Expert Witnesses - Vital Participants in Civil Justice

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Closing Keynote - remote

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Thank you very much for inviting me to speak today.

Expert evidence has always interested me. When I was a barrister practising in the Patents Court that interest was what you might call enlightened self-interest, because the major task of a patent junior was focused on the expert evidence, helping in the preparation of it and helping prepare the cross-examination. I have fond memories of being a baby junior working with the Robin Jacob QC as he cross-examined an expert in a patent case about the Sony Walkman.

As your career in patents develops you start to cross-examine the experts yourself. I dealt with subjects ranging from particle size measurements in chocolate, x-ray crystallography, genetic engineering and statistics. As a trial judge in the same field, the assessment of expert evidence plays a crucial part of the task of deciding the case. As my judicial career has developed beyond the specialist world of intellectual property, I inevitably encountered expert witness in a much wider range of cases. One thing which stands out from my work in recent years, is the importance of expert evidence in personal injury cases, including a whole spectrum: from cases about serious injuries and clinical negligence, to the higher volume county court work on whiplash RTAs.

Some common themes emerge from this experience of the Bar and the Bench. Let me mention a few.

1. We really need expert evidence. The title of this address is "vital participants in civil justice". One thing I can say right now is that it is manifest that expert witnesses do have a vital role in civil justice, and that is what I wish to focus upon.
2. But, we really need expert evidence to be kept under control. In this context the most two important rules in the CPR are r35.1 and r35.3.
    a. The title of r35.1 make clear that there is a *duty* to *restrict* expert evidence and, as the rule states:

        "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings."

    b. The title of r35.3 makes clear that experts have an *overriding* duty to help the court in their field. As that rule states:

        "(1) It is the duty of experts to help the court on matters within their expertise.

        (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid."
3. Now, it is important to understand that the need for these rules is not personal. The rules do not exist as a criticism of individual experts themselves. One might ask why

we have these rules focused as they on experts whereas we do not the same rules for other evidence, i.e. fact evidence. The essential reasons I think are two fold:

a. One is because the other kind of evidence - fact evidence - i.e. evidence of what happened, is naturally self-limiting at least to a degree. If only two people were there when it happened, there will probably only be two fact witnesses. Now I am not naive – there are problems with fact evidence (although I refer to PD57AD in the Business and Property Courts which has addressed a number of them). However unlike most fact evidence, expert evidence is not inherently self limiting, and these two duties combine to address that characteristic.

b. The other is because by definition expert evidence is about something on which, by their legal training, the judges and the lawyers are not experts. It is in that sense inherently "other". The nature of expert evidence means that the courts are heavily reliant on the experts themselves to identify what is relevant to the point they are making. This is much more so than for fact witnesses, when the judges can assess relevance much more easily.

4. It is also important to understand that the requirements of the duties embodied by these two rules – and the various detailed rules and practices which follow from them – have an impact on everyone in the justice system: the lawyers, the parties, the experts and the court itself. We all have a role to play. And to be clear I do mean both duties. The expert's overriding duty to the court is not just something for the expert, it is something the lawyers and their clients need to understand – and if necessary explain to the experts.

5. However overall, reflecting on these two duties, I think it is right to acknowledge that the rule exists because experience shows that too often this vital aspect of the civil justice system still causes difficulties. Again I want repeat this is not personal, and we all have a role to play, but it would be idle to pretend there are not difficulties.

So, what are the major dimensions to the difficulties I am referring to in civil justice at the moment? Well let me identify two difficulties:

First, despite the best efforts of all concerned, expert evidence still has a tendency to take up a great deal of time and cost, very often more than is sensible. Now there are many successes. One example, which we take for granted, is that it is I think more or less axiomatic that for any given discipline the party ought only to call one expert. Save for rare exceptions, a party does not get to call duplicative expert evidence. I mention this because I have friends in other countries in which – they tell me - duplicative expert evidence is not unusual. But they do not have the equivalent of r35.1. So the duty to restrict is a good rule – but there is much more to do on this.

Second, is a problem I want to mention which is different and I think much rarer, but it is important nevertheless. I mean the problem of poor expert evidence which is inadequately challenged. The risk of poor expert evidence is one of the reasons why we have r35.3. Now the adversarial nature of our civil justice system is the fundamental tool we have to identify error and challenge evidence, to get to the truth and justice of the case as best one can. But for that to work the challenge has to be effective. And I think there may be room for improvement.

Now one aspect of my current role as DHCJ is that I am the Deputy Chair of the Civil Justice Council. And this event is timely because at our March meeting this year I suggested that an area for future work for the CJC was experts. For example, as I hope you know, in 2014 the CJC published guidance for the instruction of experts in civil claims, which sought to assist litigants, those instructing experts, and experts themselves to understand best practice in complying with Part 35 and court orders. At our meeting it was agreed that this existing guidance should be reviewed, with the view to either updating it (or indeed politely retiring it if it is completely outdated or ineffective) or launching a wider review to answer broader policy questions. Now that work is still very much at the planning stage, but this means that if any of you have any particular issues you think the CJC should consider, it would be very helpful to hear them.

And in the meantime let me explain a bit more of my thinking on this topic.

Before I go any further, as so often with the process of civil justice, the diversity of this part of the legal sector becomes very important the minute one starts looking at it. To take an example – consider this question: should we expect expert witnesses to be experts in being expert witnesses? Professional expert witnesses might be part of a way to address the difficulties mentioned.

In the medico-legal world of personal injury and clinical negligence, many medical experts (but not all, I acknowledge) give expert opinions and evidence on a regular basis, some a very great deal. Some are essentially professional expert witnesses, and we see similar professionals in construction and in forensic accountancy. In contexts like this one can usefully work to promote and improve professional standards – which I know this institute undertakes (other institutions are available).

However to give an example from my own experience, in patent cases many experts have no expertise in being expert witnesses. They will never have done it before and may very well never do it again. There are certainly exceptions (organic chemical synthesis used to be a common one) but many patent cases require expertise which is a one off and which will be on a topic which will never come back to court. If you are an expert in growing the microorganism which produces an antigen for a vaccine for whooping cough, you may very well only give evidence in a court once, at the trial of a patent about growing bugs to make whooping cough vaccines. There is no-one with experience of giving expert evidence who would be qualified to give the evidence required in a case like that.

I mention this contrast because while proper standards are always crucial, the means to achieve that will differ and the example I give illustrates that one size does not fit all. We already have a scheme in personal injury for accrediting certain experts using the MedCo scheme. It is hard to see how one could have a similar accreditation scheme for experts in the growth of *Bordatella pertussis*, but that does not mean one could not consider whether further forms of expert accreditation might not be worthy of consideration.

A common issue in my experience is the *basis* for the expert evidence. Experts are there to express opinions, but what really matters is not so much the opinion itself but the reasons for it and the material on which it is based. After all if what the court is provided with is a conclusory opinion, one may as well delegate the decision to the expert – and that is not the point at all. For justice to be done the court needs to understand the basis for the opinion so that the court is able to evaluate it and decide what weight to put on it.

To take a topical example - what if the expert has used AI?

Well I hope the answer is obvious.

I will explain it by reference to the judicial guidance we have promulgated on AI. This emphasises that individual judges take full personal responsibility for what goes out in their name. So, just like a Google search on the internet, AI also can be handy for reminding you of something you knew but had forgotten, but also just like googling, AI is a poor and unsafe tool for finding the answer to a question you do not your self know and cannot recognise as correct. We all make mistakes but blaming AI for a mistake in your expert's report is no excuse.

An area of legal practice in which AI in already well established – and judicially endorsed – is in the disclosure process for very large data sets. So called Technology Assisted Review (TAR) has been around for a decade at least. Using TAR, experienced lawyers train the machine learning model by example, by identifying a small set of relevant documents, then the machine trawls through the whole data set with the aim of sorting out the wheat from the chaff. I mention this to make two points. One it is an example to show that used properly, AI has significant potential. The other is to highlight the point that the volumes of material which we have to grapple with in civil cases is only going in one direction. What with email, messaging systems like WhatsApp, AI driven transcripts of Teams meetings and the like, we are close to the point that it is not realistic to expect human beings to grapple with these large data sets unaided. We may even have passed it .

So when one is asked to give an opinion as an expert based on the material in a case, it may be necessary, not to say inevitable to use modern technology to identify the particular documents to grapple with. Does that use of AI need to be disclosed? Well if that really is all that the technology is being used for – as a tool to fish out potentially relevant material from disclosure already given by the other party– then the answer is no. No more than one would laboriously explain that a word search was carried out to find something. But of course, if a point was advanced which made the method of searching itself relevant – such as a statement that these are the only documents in the collection which are important – then the technique used would matter and would need to be disclosed. That is, I hope, a statement of the obvious.

But just as we have judicial guidance, so there might be need for similar guidance for experts. And to come back to the CJC for a moment, we also have a separate strand of work now underway looking whether there need to be rules relating to the use of AI in the preparation of court documents – like pleadings, witness statements and expert's reports.

And it is worth reflecting that the idea of using expert evidence in English courts is an old one and the importance of the *basis* for the opinion has been well recognised. In the (relatively) well known case about the silting up of the harbour at Wells next the sea in Norfolk in the 1780s (*Folkes v Chadd*, (1782) 3 Doug KB 157). In this case Lord Mansfield held that the *opinion* of the famous engineer John Smeaton – he who built lighthouses and the like and is now called the father of civil engineering - was admissible based as it was on facts which he himself was not attesting to. As Lord Mansfield said "Mr Smeaton is going to speak, not as to fact, but as to opinion". And that was admissible. The critical point – then as much as now – is that one can see the facts on which the opinion was based. And in

matters of science of this kind, there is no other kind of useful evidence (i.e. other than opinions of this sort).

And as Lawton LJ said a bit more recently but still in 1975 (R v Turner) [1975] QB 834:

> Before a court can assess the value of an opinion it must know the facts upon which it is based … it is wrong to leave the other side to elicit the facts by cross-examination

On the subject of expert's reports, I should tell you why I am here. In October last year I had the pleasure of meeting the Chief Executive Officer of the EWI, Simon Berney-Edwards. The context was a concern raised by the EWI about the page limit for expert's reports in the then new fixed costs Intermediate Track – for claims above the Fast Track up to £100,000 in value. The rule is CPR rule 28.14 (3) and it came in as part of the new rules on fixed costs for these cases. Now that limit excludes necessary photos, plans and academic or technical articles attached and the court can always grant permission for more. But I would like to take this opportunity to say to you directly that a 20 page limit of that kind really should not be a problem. 20 pages is a lot. Just as an example, in the Court of Appeal there is an equivalent provision, which applies across the board, limiting skeleton arguments to 25 pages (subject to the court giving permission) Part 52 PD52C paragraph 31.

But if you remain concerned, you should know that the CPRC is conducting a stock take of these fixed costs provisions later this year and please do use it if you wish to, to express your views.

Now finally I want to mention two recent developments which you might wish to know about and contribute to.

First, we now have the Online Procedure Rule Committee. It has a broad remit, potentially across the whole of the civil, family and tribunals justice systems, to improve access to justice in that sphere by harnessing the potential of digital systems. The first SI has been passed which gives the OPRC a specific remit in property and possession – and work is underway with HMCTS on the new digital system for these cases – but work is also going on to look at how to transform the space before cases come to court, by having a set of overarching principles and promoting interoperability of the systems in that sphere by the use of data standards. I would expect expert witnesses to have a role in that area – not just I the context of expert determinations but perhaps in other ways too. We know for example that pre-action medical reports play a key role in personal injury cases.

And there is to be a new pilot – hopefully starting in certain Business and Property Courts in the Rolls Building, such as the Commercial Court – in which a new approach to transparency of certain documents it taken. You are aware that many documents such as experts report can be made available to the public once deployed in court– albeit the process in the CPR is relatively cumbersome. The idea of this pilot – subject to ministerial approval as all rule changes are - is to use digital technology to make some of these documents more readily available – thereby improving the transparency of the proceedings, which is a fundamental of our justice system. It will be very interesting to see how that develops.

So there is a lot going on and. as I said at the start – you – expert witnesses – are indeed vital participants on the process of justice. I am looking forward to working with you in future on some of these projects.

Thank you.