What NOT to do as an Expert Witness from a Barrister's point of view

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Once a case gets to court, a barrister needs to present their client's case in the most favourable light. In many instances, that will involve deploying expert witness evidence. Long before that, during the life of the case, in assessing prospects, the legal team will have (hopefully) considered the strength of that expert evidence, in light of the evidence as a whole.

Recently, a high-profile criminal trial collapsed, in no small part as a result of the prosecution's reliance on an expert who the judge concluded was not appropriately "expert"[1]. He had little or no understanding of his duties as an expert. He had no appropriate academic qualifications, in fact he could not remember, when questioned, whether he had passed any A-levels. He had not received any training, had attended no courses and had read no books on the subject upon which he was providing opinion evidence. There had never been any peer-review of his work. The judge concluded that the 'expert' concerned should not be permitted to give evidence as an expert again. That is a dramatic illustration of what can happen, but it should be a salutary lesson, if ever there was, that an expert should be utterly familiar with and should not forget their duties as an expert.

The Academy of Medical Royal Colleges has published guidance[2] which has been endorsed by nine healthcare professional bodies, including six regulators, (the GMC, NMC, HCPC, GDC, GCC and General Pharmaceutical Council), who have all confirmed that the guidance is consistent with their regulatory standards. Healthcare professionals who act as expert witnesses should undergo specific training for being an expert witness. It seems sensible for other types of expert and would-be expert witnesses to do the same.

Here are some things that I have come across in my work as a civil barrister that expert witnesses would be well-advised not to do. Some of them have got experts, or the clients who have instructed them, into difficulty in court or with the court. Some of them are simply issues relating to good practice and/or quality of work. As an expert you should not think that barristers and solicitors do not discuss the performance of experts they have instructed. Word, both good and bad, gets around. In the expert world, there is such a thing as bad publicity.

Cut and paste CV

You need to demonstrate why it is that your opinion in relation to the subject matter of the case in hand is truly expert. Paragraph 54 of the Guidance for Instruction of Experts in Civil Claims 2014[3] specifically states:

"The details of experts' qualifications in reports 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 specialised evidence".

Do not forget that in your report you are going to have to include a statement not only that you understand your duty to the court, have complied and will continue to comply with it, but also that you are aware of and have complied with the requirements of CPR35 and Practice Direction 35 and the Guidance for Instruction of Experts in Civil Claims 2014[4] (quite a few expert reports seem to miss out the requirement to mention the Guidance).

So don't just put in the same generic, one size fits all, CV for every report you write. It isn't necessarily, for example, sufficient to say that you have written thousands of reports to demonstrate that this means what you say should be accepted. Give some real thought as to what detail needs to go in for the specific case. Ideally do so early on, because it may be that you discover that you are not ideally qualified in this case, or that you need to defer to another expert on certain issues. If that happens, it's very much better to acknowledge it early on so everyone knows what the position is.

Also give some consideration as to where in the report to include your CV. Although the writer's qualifications as an expert are clearly an important part of the report, the reason for the court giving permission for expert evidence is when it is reasonably required to resolve the proceedings, as opposed to the issues being for example, simply common sense or general knowledge. The credentials of the expert are therefore a means to this end and not part of a job application. A brief introduction to the writer at the outset of the report can then, if necessary and proportionate, helpfully refer to more comprehensive detail of expertise in an Appendix. This allows the reader to get on with the studying of the contents of the report.

Having said that, do not make the mistake of assuming that lawyers don't actually read what you have included in your CV and ask their own experts what they know about you. If you have to give oral evidence in court, don't forget that you may be questioned on what it is that makes you an expert that can assist the court in the just disposal of the case in hand. It may be one of the first things you are asked about. Don't let that throw you.

In *Scott Inglis v Susan Brand* [2016][5], a case that involved allegations of lingual nerve damage following removal of a lower wisdom tooth by a general dental practitioner, the expert general dental practitioner instructed by the claimant:

i. Had retired in 2014, two years before trial, and had not treated a patient since, in fact was no longer on the Dentist's Register;

ii. For the last 15 years of his practice had undertaken somewhat restricted part-time work in dental sedation and had only practised dentistry for 2 sessions per week;

iii. Accepted that he did not have the expertise to comment on causation;

iv. Was uncertain, during cross examination, of the appropriate test for professional negligence, despite having referred to it in shorthand throughout his report.

Whilst the judge did not say that the expert was not a credible or reliable witness, he did say that he considered it prudent to regard the witness's evidence with some caution, insofar as it departed from the other dental evidence from two further experts available to the court, partly because of the lack of recent, relevant practice. This resulted in the judge preferring evidence on the issue of informed consent and also diagnosis leading to the tooth extraction from the expert instructed by the defendant.

The expert report – ease of navigation

Do not forget to paginate your report and ideally also break it down into headed, numbered sections. It is also probably better to use numbers rather than symbols for bullet-pointed lists. If the report is very long, an index can be helpful. This really assists everyone in navigating and referencing points made.

This then means that it is straightforward to identify in conference and in court exactly what part of a report is being referred to, both when a report is presented as written expert evidence only or during the provision of oral expert evidence. If you find yourself having to give oral evidence, you may well find it very useful to be able to "anchor" yourself to the contents of your report swiftly under cross-examination and it really does assist a judge in following what you are saying if you are able to point to where you have referred to the issue in your written evidence.

Referencing opinion from the literature

Paragraph 35.3 of the Practice Direction supplementing CPR 35 says at sub-paragraph 3.2 (2):

"an expert's report must give details of any literature or other material which has been relied on in making the report".

However, do not simply include a reference from the literature to underpin your opinion without actually reading that reference, all of it, and also carrying out your own reasonable critical appraisal to check that it really says what it purports to say. Whilst it may be very tempting to read only the abstract of a paper you've found on a database on the internet that sounds as though it supports what you are saying, and it may actually be quite difficult to get hold of the full text, you should anticipate that if you are questioned on it, the questioner (or someone advising them, such as another expert), will almost certainly have taken the trouble to look at the whole reference. In fact there is Court of Appeal authority[6] to say that any literature relied upon by one party's expert should be reviewed by the other party's expert and be available for the trial judge. It may be that it doesn't actually stand up to critical appraisal. If so, you should at the very least be ready to explain specifically why it is that any weaknesses do not undermine your conclusions.

Likewise, don't forget to review the literature relied upon by your counterpart expert and don't keep the strengths and weaknesses to yourself, please tell the legal team instructing you if it may alter their assessment of the strength of the case.

Being prepared for a conference

Most experts will have had the experience of the instructing solicitor saying that counsel has asked for a conference with the expert. The barrister will have read the report and may well have clarification questions in order to inform them when drafting the pleadings, or to assist them in becoming suitably "expert" in the subject matter to be able effectively to adduce the expert evidence and cross examine the opposing expert. Further, the barrister may well wish to "test" the expert evidence in conference, to assess the strength of that evidence and perhaps to identify additional scientific literature which may need to be sourced and appraised.

These days, many conferences are held by telephone. That makes economic sense. It is understood that experts are busy people. However, if a conference is booked for a particular time, it is as well to ensure that you have done some preparation and at least read through your report before the phone rings.

Please don't:

i. Attend the conference, either in person or by telephone, without having your report to hand as well as the material that you used to prepare it. It may have been quite a time since you wrote your report. You should re-familiarise yourself with the case and the evidence. If you have returned the papers (or, as one expert recently explained to me, deleted them from your computer to "free up space"), then request a new set from the instructing solicitor in advance of the conference. There may well be a need to refer to various documents, just as there would be in court.

ii. Refuse to answer questions that the barrister asks on the grounds that they won't understand the answers because they are not an expert. The barrister needs to have sufficient understanding to be able to draw out your relevant expert opinion for the assistance of the court.

iii. Take offence when the barrister asks "difficult" questions in conference. Barristers are generally taught ideally never to ask a question of a witness in court to which they do not already know the answer.

That is one very good reason why they may wish to ask you difficult questions in conference - to find out what the answer is likely to be if they ask the other side's expert the question.

Amending a report

Experts must provide opinions that are independent. However, this does not mean that they cannot be invited to amend, expand or alter parts of a report to ensure accuracy, clarity, internal consistency, completeness and relevance to the issues[7]. It may be, for example, that during a conference, a particular area has been explored in detail and it has become apparent that it would be helpful to the court if at least some of the expansion is included in the report. Always, though, keep in mind the duties of an expert and check that any amendments you agree to make are still compliant.

Recently, an expert only just avoided going to prison for contempt of court. His custodial sentence was suspended. *In Liverpool Victoria Insurance Company Limited v Khan and others* [2018][8], the medical expert, Dr Zafar, had examined the claimant in a personal injury claim and dictated his report on the same day. Subsequently, the instructing solicitor requested significant amendments to the report which would substantially alter the contents, in particular altering the length of time that the claimant had suffered from symptoms. Without re-examining the claimant, and as the court found, recklessly, the expert acceded to the request (or allowed one of his assistants to do so on his behalf). The existence of the two reports which differed so greatly was discovered by chance when a paralegal disclosed the original report and the insurance company began to investigate. When the personal injury case came on for trial, the barrister representing the claimant was faced at court with finding out for the first time that there were two versions of the medical report. He had no instructions as to how this had occurred and indeed, as was determined during subsequent committal proceedings, there was no proper basis upon which the request for amendment to the report had been made or carried out.

Fairly obviously, the personal injury trial was adjourned with directions for explanatory witness statements to be made by the instructing solicitor and the medical expert. Things unravelled from there. Eventually, committal proceedings for contempt of court were brought and proved against both the instructing solicitor and the expert. The instructing solicitor received an immediate custodial sentence. Following a subsequent appeal by the insurance company to the Court of Appeal[9] on the grounds that the suspended sentence was unduly lenient both in respect of the length of the sentence and its suspension, it is clear that similar contempt of court on the part of an expert would not in future escape immediate custody.

Being balanced, measured and making appropriate concessions

Coming over well and reassuring the court as to your expertise and the relevance of your opinion of course involves confidence but it is very much assisted by demonstrating mature consideration and the ability to concede, when required, points that can no longer be sustained. If evidence emerges as a case progresses, particularly in a developing scientific field or a medical case where later investigations clarify or alter a previous diagnosis, it really is essential to consider whether an opinion is altered, even as late as when giving evidence at trial, and making any appropriate concessions. Do not continue stubbornly and unreasonably to stick to a view which is unsustainable.

A relevant range of possible treatments or diagnoses for example, should be dealt with in a balanced, measured and suitably comprehensive way, before explaining why it is that you prefer or conclude one over others in this particular case. An expert is obliged to consider such a range. For example, whilst it is fine to say, calmly and factually, in a professional negligence matter that you do not believe that any reasonable body of professionals would have acted in the way this person (the defendant) did, you must explain why you have come to that conclusion and avoid using hyperbole. If you are presented with a hypothetical scenario which you have not considered, deal with it, as straightforwardly as possible. Judges frequently in their determinations comment upon experts who particularly impress them in this way.

Unfortunately for the claimant in G*eoffrey Kennett v East Kent Hospitals University NHS Foundation Trust (2018)*, a case involving abdominal wound dehiscence, the judge was not impressed by his expert, whose approach he described as:

- Dogmatic
- Based on mistaken assumption
- Entirely speculative
- Did not refer to any literature to try to justify his opinion
- Provided "remarkably little analysis" of why he considered the cause to be substandard medical practice.

The judge then went on to dismiss the claim, citing the authority of *Ternant v Ashford & St Peter's Hospital NHS Trust* [2010][10]

"The court should not lightly infer that a surgeon had conducted a procedure negligently, particularly where the literature does not deal with the issue of negligence and where there are other plausible explanations, as in this case".

Complying with Court Orders

It really is essential to comply with court orders. Most junior barristers are only too familiar with having to make an application for relief from sanctions imposed due to failure to comply with an order of the court on the part of the party that they represent, and that can include failures by experts instructed by that party. It is by no means definite that relief from sanctions will be granted, particularly if an application has to be made, in effect, unexpectedly. If a deadline is missed and relief from sanctions is not granted, this can result in the party being unable to rely on their expert evidence at all or even the whole case being struck out.

In *Mayr & Ors v CMS Cameron Mckenna Nabarro Olswang LLP [2018]*[11], the claimant's expert participated in two separate joint experts' meetings, as ordered by the court, and in each joint report his views on multiple agenda items were recorded as indicating that the claimant's expert was "considering his response", and that he was due to serve a supplemental report by a later date *"by when he will have formed a settled view as to whether he agrees or disagrees with Mr X (the defendant's expert) on this point"*.

Things came to a head at a pre-trial review about a month before the trial date, when it appeared that the expert was saying that his supplemental report would not be ready until two weeks before trial. The judge ruled that as matters stood, the claimants no longer had permission to adduce expert evidence on the relevant part of the claim which was worth a considerable sum. A significant part of the claim was, in effect, struck out without an unless order unless the claimants obtained relief from sanctions. The barrister for the claimants therefore found himself in an invidious position. He invited the judge to reconsider this decision, advancing a number of arguments there and then, but the judge stood firm, making permission for the claimants to adduce expert evidence conditional upon their expert being able to produce his supplemental report within seven days and there being produced further proposals for an experts' meeting and joint report to be provided which would not jeopardise the trial date or prejudice the fairness of the trial.

If there is a very good reason why you will not be able to comply with a court order within a timeframe, then you should always inform those instructing you in very good time. Do not keep it to yourself. It can be much more straightforward to negotiate a short extension of time with the opposing party or apply to the court in advance rather than trying to persuade a judge to grant relief after the event, but the reason for delay still needs to be very good.

In *Re X and Y (Delay: Professional Conduct of Expert) [2019]*[12], an expert had suffered personal and family difficulties over a number of months which she eventually explained accounted for a persistent failure to comply with the required timeframe to provide her report. However she had failed to advise her instructing solicitors or the court of the difficulties. Ultimately, it was necessary for an alternative expert to be agreed, with permission of the court. The judge acknowledged that there would be occasions when, due to a change in circumstances after instruction, an expert would find themselves genuinely unable to complete a report within the prescribed timeframe, but said that if that occurred it was the duty of the expert to advise their instructing solicitors accordingly who would work with the court on variation of the timetable. The judge specifically included his disapprobation of the expert's conduct within his judgment:

"I am deeply concerned about the way [the expert] has behaved in this case. It does not meet the standards expected of an expert witness or the expectations of the court in this particular case. It cannot be allowed to pass without comment. That comment should be placed in the public domain."

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