Chapter 1
Introduction

1.1 Introduction

Expert evidence, as a subject for legal and even technical comment, is often confined to a few chapters in the middle or towards the end of textbooks covering all aspects of the law of evidence. The purpose of these textbooks is to deal with the law of evidence as a whole and so, in relation to expert witnesses, the key legal issues are identified relating to the production and use of expert evidence but, by their nature, these texts concentrate on the meaning of expert evidence in a legal sense and how it relates to the 'law of evidence'. There is relatively little direct and in depth guidance on the legal issues arising from acting as an expert witness and the use of expert evidence. There is even less guidance putting this into the context of the construction industry and less still that deals with the practical and legal issues together. However, this degree of specific and detailed focus is necessary and invaluable for anyone acting as an expert witness and for those employing or instructing an expert. The law in relation to expert evidence is changing rapidly and so application and analysis of this area, in practice, is particularly important, whether you are an expert witness, instructing experts (frequently or infrequently) or relying on their views to support your position.

This book focuses on the expert's role itself (rather than evidence or procedure) and is divided into two parts. Part One[1] establishes the legal issues and principles surrounding the use of opinion evidence generated by expert witnesses and the role of expert witnesses within, linked to and outside formal proceedings. Part Two focuses on the practicalities of being an expert, in particular giving guidance on the various ways in which expert evidence can be presented to a tribunal[2] and, before that, to the party instructing that expert.

In considering these practicalities this book will explore the different, and sometimes conflicted expectations of clients, lawyers and tribunals and will give guidance as to how

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[1] Part One comprises Chapters 1 to 6 and Part Two comprises Chapters 7 to 11. Chapter 12 deals with legal liability common to both Parts.

[2] For these purpose a tribunal includes anyone or body to whom an expert provides evidence, guidance or opinions.

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expert witnesses, and indeed lawyers, can tread that tightrope to achieve the best use of the knowledge of the retained expert and deploy that knowledge in as persuasive a manner as possible. Of necessity, therefore, the second part of this book will go beyond the simple legal issues surrounding expert evidence and examine the practicalities that all experts should be aware of and how experts should conduct themselves while preparing for and giving evidence. It also provides those instructing experts with guidance as to how they can ensure that their experts provide them and the tribunal with the evidence that is required.

1.2 What is expert evidence?

> The opinion of scientific men upon proven facts may be given by men of science within their own science[3]

The above quotation, taken from an eighteenth century case arising out of construction issues, is widely regarded as the first attempt by the courts of England to grapple with the question of opinion evidence – such evidence being not about a fact in question on which a witness had a direct perception but was instead about the interpretation of such a fact or set of facts. Until this point, and even for some considerable period after this case, while the impact and implications of this judgment were being understood, the interpretation of the facts was a matter for the jury (or judge alone in later civil disputes). This meant that complex and highly technical matters could be very difficult to deal with. As a result it is not surprising that construction disputes were difficult to present on a purely factual basis and this helps to explain why the construction industry was at the leading edge of developing a practice of expert witness involvement.

The essence of the issue in *Folkes v Chadd*[4] was whether the demolition of a sea bank constructed to prevent the sea overflowing into some meadows contributed to the decay of a harbour. The question the court was asked to consider was what had been causing the decay to the harbour. The question itself was a matter for interpretation and would require a deep and detailed understanding of engineering issues to answer it. The defendant, Chadd, produced evidence from an eminent engineer to show that, in his opinion, the demolition of the sea bank had no significant impact on the decay of the harbour. Of course, the eminent engineer was not relaying to the court facts he had observed, but rather his interpretation of what those facts meant and what the consequences of those facts might be.

In his judgment, Lord Mansfield said:

> It is objected that Mr Smeaton [the engineer] is going to speak, not to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed; the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all of these factors that, mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr Smeaton understands the construction of harbours, the causes of their destruction and how

[3] *Folkes v Chadd* [1782] 3DOUG.KB.157.

[4] [1782] 3DOUG.KB.157.

> remedied … I have myself received the opinion of Mr Smeaton respecting mills, as a matter of science. The cause of the decay of the harbour is a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, such men as Mr Smeaton alone can judge. Therefore we are of the opinion that his judgement, formed on facts, was proper evidence.

Parts of that explanation from Lord Mansfield are still clearly recognisable in the way expert witnesses are identified today. The most noticeable difference, at least on the surface, was perhaps the focus of the expert evidence being 'a matter of science'. This was the tool the courts used to draw the evidence away from factual evidence without straying into fiction or wild imaginings. How much of the role of the modern expert witness in construction law can be said to be a matter of science? Is delay analysis a matter of science? What about quantity surveying or some aspects of architecture? These are all very relevant and important questions to the development of modern expert evidence dealt with in more detail in this book. However, the role of the expert witness has, in many ways, moved on considerably – not least of which appears to be the acceptance in the recent case of *Jones v Kaney*[5] that the definition of expert must include an acceptance that there is some form of paid reward for the giving of that expert evidence.[6]

In essence then and at its heart, expert evidence is interpretive opinion evidence provided to the tribunal to assist the decision-making process. The expert witness does not make the decision[7] and neither does he speak on issues outside the remit of factual evidence. For obvious reasons, what it means to be an expert and what it means to give expert evidence are closely linked. Where the dividing lines might be is a constant question and source for continual development, particularly in the construction industry.

1.3 The expanding role of the expert witness

The constant refinement of the role of the expert witness, particularly within the construction industry, is the focus of this book. Importantly, the role of the expert witness is now not solely about the production of a report or the provision of an opinion in relation to matters of science, or even the giving of oral evidence before a tribunal.[8] The role of the expert now reaches back into projects still being constructed and forward into the operational phase of an asset and interpretation of the decision or judgment in any dispute. This is particularly true of private finance initiatives and other long-term or complex project models.

The role of the expert as advisor to a party in pre-proceeding stages[9] and as part of a team during any form of dispute resolution is equally important to understand and

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[5] [2011] UKSC13.

[6] See for example paragraph 100 in the judgment of Lord Dyson.

[7] Other than in expert determination as set out in Chapter 4, section 4.7.

[8] Be that a judge, arbitrator, adjudicator or a myriad of other possible ways of resolving a dispute.

[9] See in particular Chapter 4, section 4.3.

appreciate. A recent case[10] confirmed that the early involvement of an expert witness is quite acceptable. In the Court of Appeal Lord Justice Tomlinson put it this way:

> Experts are often involved in the investigation and preparation of a case from an early stage. There is nothing inherently objectionable, improper or inappropriate about an expert advising his client on the evidence needed to meet the opposing case, indeed it is often likely to be the professional duty of an expert to proffer just such advice. … There is nothing improper in pointing out to a client that his case would be improved if certain assumed features of an incident can be shown not in fact to have occurred, or if conversely features assumed to have been absent can in fact be shown to have been present.

While, on the face of it, the Court of Appeal may be seen to be supporting early expert witness involvement and certainly the Court of Appeal specifically confirmed that expert witnesses do owe duties to their clients as well as to the court, there must always remain some hesitation in expert witnesses becoming too closely involved in the preparation of a claim. The overriding requirement for an expert is that he should be able to present his views impartially. His involvement within the claim preparation team must always have that in mind.

As a matter of practicality, if an expert witness oversteps this line and ventures into the land of becoming an advocate for one party, not only will his credibility within that case be significantly reduced but also his credibility in future cases.[11] Where the expert witness crosses the line and becomes not an independent and impartial advisor but an advocate, he is often referred to as being a 'hired gun'. The perception of expert witnesses appearing as hired guns has done great damage to their credibility. Expert witnesses are well advised to always take a cautious approach and not be drawn into a fixed position.[12]

It is no part of the role of an expert witness to support blindly a position being adopted by the party instructing them. The essence of being an expert witness does indeed go back to the commentary of Lord Mansfield noted above that the expert opinion must be 'deduced from all these facts'. It is therefore the expert witness's duty and obligation to involve himself very carefully in all of the facts in order to draw a proper conclusion based on his expertise in that area. There is little value to be had from an expert witness who expects, for example, to be fed all the information he needs and is unwilling or unable to conduct any investigation on his own.

Understanding where the dividing line sits between advocating a position and reaching an independent and impartial view can be complex. It is no doubt the case that the more complex the factual problem and technical issues, the harder it is to see where that dividing line is. An expert witness who believes strongly in his view is not necessarily being an advocate for the party who adopts his position. The question is, who is leading

[10] *Stanley v Rawlinson* [2011] EWCA Civ 405.

[11] Judicial comments in relation to evidence given by experts is often searched for and identified pre-hearing and used in cross-examination. In *BSkyB Ltd v HP Enterprise Services UK Limited* Mr Justice Ramsey said that 'Whilst such criticisms are noted the focus must be on the evidence given in this case'. No doubt his intention was to focus on the evidence in the present case but it clearly identifies that judicial criticism will be noted. See also the judgment in *Ampleforth Abbey Trust v Turner & Townsend Project Management Limited* [2012] EWHC 2137 (TCC). However, whatever the attitude of tribunals in later cases, the more immediate problem for the expert is likely to be obtaining instructions on new matters.

[12] This is considered more fully in Chapter 11, section 11.8.

that position? Is it the expert witness who has formed an independent view with the client adopting that as his position or the client adopting a position he would like to achieve and persuading an expert witness to support it? For expert and legal teams alike this is an area that needs constant and careful consideration. One false step and the expert's credibility can be destroyed and an otherwise good case irreparably damaged.

While it is often easy to identify the 'safe' areas in providing expert evidence there is no doubt that expert witnesses often come under tremendous pressure to get as close to the advocacy line as possible. Again, however, what may appear as advocacy in the course of cross-examination may simply be the expert witness's genuinely held impartial view which he defends vigorously. The longer the expert has been involved, the more value he has been able to add to the case, but also the firmer his views will be and the easier it will be to slip into advocacy.

Therefore, as well as academic and legal explanation of the duties and obligations of the expert witness, this book will provide practical guidance for experts, and those instructing or relying on them, for staying the right side of the advocacy line and dealing with the pressures which may come to bear.

1.4 What makes a good expert witness?

Nobody sets out with the intention of hiring a bad expert witness. Therefore, the question of what makes a good expert witness is crucial. It is not a simple question to answer. A good expert will have a range of skills and knowledge suited to the needs of the particular issues upon which his expert evidence is needed.

Although it doesn't necessarily help with the definition of what makes a good expert witness, it is important to have fixed clearly in one's mind the purpose of being identified as an expert. Above all else, the expert witness is there to assist the tribunal. Whatever mannerisms, skills and knowledge the expert witness may have, it must be tailored with a view to assisting the particular tribunal he is appearing before. An expert who cannot express his views at an appropriate level for the tribunal to understand is of no assistance to the tribunal and therefore will not make a good expert witness – even if he is the leader in his field and recognised as such within his profession.

As noted above, from 1782 the focus for an expert witness or 'man of science' is that he may give an opinion on a set of facts. So, to continue the reference to *Folkes v Chadd*, the question in that case was whether the demolition of a sea bank contributed to the decay of a nearby harbour. The questions of fact were that the sea wall had been demolished and that the nearby harbour had decayed. The causative link between the two was, however, difficult to establish as a matter of fact and beyond the knowledge of most lay people or indeed, in this case, the tribunal. Lord Mansfield summarised the position as follows:

> The cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, such men as Mr Smeaton alone can judge. Therefore, we are of the opinion that his judgment, formed on facts, was proper evidence.

Lord Mansfield obviously found that Mr Smeaton was a 'good expert'. However, when Mr Smeaton was giving evidence there was a very small pool of expert witnesses providing assistance to the court. This is not the case today. In the construction industry alone

there are now many hundreds of experts covering many different disciplines from hydrology to electrical engineering, to quantity surveying.

The essential primary skills that a good expert witness needs to exhibit are detailed below.

1.4.1 Knowledge

A good expert witness must have a thorough knowledge of the area upon which he is to give expert evidence. He must know and appreciate the full range of different views held about his subject matter and must be able to talk knowledgeably about the pros and cons of each different approach.[13]

1.4.2 Understanding

The expert witness must have the ability to understand the facts of any given scenario and apply his knowledge to those facts. Academic reasoning and discussion is not enough to make a good expert, he must be able to apply that knowledge.[14]

1.4.3 Expression

In order for an expert witness to assist the court, he must be able to express his views on the facts and the application of those facts to his knowledge in a meaningful and understandable way. The expert must understand that the reason he has been appointed is to assist the tribunal as it does not have his level of knowledge. However, the expert equally must understand that he is not there to teach the tribunal his subject area but to assist in the resolution of a specific difference or dispute or issue to which his opinion has been referred.[15]

1.4.4 Clarity

The expert witness must be clear in expression and thought. This clarity needs to be represented both in his written work and in his explanation orally before the tribunal.[16]

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[13] See *SPE International Limited v Professional Preparation Contractors (UK) Limited and another* [10 May 2002] EWHC 881 (Ch) dealt with in detail in Chapter 9 where the claimant's expert was held to have no relevant expertise of specialist knowledge.

[14] See *Carillion JM Limited v Phi Group Limited* [2011] EWHC 1581 (TCC) in which the expert's 17 options were said by the judge to have been 'lacking in reality'. Dealt with in more detail in Chapter 9.

[15] *Skanska Construction UK Limited v Egger (Barony) Limited* [2004] EWHC 1748 (TCC) in which the programming experts report was said to be too complex and extensive for the court to easily assimilate. See Chapter 9 for further discussion.

[16] See *Double G Communications Limited v News Group International Limited* [2011] EWHC 961 (QB) in which the judge found one of the experts could not answer questions in an illuminating or straightforward way, tending to ramble off the point. Further discussion can be found in Chapter 11.

1.4.5 Flexibility

A good expert witness will not have a single answer to every situation. A good expert will take on board additional information and additional facts as presented to him and adjust his views to ensure that his knowledge and understanding remain clear for the tribunal. An expert witness who is too attached to a particular answer and will not change his view, no matter what facts are presented to him, does nobody any service and runs the real risk that he will be seen as crossing the line into advocacy.[17]

1.4.6 Professionalism

The expert witness must be able to present both himself and his views professionally. He must be able to answer criticism without taking offence and to avoid the temptation of point scoring. This also applies to an expert interacting effectively and appropriately with other experts in any dispute whether they are both appointed by the same party or not.[18]

1.4.7 Resilience

Once an expert witness has formed a view he should not move away from it lightly. He should have very carefully considered a wide range of issues in order to form that initial view. Rapidly changing approach suggests to a tribunal that the expert does not really fully understand the subject matter.

1.4.8 Team player

This is perhaps one area where some commentators might start to feel uncomfortable. However, it is essential that the expert understands his place in the framework in any dispute and how he should interact with other members of the team operating for one of the disputing parties. The reality is that the expert witness who wants to have a successful career as an expert needs to strike up a rapport with instructing solicitors, advocates, fellow experts and clients alike. An expert witness who is very good but requires a degree of 'management' is likely to receive fewer instructions because of the burden of dealing with such an expert can distract other team members from their role and function.

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[17] See *Double G Communications Limited v News Group International Limited* [2011] EWHC 961 (QB) in which the judge said that the other expert was said to have stuck to his theories through thick and thin in cross-examination. Chapter 11 deals with this case in further detail. See also *City Inn Limited v Shepherd Construction Limited* [2007] CSOH 190 where favourable comment was given to an expert adapting and altering his view in response to further information.

[18] See *Edwin John Stevens v R J Gullis* [1999] BLR 394 (CA), WL 477623 (CA) in which the judge said that one expert was not cooperating with the other experts in the case. Chapter 10 gives further discussion of this case.

Furthermore, the ability to work cooperatively with an opposing expert may be equally important in carrying out joint tests and investigations and working towards narrowing issues and setting them down in an agreed joint statement.

In addition to these primary skills a good expert witness can be defined by a list of secondary skills, such as succinctness, thoroughness and objectivity. However, these skills are built up from varying combinations of the primary skills. For example, succinctness would be a combination of clarity and expression, thoroughness a combination of knowledge, understanding, expression and professionalism, etc.

1.5 What is an expert witness and what is an expert witness used for?

Expert evidence can only be called and presented before any tribunal if it is relevant to one of the issues in dispute, is not capable of determination through presentation of facts alone and is outside the range of experiences on which a lay person can offer opinions.[19] As described in *Folkes v Chadd*, expert evidence is based on observation and interpretation of certain facts. In order to provide such observations, the expert witness must be able to show a degree of experience or knowledge above and beyond that which is held by the average person.

Therefore, on many issues of opinion or interpretation there will be no need for expert evidence despite the need for forming an opinion.[20] Indeed, if expert evidence was presented in such circumstances, it could quite properly be excluded on the basis that it does not provide any guidance beyond the issues the tribunal is capable of deciding itself.

There is no definitive explanation of what amounts to proper expert opinion evidence. However, in the south Australian case of *R v Bonython*,[21] Lord Chief Justice King set out two questions which needed to be answered before expert evidence would be allowed. The first question was:

> Whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible.

This question was subdivided into two parts as follows:

> (a) Whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge of human experience would be able to form sound judgement on the matter without the assistance of witnesses in possession of special knowledge or experience in the area; and
> (b) Whether the subject matter of the opinion forms part of the body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which, by the witness, would render his opinion of assistance to the Court.

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[19] In addition, in court and certain arbitral proceedings, specific leave of the court is required, for example under CPR 35.4(i). See also Chapter 4 for details on arbitral rules where the same requirements exist.

[20] Examples include proving a public or general right, proof of charter or proof of a public opinion.

[21] (1984) 38 SASR 45-47.

The second question was framed as follows:

> Whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the Court.

One question which has remained difficult to answer is whether there does in fact need to be a 'body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.' In other words, is the method of analysis or area of expertise so scientifically cutting edge that the results it produces are not yet reliable? The most obvious example of such an area outside the field of construction disputes is dactyloscopy, or fingerprint identification. There are few people now who would reject, in principle, the use of fingerprint identification. When it was first introduced, however, it was commonly rejected by the courts as being unreliable.

It is more difficult to identify areas in which comparable issues arise in relation to commercial disputes and particularly construction disputes.[22] In commercial and construction disputes the tribunal or court tends to be much more pragmatic and will listen to an expert witness and then form its own view. However, if one looks at the evidence of, for example, delay experts and analysts it is possible to see a similar trend. In particular, the judgment in *City Inn Limited v Shepherd Construction Limited*[23] identifies the evidence of one delay expert explaining how one or two small changes to the assumptions made by the other expert fundamentally change and remove the credibility of his evidence. In this case, while the court heard the evidence of the challenged expert witness, it did find that his approach was fundamentally undermined and, arguably, did not in fact present expert evidence as described in the tests notified above.

The English courts have been reluctant to provide any form of overarching test or requirement in the use of expert evidence for the reasons set out above. The English courts prefer to rely on general guidance and then adopt a pragmatic view and apply weight to the expert evidence to reach a conclusion. The premise behind this approach is to allow the tribunal the maximum flexibility to decide whether to hear an expert witness on any particular subject and if it does so hear the evidence, what weight it might give to it. As Lord Lane explained in *R v Oakley*[24]

> The answer is that as long as he [the expert] keeps within his reasonable expertise, which is a matter for the Judge, he is entitled to be heard on every aspect as an expert, to that extent, if no further

Therefore, the decision on expertise is reserved for the tribunal – but what is the expertise that is being considered? Is there, for example, any requirement that academic or demonstrable study has been undertaken to give the expert witness the claimed expertise he now intends to share with the tribunal? In other words, in order to give expert evidence does one have to show any forensic qualification or ability? While the question

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[22] Although the controversial area of 'cumulative impact' claims in relation to loss of productivity on construction sites may be one.

[23] [2007] CSOH 190.

[24] [1980] Cr App R 7.

of expertise has arisen on numerous occasions, it is the forensic abilities of the expert witness that are paramount when he acts as an expert witness before a tribunal. In particular, it is the application of facts to expert knowledge which enables an expert to give proper expert evidence. The application of the facts to knowledge is a forensic process starting with the expert witness carrying out a full and proper investigation into the relevant issues. If and when the expert witness does not have that forensic ability, substantial doubt should be cast on his ability to act as a proper expert to the court or tribunal.[25]

A case heard in 1894[26] gives a good background and starting point to this issue. In this case, the question was whether a person giving evidence in relation to handwriting had sufficient expertise or skill to assist the tribunal. Lord Chief Justice Russell commented, in considering whether the expert witness was 'peritus' or sufficiently skilled that:

> It is true that the witness who is called upon to give evidence must be peritus; he must be skilled in doing so; but we cannot say he must become peritus in the way of his business or in any definitive way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge? Looking at the matter of practicality, if a witness is not skilled the Judge will tell the jury to disregard his evidence.

This idea of focusing on what is essentially a practical matter was reinforced in a more recent Canadian case of *R v Bunnies*[27]. In this case, Canadian Chief Justice Tyrwitt-Drake commented that the manner in which a skill or expertise has been acquired was immaterial, the focal point was whether that skill was possessed by the expert. Canadian Chief Justice Tyrwitt-Drake put it in these terms:

> The test for expertness, so far as the law of evidence is concerned, is skill and skill alone in the field of which is sought to have the witness's opinion. … I adopt, as a working definition of the term 'skilled person', one who has by dint of training and practice, acquired a good knowledge of the science or art concerning which his opinion is sought … It is not necessary, for a person to give opinion evidence of a question of human physiology, that he be a doctor of medicine.[28]

As a result of these cases, it is clear that from the outset the development of the role of the expert witness has been based on practicality rather than academia. To this extent also, the forensic abilities of the expert witness come to the fore even if they were not a

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[25] Dr Sean Brady produced a very helpful paper in relation to this issue which he presented to the Society of Construction Law on 8 April 2012 (published March 2012) entitled: *The Structural Engineer as Expert Witness – Forensics and Design*. In this paper, Dr Brady examines the difference between a Structural Engineer capable of providing structural calculations and designs and a Forensic Structural Engineer capable of investigating, understanding and explaining structural failings. Likewise, forensic delay analysis for the purposes of expert evidence is distinct as a skill set from project programming.

[26] *R v Silverlock* [1894] 2 QB 766.

[27] (1964) 50 WWR 422.

[28] See also *The Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Limited* [2012] EWHC 2137 (TCC) where evidence on project management given by someone with no current experience of managing a project was admissible due to work as an expert in related fields.

basic requirement to be met before evidence can be tendered. Again, one comes back to the very simply proposition that the expert witness must be giving evidence which is of assistance to the tribunal in properly deciding the matter before it. To be of assistance that evidence must provide additional insight into the question in issue.

While experts may therefore be in a rather unique position,[29] they do not have a completely free hand in the evidence they give. There are a number of fundamental restrictions or checks and balances against the influence of the opinion evidence of experts. The first is that the opinion of the expert witness must be based on facts. If the expert has used the wrong facts, a question often only decided towards the end of any proceedings, then the expert's opinion is unlikely to be sound. Lord Justice Lawton[30] explained the expert's reliance on the underlying facts in the following terms:

> Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or he has taken irrelevant facts into consideration or has omitted to consider relevant ones the opinion is likely to be valueless.

Lord Justice Lawton's comments were in relation to a criminal trial but the point on expert evidence is equally valid for civil matters and specifically construction disputes. In fact, Lord Justice Lawton went on to explain that the expert must set out the facts upon which his opinion was based. This explanation by Lord Justice Lawton was long before the Civil Procedure Rules (CPR) made such a requirement compulsory. Although Lord Justice Lawton explained the requirement for an explanation of the facts upon which opinions were based in the context of examination in chief and cross-examination, the basic point has been adopted generally and is now a requirement of the CPR.[31]

The CPR requires an expert witness to both disclose his instructions and set out the facts upon which his opinion is based, ending in a declaration that the expert considers the facts to be true and its opinions reasonable. Although, strictly taken, the guidance and requirements set out in the CPR are not binding in other circumstances and before other tribunals,[32] they do at least set out a good practice guide. Indeed, in relation to domestic disputes, the CPR are invariably adopted and followed in relation to expert evidence even if little else. In the international context, similar general principles are adopted but there can be significant and important regional differences.[33]

Of course, if an expert witness was limited to giving opinion evidence based on agreed facts, the role of the expert witness would be similarly limited and its value to the tribunal would be questionable. It is the underlying facts themselves that are as often in dispute as the interpretation or application of them to any particular situation. Further,

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[29] They provide opinions rather than factual evidence allowing them to interpret and assess in a similar way to the tribunal.

[30] *R v Turner (Terence Stuart)* [1975] QB 834.

[31] Practice Direction to Part 35 Paragraph 3.2(2). See also in relation to arbitration the provisions of the CIArb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration Article 4 and of the IBA Rules Article 5.2.

[32] For example the CPR to not bind the approach in arbitration, adjudication or any other form of ADR, but see the IBA Rules Article 5.2(b) and CIArb Protocol Article 4(c) and (f) both discussed in Chapter 4.

[33] The principles of expert evidence in an international context are given in Chapter 6.

if experts could only rely on agreed or determined facts, every dispute would have to proceed through two stages; the first a factual investigation stage to establish what happened (if necessary), followed by a second interpretive stage to decide what these facts mean and what consequences and conclusions should be drawn from them. This rather restrictive approach to the provision of expert evidence is not helpful to a tribunal.[34]

While it may provide a good check or balance against an expert witness going too far, it swings the problem too far towards control and away from freedom to allow the expert to provide his evidence in a useful way. Further, and in any event, it is often the role of the expert witness, before giving any evidence to the tribunal, to investigate and interrogate the facts presented to him. A properly instructed expert witness is in a unique position to carry out such investigation and should ensure that he does so. Artificially constraining this important part of the process would distort the role of the expert witness.[35]

The practical knowledge and experience that a good expert witness brings to any factual investigation can be significant. As an example, an expert in construction, say a quantity surveyor, will have a clear picture of the types of records he would expect to be kept on projects of varying sizes or complexity. When those documents are not presented to him for his factual investigation, he can ask focused and probing questions of those instructing him, or indeed the other side through those instructing him, as to the existence of such documents and if they don't exist, why they were not kept. This challenging and investigation of the facts, where the expert witness brings his expertise to that investigation, is particularly important and can be particularly useful to the tribunal. The investigatory role of the expert is not only to be recommended but is a key part of the modern experts' roles.[36]

The days when an expert witness, particularly in the construction industry, could give an opinion simply on the facts given to him and without his own thorough investigation are long passed. If nothing else, the CPR[37] requires confirmation from the expert witness of what he has considered and what he has been provided with. A lack of independent investigation by the expert witness will be readily apparent and will seriously damage the credibility of the evidence which the expert presents and indeed the credibility of the expert himself through what would undoubtedly be a very uncomfortable period of cross-examination which could be along the following lines:

COUNSEL: Mr Smith, you appear here as a quantity surveying expert for the Claimant
MR SMITH: Correct
COUNSEL: You have provided a report setting out those documents upon which you rely
MR SMITH: Correct
COUNSEL: Is that list of documentation complete?

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[34] Although there are times when a separate hearing and determination of facts may considerably reduce the extent and hence costs of the expert evidence that is required.

[35] Current guidance in the CJC Guidance is such that parties and their experts are encouraged to agree a joint set of relevant documents at an early stage. This is a significant step towards agreeing facts without binding the experts too tightly to a single methodology.

[36] See the comments of Mr Justice Ramsey in *BSkyB Ltd v HP Enterprise Services UK Limited* [2010] EWHC 86 (TCC).

[37] Practice Direction 35 Paragraph 3.2(3).

MR SMITH: It is complete
COUNSEL: The list of documents attached to your report does not identify any invoices. Does that mean that you have not considered invoices in reaching your expert opinion on the quantum issues upon which you give expert evidence?
MR SMITH: That is correct. I have not considered invoices
COUNSEL: Why, Mr Smith, have you not considered invoices? Do you not consider them relevant?
MR SMITH: I've not considered invoices as I was not asked to consider invoices. I do consider invoices would be relevant to providing an expert opinion
COUNSEL: Mr Smith, do you appreciate the nature of your duty to the court?
MR SMITH: Yes, my overriding duty is to the court to provide it with guidance and assistance on matter within my expertise
COUNSELL: Mr Smith, did you ask to see the invoices?
MR SMITH: No I did not
COUNSEL: You agree with me that the invoices are relevant to the proper formulation of your expert opinion but you did not look at them. Is that correct?
MR SMITH: Yes, that is correct
COUNSEL: If you accept that it was necessary to review the invoices to provide a proper opinion, that you did not look at the invoices and that you did not try to look at the invoices, please could you explain to the court how you consider you have complied with your duty to provide proper expert evidence
MR SMITH: …

In the modern age of text searchable judgments, negative judicial comment about the credibility and reliability of expert witnesses is easy to obtain and should not be ignored. Although it will not be a deciding factor in subsequent cases as to the weight to be given to expert evidence it is an issue which subsequent judges will take note of.[38]

The Civil Evidence Act 1972 confirms the position from the early case law that expert opinion evidence is admissible generally. The Civil Evidence Act provides, at Section 3, as follows:

1. Subject to any rules of court … where a person is called as a witness in any Civil Proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence, shall be admissible in evidence…
2. In this section 'relevant matter' includes an issue in the proceedings in question.

Therefore, the Civil Evidence Act 1972, together with the CPR sets out the basic requirements for admissibility of expert evidence. Added to that should be the common law guidance on expert witnesses provided in the *Ikarian Reefer*.[39] The *Ikarian Reefer* should be very much seen as a precursor and forerunner to the detailed requirements of the CPR in relation to the provision of expert evidence to a tribunal or court.[40]

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[38] See Mr Justice Ramsey in *BSkyB Ltd v HP Enterprise Services UK Limited* [2010] EWHC 86 (TCC) but also see paragraph 88 of the judgment of Judge Keyser QC in *The Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Limited* [2012] EWHC 2137 (TCC).

[39] *National Justice Compania Naviera SA v Prudential Assurance Company Ltd (Ikarian Reefer) (No.1)* [1995] 1 Lloyds Rep.455.

[40] See Chapter 2 for detailed discussion on *the Ikarian Reefer* and duties of the expert.

It is not just within the UK or Commonwealth jurisdiction countries that the role of expert evidence has been significantly explored and explained. The American Federal Rule of Evidence 702 provides a similar explanation and definition of the provision of expert evidence. They possibly give a more specific and useful set of guidelines for an expert to understand his obligations and duties. The American Federal Rule of Evidence 702 provides as follows:

> If scientific, technical or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

The American Federal Rule of Evidence carries on and provides further guidance at 704 in the following terms:

> (a) Except as provided in Sub Division (B), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
> (b) No expert witness testifying with respect to the mental state or condition of an accused in a criminal case may state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting the element of the crime charged or of a defence thereto. Such ultimate issues are matters for the trier of fact alone.

The opportunity to provide expert evidence is therefore very widely drawn. There are a small number of specific, statutory, restrictions on the provision of expert evidence,[41] but none of these specific restrictions apply to expert witnesses in the usual run of construction disputes. The tribunal is therefore left with a very open hand to take that evidence which it considers will be of benefit to it.

1.6 Duties of the expert witness

In recent years[42] focus for the role, obligation and duties of an expert witness has been on the relationship between the expert and the tribunal. That is the case whatever the format of the tribunal but particularly in relation to arbitration and litigation (as explained in Part 35 of the CPR) (and the *Ikarian Reefer*).

Within the judgment on the *Ikarian Reefer*, the court took the opportunity to make clear that the primary obligation of any expert witness was to the tribunal. The principle findings within the *Ikarian Reefer* judgment were:

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[41] See Section 1 of the Criminal Procedure (Insanity and Fitness to Plead) Act 1991 setting out specific requirements for the qualification of medical practitioners to give certain evidence in relation to pleas of insanity and fitness to plead in criminal cases.

[42] Particularly since the *Ikarian Reefer*.

- expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation;
- an expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to the matters within their expertise;
- an expert witness should state the facts or assumptions on which their opinion is based. They should not omit to consider material facts which could detract from their concluded opinion;
- an expert witness should make it clear when a particular question or issue falls outside their expertise;
- if an expert's opinion is not properly researched because they consider that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one;
- if, after the exchange of reports, an expert witness changes their view on the material having read the other side's expert report or for any other reason, such a change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court; and
- where expert evidence refers to photographs, plans, calculations, analysis, measurement survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

Following the judgment in the *Ikarian Reefer*, the Access to Justice Report prepared by Lord Woolf commented, in relation to the duties and obligations of experts, that the free admission of any expert evidence in civil cases was a serious evil which promoted an industry of highly paid experts who tended to render opinions in accordance with the needs of the parties by whom they were retained, and the cost of which helped to resist access to justice.[43]

The Access to Justice Report led to the CPR which in turn provide a requirement that the expert witness must state in his report that he understands his duty to the court and has complied with it.[44] Without such a statement the expert witness's report may be excluded or of reduced weight as evidence.

In the case of *Meadow v General Medical Council*,[45] Master of the Rolls Sir Anthony Clark added judicial approval to the protocol for instruction of expert witnesses to give evidence in civil claims.[46]

There have therefore been significant advances by the court[47] in terms of positive guidance to expert witnesses on the way they are to behave and approach their

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[43] Access to Justice final report page 137 These views had been expressed in court on previous occasions, for example, *Liddell v Middleton* [1996] PIQR 36 (in this case discussing the use of accident reconstruction experts).

[44] CPR 35.10(2), see also Article 4 of the CIArb Protocol in relation to arbitration.

[45] [2007] 1 AER1 and [2006] EWCA Civ 1390.

[46] Civil Justice Counsel, 2005 updated 2009. This is currently under review in 2012 and this review may lead to further amendment in due course.

[47] There have also been significant advances in arbitration practice, for example with the publishing of the IBA Rules in 1999 and the CIArb Protocol published in 2007.

professional obligations and duties. There is no doubt that the duties and obligations of an expert witness appearing before the court are, on the one hand, complicated to explain, but on the other hand easy to understand. The overriding duty is simply to the court. However, there are, almost inevitably, a huge number of shades of grey below that clear guidance on the overriding duty.[48]

While there can be no doubt from the guidance note from the court, and generally as mentioned above, that the primary duty of the expert witness is to the court, that is certainly not his only duty. This is where the shades of grey begin to appear.

The expert witness, in addition to his duty to the court, retains a duty to the party instructing him, both to carry out his investigations properly and thoroughly but also, where appropriate, to advise that party on the preparation and presentation of its case. There has been some significant misunderstanding in relation to whether an expert witness once instructed can continue to advise its instructing party on the correct way to proceed. However, not only can an expert witness do so, there is good support for a proposition that he must do so. If he fails to do so he will be acting outside his professional duties and obligations.

Lord Justice Tomlinson explained the position in *Stanley v Rawlinson*[49] in the following terms.

> Experts are often involved in the investigation and preparation of a case from an early stage. There is nothing inherently objectionable, improper or inappropriate about an expert advising his client on the evidence needed to meet the opposing case, indeed it is often likely to be the professional duty of an expert to proffer such advice … There is nothing improper in pointing out to a client that his case would be improved if certain assumed features of an incident can be shown not in fact to have occurred, or if conversely features assumed to have been absent can in fact shown to have been present.[50]

The duties owed by an expert witness are clearly one of the key issues every expert witness, and indeed every lawyer or person instructing an expert witness, must bear in mind. The duties and compliance with those duties will form the bedrock of the role and function that the expert witness will perform. Importantly, the duties of the expert witness will inevitably lead into the definition and explanation of the expert's possible liabilities as recently considered in *Jones v Kaney*.[51] The issues around the potential liabilities of an expert witness to the party instructing it are dealt with in more detail in Chapter 12.

While it might be seen, in theory, that the distinction between an expert witness explaining his views and a party adopting that view and adapting its case so the expert witness can support it, and an expert witness adopting and advocating the position of its own client, is an easy one to judge, in practice this is far from the case. Who has persuaded who of the correct position during a one to two year preparation period for a

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[48] See Chapter 2 for further discussion on the duties of an expert.

[49] [2011] EWCA Civ 405.

[50] From paragraph 19 of the judgment.

[51] [2011] UKSC 13.

hearing can be incredibly difficult to uncover. This is not least because the expert's opinion must be based on the facts of the case before him. As a case develops so clarity and precision is brought to the factual analysis. That additional clarity could substantially change the merits of the case from the expert's perspective. Where the developing factual situation matches early advice given by the expert witness on what he would need to support a particular position,[52] the distinction begins to blur. It becomes even more difficult when the expert witness, as he is quite entitled to, then strongly defends his belief in the result of those facts.

The more technically complex the issues in dispute, the greater the need for expert evidence and the more difficult it is to understand the demarcation between an expert witness acting properly and one who favours his client's position too much.

That being said, the fact that the balance is difficult to get right and often difficult to understand often leads to particularly difficult cross-examination for the expert witness. This is where a good expert witness can demonstrate that he is not advocating a client's position. A good expert witness at this point will not simply stick to the opinion in his report but will adapt his view depending on the information presented to him during the hearing and, potentially, following the alternative factual (or even hypothetical) scenarios presented by counsel during cross-examination.

It is important during cross-examination for the expert witness to be clear in his primary duty to the court. During cross-examination there is no opportunity to advise a client. If the expert witness has failed to advise the client earlier, this is not something that can be put right through an obdurate demeanour during cross-examination.[53]

1.7 Use of expert evidence

As noted earlier in this chapter, the role of the modern expert witness goes well beyond presenting oral evidence before a tribunal. There will, at the least, be an expectation of a written report which is exchanged before any hearing.[54] Further, the expert witness, particularly in construction, may be involved quite properly from a very early stage advising and assisting the client in considering and presenting its case.

All these different activities fall quite properly under the ambit of the expert witness. Trying to distinguish the advisory role at an early stage from the preparation of a report through expert discussions and onwards to answering questions during a hearing is inappropriate and misleading.

Once it is accepted that the role and involvement of the expert witness goes beyond his report and appearance in court, an important question to consider is how the interim views of such an expert are used, or perhaps more importantly, how are his interim views and advice protected from inappropriate use by either party.

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[52] Which advice he should give and should not be afraid to give, following the judgment in *Stanley v Rawlinson* noted above.

[53] Chapter 11 provides further detail on issues arising during cross-examination and appearance in hearings.

[54] In most proceedings a joint statement with an opposing expert setting out matters agreed and not agreed and reasons for disagreement should also be expected as a minimum.

This issue is generally dealt with in Chapters 7 and 9 but the essence of the question is whether disclosure can be ordered of an interim report, note or view of the expert witness, or is an expert report entirely privileged at all stages of its development. As with so many issues, this is a more complicated question than it first appears. While the general position is that an expert report is privileged at all stages until it is served on the other party is correct, there are a number of important exceptions to this including: (i) the purpose of the report, (ii) accidental disclosure, (iii) joint statements and (iv) changing expert witness.

In one area in particular – advancing a claim for professional negligence – the use of and requirement to adduce expert evidence is required. This requirement comes not through a statute but through the development of the common law.

Looking back at the principle reasons for using expert evidence[55] and the test for professional negligence[56] it quickly becomes apparent that expert evidence is needed. This is not simply or solely because the matters in dispute are technically complex – they may well not be – but because assessing the proper actions of a class of professionals to understand whether particular actions fall below the required standard will require broader knowledge of that class of professional.[57]

In a recent case,[58] Mr Justice Coulson explained the expected role of the expert witness in relation to professional negligence claims in the following terms:

> … It is standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise. That is a matter of common sense: How can it be asserted that Act X was something that an ordinary professional would and should not have done, if no professional in the same field has expressed such a view? CPR Part 35 would be unworkable if an allegation of professional negligence did not have, at its root, a statement of expert opinion to that effect.[59]

The role and involvement of the expert witness therefore goes beyond the straightforward interpretation of facts and on to the more complex application of standards to facts to consider a result or conclusion. This, of course, should not and cannot amount to usurping the role of the tribunal in making the decision. The expert witness is only providing opinion evidence to the tribunal in order to make its decision.

However, once again, there is no special test or description of what makes an expert witness sufficiently experienced to give opinion evidence in relation to matters of professional negligence. That said, given a choice between an expert witness with a live and current practice in the relevant area and one who is consulting or only acting as an expert witness, all other things being equal, the tribunal is likely to favour the expert

[55] The provision of technical or scientific opinions on matters beyond the scope of understanding of the average person.

[56] Whether the actions of the defendant have fallen below the expectation of the majority of professionals within that class. *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118.

[57] There must be some doubt that this position is the same in arbitration where the tribunal could itself hold that expertise.

[58] *Pantelli Associates Limited v Corporate City Development Number 2 Limited* [2010] EWHC 3189 (TCC).

[59] Paragraph 17 of the judgment.

with the current practice. The courts are giving some gentle guidance in this direction and that is yet another part of the balancing act an expert witness has to perform (staying current in the industry while demonstrating an ability and experience of presenting to tribunals).[60]

1.8 Summary

The position and role of an expert witness in modern proceedings in relation to the construction industry is difficult to fully understand and appreciate. However, there are certainly some absolute underlying themes such as requirements that the evidence given by the expert witness must relate to a demonstrable area of scientific research and that the expert witness has a proper understanding of the subject matter in order to give helpful guidance and assistance to the court (whether that understanding has been gained through practical knowledge and experience or academic research and learning).

The role of the modern expert witness has been changing rapidly over recent years with a depth of understanding and appreciation required of its legal duties now as much a factor in the production of any expert views or evidence as that expert's technical ability in the subject area.

It is meaningless to try and categorise or list all of the different types of expert witness evidence which can be given even within a reasonably narrowly defined work sector such as construction. While most construction disputes will centre around three broad topics (technical, delay and quantum), there are many forms of expert witness and expertise within each of those categories, particularly in relation to technical experts.

The duties and obligations of the expert witness are wide ranging and difficult to fully understand and appreciate. However, the expert witness has the requirement on his shoulders alone to ensure that he complies with all of these obligations. While the individuals instructing the expert witness can help assist and guide the expert witness through his duties and obligations, if the expert witness wishes to avoid any negative judicial comment on his performance as an expert witness, then he needs to understand all of these issues himself and apply himself accordingly.

Through the rest of this book the specific duties and obligations of the expert witness will be examined in more detail and also how these duties and obligations apply in the real world. How the role of the expert witness can change depending on who he is presenting to or in what context he is giving that presentation will be considered. How all of these legal obligations, duties and requirements are drawn together into the practicalities of acting as an expert witness and preparing a report, meeting other experts and giving evidence to a tribunal will then be looked at. Finally, the liabilities which an expert witness may have to those instructing him and to others will be examined.

[60] Refer again to the judgment in *The Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Limited* [2012] EWHC 2137 (TCC).