assessor should not retire with the coroner.
35. It may be prudent to obtain the consent of the relevant Local Authority to the (potentially significant) expenditure before appointing an assessor.

### **Fees payable**

36. By [reg 9](#) of the [Coroners Allowances, Fees and Expenses Regulations 2013](#), a coroner may pay an expert witness, who has carried out preparatory work directly related to the giving of evidence at an inquest, a fee that the coroner considers reasonable having regards to the nature and complexity of the preparatory work carried out.
37. A coroner may also pay an expert witness a fee that the coroner considers reasonable for attending and giving evidence at the inquest ([reg 10\(1\)](#)).

38. When considering what level of fee is reasonable under [reg 10\(1\)](#) the coroner shall have regard to the nature and complexity of the evidence provided by the expert witness.
39. There is no set rate for experts in coroner's courts but a reasonable starting point for the negotiation of expert fees is the schedule of appropriate expert fees set out by the Legal Aid Agency in the government's '[Guidance for Remuneration of Expert Witnesses](#)' and, in particular, the fees set in schedule 5 of the [Civil Legal Aid \(Remuneration\) \(Amendment\) Regulations 2013](#).