The need for expert witness

Expert witnesses were being appointed in England as long ago as 1784, when the well-known British civil engineer John Smeaton appeared before an English court on a case relating to the silting-up of the harbour at Wells-next-the-Sea in Norfolk, England. Today, a brief exploration of the internet will identify many companies and individuals offering expert witness services in various branches of engineering and construction within individual jurisdictions or internationally, be it programming and delay analysis, or costing and valuation. In each case, the experts will usually advertise...
that they have years of experience in their chosen field and the skill, knowledge and expertise gained in that time will be relied upon when forming and presenting opinions on matters that are often key to the resolution of the dispute.

However, there are rules and guidelines within which expert witnesses must operate and these can differ considerably between one part of the world and another. This article will focus on the UK and US rules.

**Similarities between UK and US expert witness law**

Before exploring some issues relating to judicial management of expert witness, it is important to recognise the similarities between the two jurisdictions. The fundamental principles regarding the admissibility of expert testimony in both the UK and the US are as follows:

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<th>United Kingdom</th>
<th>United States</th>
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<tr>
<td><strong>The purpose behind the use of expert witnesses</strong></td>
<td>Expert evidence is to furnish the judge or jury with necessary scientific criteria for testing the accuracy of their conclusions (R v Turner [1975] AB834)</td>
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<tr>
<td><strong>Qualification of expert witness</strong></td>
<td>An expert witness is qualified to give evidence where the court itself cannot form an opinion and special study, skill or experience is required for the purpose (Lord Mansfield, Folkes v Chadd, 1782, 3 Doug 157)</td>
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<td><strong>Admissibility of evidence</strong></td>
<td>Expert evidence must be provided in as much detail as possible in order to convince the judge that the expert's opinions are well founded (UK Register of Expert Witnesses, Factsheet 02: Expert Evidence, available at: <a href="http://www.jspubs.com/experts/fs/02.pdf">www.jspubs.com/experts/fs/02.pdf</a>)</td>
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It is evident that in both UK and US jurisdictions, the fundamental rationale for calling expert assistance is to assist the judge or trier of fact to understand the technical issues at hand. Therefore, in order to qualify as an expert, one must possess sufficient knowledge and expertise, gained either by formal study and/or by virtue of experience in a specialist trade, to provide that assistance. In the UK, this requirement is set out in the Civil Procedure Rules (CPR) and Practice Direction (PD) 35, and in the US under the Federal Rules of Evidence (FRE), 702.

Irrespective of the standing and experience of the expert witness, the judge must decide the weight and probative value of expert evidence given. Under FRE 703, experts may rely on data published by others. However, in the US, three cases which have become known as the ‘Daubert trilogy’, define tests that may be applied to determine whether investigation undertaken by the expert (or by others on his/her behalf) can be relied upon:

- Can the theory or method be empirically tested?
- Has the technique been subjected to peer review or publication?
- Can potential error rates (if any) be controlled?
- Are the proposed methods generally accepted with the specific community?

At present, under UK jurisdiction there is no statutory test for determining the admissibility of expert evidence but the consequences of permitting unreliable testimony have not gone unnoticed. In April 2009, the Law Commission published a consultation paper titled *The Admissibility of Expert Evidence in Criminal Proceedings*, recommending a general standard to ensure there is sufficient reliability of expert testimony. The proposed three stage process is as follows:

- the evidence must be predicated on sound principles, techniques and assumptions;
- the principles, techniques and assumptions must have been properly applied to the facts of the case; and
- the evidence should be supported by those principles, techniques and assumptions as applied to the facts of the case.

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Furthermore, in January 2013, the UK Ministry of Justice published a Report on the implementation of Law Commission proposals stating that there should be a new statutory reliability test of expert evidence in criminal proceedings. Though there is no mention of introducing statutory tests in civil proceedings, it can be speculated that such tests could also be introduced, if they prove to be successful in criminal cases.

**Differences between UK and US expert witness law**

Notwithstanding the similarities, there are three notable differences between the UK and US practice in relation to expert witness evidence as set out below:

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<th>Conduct of expert witness</th>
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<th>United States</th>
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<td>An expert’s ‘duties to the Court override any obligation to the person from whom they have received instructions or have been paid by’ (Civil Procedural Rules 35.3.2)</td>
<td>An expert’s duty is not formally defined under the Federal Rules of Civil Procedure/ Evidence</td>
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<tr>
<th>Depositions</th>
<th>United Kingdom</th>
<th>United States</th>
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<td>Expert evidence is examined before the judge</td>
<td>Expert evidence can be compelled to deposition</td>
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<tr>
<th>Ultimate issues</th>
<th>United Kingdom</th>
<th>United States</th>
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<tbody>
<tr>
<td>Expert opinion on ultimate issue is not admissible</td>
<td>Expert opinion on ultimate issue is admissible</td>
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**Independence and impartiality of expert witness**

The development of rules governing the conduct of experts seems to be greater in the UK than in the US and has increased over the years. As an example, in the UK cases *The Ikarian Revere* (1993) 2 LILR 68, 81-82 and *Davies v Magistrates of Edinburgh* [1953] SC 54, SLJ 54, the duties of the expert are set out clearly. Not only does the appointed expert have an overriding duty to the court, but he/she must remain independent and impartial and identify in his/her testimony any opinions held which do not support the case put forward by the party who appointed him/her. Also, under the CPR PD 35.10 (2), at the end of an expert’s report, he or she must include a statement that he/she is aware of his/her duties and has fulfilled them and will continue to do so.

By comparison, the law in the US is often perceived to be less prescriptive and persons directly involved in the independent analysis of the project are allowed to give expert evidence whereas in the UK this is usually not allowed. The FRE does not formally define the duties of an expert witness nor does it contain any specific written obligation for the expert to be independent. This distinction between the UK and US jurisdictions has prompted views of greater expert partisanship in the US. Nevertheless, there appears to be little enthusiasm for any change in the FRE to deal with this and the US appears to be content with the current governance of experts.

**Depositions**

Pursuant to Rule 29 of the US Federal Rules of Civil Procedure (FRCP), any party may take the testimony of any person by the form of oral (Rule 30) or written (Rule 31) deposition unless the court orders otherwise. If the deponent fails to attend, he/she could be compelled to do so by subpoena (Rule 45.B). The use of deposition is an important component of discovery (the right to compel an opposing party to disclose material facts and documents supporting its contentions) in the US legal system, as it enables lawyers to determine the strength of the other side’s evidence which may lead to early settlement or determine trial tactics.

By comparison, the use of depositions is uncommon before UK courts and civil law proceedings (although possible under certain circumstances). Unlike the US system, any cross-examination of an expert must be conducted under oath (or affirmation) in front of a judge. The expert must attend at the agreed trial date, preferably voluntarily but under subpoena if necessary. Any ambiguity or obfuscation within the expert’s report will be highlighted by the legal counsel during cross-examination and may prompt the judge to place less weight on that evidence.
**Ultimate issue**

The US and UK jurisdictions have adopted different stances on whether the expert can or cannot opine on issues which the judge is ultimately required to decide. Under FRE 704(a), the expert is permitted to opine on the ‘ultimate issue’ and ‘an expert’s testimony is not objectionable just because it embraces an ultimate issue’.

In contrast, experts who operate under the UK rules are strictly forbidden from opining on the ultimate issue. Experts must follow the code of conduct and not stray from the instructions given by their instructing lawyers. In the event of digression, the expert could face possible costs sanctions. In the words of Lord Cooper, former Head of the Judiciary in Scotland: ‘Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or the Judge sitting as a jury’.

**Expert witness or expert advocate?**

Under the adversarial litigation systems in both the UK and US, parties are entitled to choose the expert they hire. This gives parties the opportunity to appoint an expert who may be willing to best support the party’s view rather than the most experienced expert in their field of practice. Since experts are appointed and paid on the basis of a contractual relationship, some unfortunately may adopt the position of a ‘hired gun’, advocating on behalf of the party which appointed them in an attempt to advance that party’s contentions.

Misapprehension concerning the integrity and independence of experts is not a recent phenomenon and has become somewhat widespread. In 1996, Lord Woolf, then the Lord Chief Justice of England and Wales, published the Access to Justice report, noting that the civil justice system was slow and expensive, with the prolific use of expert witness as one of the contributing factors. In addition, the conduct of expert witnesses was further scrutinised in the landmark case of Jones v Kaney (2001) UKSC 13, which resulted in the expert’s immunity being abolished by the Supreme Court of the UK.

Similarly in the US, there is no shortage of cases in which the usefulness of expert witness testimony has been questioned. For instance, in the case of Finkelstein v Liberty Digital Inc [2005] CA No 19598, the judge highlighted that ‘[t]hese starkly contrasting presentations have, given the duties required of this court, imposed upon trial judges the responsibility to forge a responsible valuation from what is often ridiculously biased “expert” input’.

**The way forward – concurrent evidence**

In 2010, Lord Justice Jackson, a member of the Appellate Court of England and Wales, produced reports concluding that the cost of appointing experts was becoming disproportionate. The report highlighted the need for greater control of judicial case management, and one of the methods recommended was concurrent expert evidence, also known as ‘hot-tubbing’. This method, developed in Australia in 1980, proposes that experts should be sworn in at the same time before the judge who will then put forward a series of questions to the experts in order to identify the issues and to arrive, where possible, at a common resolution. As the ‘hot-tubbing’ method has encountered a mixed reception, it was proposed by Lord Justice Jackson that such method should be tried and tested in cases where the experts, the lawyers and the judge all consent.

A pilot scheme, also known as Concurrent Expert Evidence Direction (CEDD), was introduced in the Mercantile Court and Technology and Construction Court of Manchester under the leadership of Justice Waksman. From interim reports, the response to the pilot scheme was promising and the evaluations have shown no significant disadvantages. In the words of Professor Dame Hazel Genn: ‘As a procedure for enhancing the quality of judicial decision-making there seem to be significant benefits’. Furthermore, as of 1 April 2013, amendments were made to CPR PD 35 paragraph 11.1–11.4 so that ‘[a]t any stage in the proceedings the court may direct some or all of the experts from like disciplines to give evidence concurrently’.

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In contrast, there are some lawyers in both the UK and the US that have expressed their resistance to hot-tubbing. The primary reason conveyed is that they believe the method diminishes the control of the legal counsel since the expert’s testimony will be tested by the judge and the other expert rather than by counsel. Currently as it stands, there do not seem to be any reports of the US judiciary examining the compatibility of concurrent evidence with federal rules of evidence or civil procedure. However, the consensus amongst the US judges who have used the method is that the technique is helpful. For example, Judge Woodlock, a federal judge in the US District Court of Massachusetts, stated that ‘[t]he parties and the court found this “hot tub” approach extremely valuable and enlightening’.

**Conclusion**

The use of expert evidence in legal proceedings has been a long standing tradition and will remain an important part of the litigation process. It can be seen that under UK jurisdiction, measures have been enforced by reassuring that integrity and independence are upheld and, secondly, to remind the experts that their primary mandate is to serve the courts and not their fee payers. The recent legislative amendment of permitting concurrent evidence in the courts may help the judges to act as better gatekeepers to examine any fallacious expert testimony. Even though US courts may appear to be more relaxed in relation to the conduct of the experts, our experience in providing expert testimony in US and UK jurisdictions has proved this theory to be incorrect. We experienced little difference between the professional conduct of the expert witnesses, lawyers and judges who participate in the legal proceedings.

To conclude, it should be emphasised that whether providing expert testimony in the UK or US, experts should at all times ensure that their purported evidence is supported by relevant validation and must pay special attention to the methodology and facts that they are relying upon.

**Notes**

1 Available at: www.wirralmodelengineeringsociety.co.uk/Articles/John_Smeaton.pdf.
5 Ibid, 14, p 40.
9 Available at: www.judiciary.gov.uk/ICO%2FDocuments%2FReports%2FConcurrentEvidence-interim-report.pdf.
11 Available at: www.jonesday.com/room_in_american_courts/.

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