The expert witness and the lawyers

The English legal system permits an expert qualified by learning and experience to give opinion evidence in court. This is an exception to the sensible general rule that a witness may only give evidence of fact (what he did, said, saw or heard) and may not express his opinion on the facts, however sincerely held. The rationale for this unique exception to the normal rule is not that the expert opinion is intended to be definitive of guilt or innocence, or in a civil case determinative of the outcome of the dispute. It is rather that where the allegations or issues to be tried involve complex matters of which the judge and/or jury are ignorant, they shall receive proper assistance from those who are skilled in them, and who are by specialist knowledge equipped and able to interpret and explain them, and to promote a proper understanding in the minds of those who must do the deciding.

It is not, nor should it be, any offence on the part of an expert who gives evidence before a court, that in the view of the judge or jury his opinion is not in the end persuasive, or that it is held to be wrong, or mistaken, or is for whatever reason disregarded or not preferred. Provided his opinion is honestly held, and impartially presented, after careful enquiry and research, the expert witness has done his duty and done it properly. Just as it is not of itself negligence on the part of a professional simply to make a mistake or to have a bad outcome, so it is not improper or professionally culpable for an expert witness to have formed and expressed an opinion which is not accepted, or is held after forensic enquiry to have been wrong.

The validity of opinions

By way of example, there will in every contested medical negligence action be two opposing and often diametrically contrary opinions expressed by experts on either side. Those opinions may be presented, entirely fairly and honestly, in terms which allow no middle ground whereby each represents part of the truth. Unlike the situation at a scientific symposium, where the audience may take away their impressions of the differing views for further thought or research, and one day reach a scientifically conclusive view one way or the other, the expert witnesses' opinions are offered in the context of an adversarial trial, a process designed to arrive there and then at an answer which favours one side of an argument over the other.

In this context the judge must decide which of the two should prevail, always of course with the unscientific luxury of determining the issue 'on the balance of probabilities'. In effect he will be deciding that one of them is most probably wrong, or at least not provenly right, about the significance of the facts and/or about the justification for the decisions or actions of the defendant. Yet at the end of these cases we do not expect a hue and cry, or allegations that the expert whose opinion has been rejected has acted dishonestly, improperly or culpably. Particularly in medicine, but also in other specialist disciplines, there is often room for opposing views to be held by experts whose respective interpretations of the facts, or of the inferences properly to be drawn from the facts, differ markedly on grounds which are at least arguable, and are advanced with complete sincerity.

To say this is not of course to excuse some of the more extreme errors of which unwise experts can be guilty. It is important, for example, always to avoid lurid or inflammatory language in conveying an opinion to a judge or jury, although there may be a very fine line between translating abstruse scientific concepts into language which ordinary and unscientific audiences can understand (which is a skill required of an expert witness) and dramatising or over-simplifying the difficult material which it is one's task to get across.

Sir Roy Meadow gave evidence in the Sally Clarke trial of a kind and in a manner which led, subject to his pending appeal, to a finding of serious professional misconduct and erasure by the General Medical Council. Irrespective of any failings on his part, it is reasonable to ask what the lawyers who made the decision to call him, and who led the now tainted evidence from him in the witness box, had themselves done to test and to confirm to their own satisfaction the validity of his statistics, and the reliability of his opinion on their significance, before he laid them before the jury. Did they subject the statistics, or the conclusions which he asserted could be derived from them, to logical analysis in advance? Did they enlist expert statisticians, whose science is known to be arcane if not impenetrable, to verify the Professor's contentions? Did the defence challenge what he proceeded to say in court, or marshal any reasoned case against it, with or without the assistance of a statistician?

Testing expert opinion

In the field of medical litigation, indeed in any court proceedings involving expert evidence, barristers and solicitors need to be keenly aware of the necessity to establish, to their own satisfaction and to a high standard, the strength of expert opinion on which they wish to rely, and how well it withstands the case made against it. This requires detailed exploration at the outset with the expert's assistance, and putting it robustly to the test of contrary views which subsequently emerge in reports from experts on the other side.

If this task is properly carried out it will serve as a solid protection for expert witnesses against accusations of bias or of impropriety, and of course in the end of professional misconduct. If and insofar as the expert has, unwittingly or otherwise, gone out unreasonably on a limb, he will be reminded of that before his report is exchanged or the trial begins. If he has strayed outside his field, that will become apparent and the pitfalls and the criticisms avoided. To the extent that his opinion is weakened or even undermined by cogent expert opinion on the other side, he will have been enabled, and will no doubt be glad, to confront and recognize this, and upon mature reflection to rethink, and if so persuaded, to revise and/or recast the advice being given.

It should be remembered that it is no disgrace for an expert whose initial opinion has not withstood this process to change his mind. On the contrary, if at any stage, on thoughtful analysis prompted and assisted as it should be by the lawyers, he concludes that his opinion is weakened or countered effectively, or simply that for whatever reason he was wrong, it is his duty to say so, and for everyone's sake the sooner the better. There are few less edifying experiences than that of an expert who comes belatedly, after the trial has begun, to the realization that the opinion he has given, and on which the lawyers have been proceeding all along, is erroneous or substantially less supportable than he had hitherto believed it to be, and that he can no longer advance it with conviction before the judge or jury.

If matters are conducted in this way, it will be rarely if ever that an expert presents to the court an opinion or argument that is so unreasonable or unsupportable that his bona fides are called into question, or his professional conduct impugned. Opinions which are excessively partisan, overly dogmatic, undermined by cogent and compelling evidence from the other side, or are otherwise incapable of withstanding logical analysis will be exposed before trial begins, and reliance upon them avoided. What is more, if lawyers do their duty in this way a further huge benefit will be gained. This is the avoidance of the crushing blow to the party whose unjustified claim collapses, or whose unsustainable defence is dismantled only after the matter has been taken to a trial upon which so many hopes have rested for so long.

Lessons for lawyers

To the lawyers the lesson must be to ensure in advance of the trial by all means possible, including well prepared conferences, and as thorough and detailed a mastery of the relevant science as they can achieve, that every expert opinion presented is well-founded, has a logical basis, can survive the assaults of the opposing side, and is supported, or at least is not contradicted, by relevant published learning.

They must be astute to ensure also that the expert has thought his opinion right through, with all its implications for the issues before the judge or jury. The opinion, in all its aspects, must be thoroughly scrutinized, tested and questioned before ultimate reliance is placed upon it in court, where so much may be at stake for the parties. In those circumstances, provided the opinion then expressed in court is honestly and sincerely held, there should be no occasion for any allegation of impropriety or misconduct on the part of that witness.

That is the right way to avoid the kind of problems which beset Sir Roy Meadow, and which have sent a shiver down the spines of many experts, no matter how conscientious they may be. It will provide the best possible protection for the expert against allegations of misconduct, for the parties against potential injustice, and for the courts against the presentation of evidence which is later alleged to have tainted or undermined the trial process. BJHM

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KEY POINTS

- Expert evidence is evidence of opinion, no more and no less.
- It is neither culpable nor disgraceful for an opinion honestly expressed to be held to be wrong.
- All expert opinion should be thoroughly explored and tested before it is given in the witness box.
- The lawyers bear the principal burden of ensuring that experts' opinions withstand logical analysis.
- If pre-trial preparation is properly done, the expert will be protected from allegations of impropriety or misconduct.