

Construction Solutions

The Evolution of Expert Witness Law Under UK and US Jurisdiction

Over the years, we have seen a rise in the demand for expert witnesses, and while the market for these services gains more traction and prospects remain strong, it has become increasingly important to examine the backgrounds of these individuals and what measures are in place to ensure their expert witness testimony is reliable and ethical.

The Need for Expert Witness

The use of expert testimony in construction disputes is not new, but as the technical and logistical complexity of construction projects has increased, so has the need for expert testimony to assist a Court or Arbitral Tribunal to understand and resolve the issues in dispute when parties find themselves having to resort to formal dispute resolution processes to settle their differences. Expert witnesses were being appointed in England as long ago as 1784, when the well-known British civil engineer (and lighthouse builder) 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.¹

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 engineering design, construction methods, project management, programming and delay analysis, or costing and valuation, to name just a few. In each case, the expert will usually advertise that they have years of experience in his or her 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 describes some of the similarities and differences between the way expert witnesses should operate under the legal systems of UK and US respectively, particularly in relation to Court proceedings but similar arrangements apply to expert evidence in Arbitration proceedings (although there is sometimes a greater flexibility of procedure in arbitration than in court).

¹ Accessible by http://www.wirralmodelengineeringsociety.co.uk/Articles/John_Smeaton.pdf

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:

	United Kingdom	United States
The purpose behind the use of expert witnesses	Expert evidence is to furnish the Judge or jury with necessary scientific criteria for testing the accuracy of their conclusions. ²	Expert evidence is admissible on the basis that the knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. ³
Qualification of expert witness	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. ⁴	An expert witness is qualified by knowledge, skill, experience or education. ⁵
Admissibility of evidence	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. ⁶	Expert testimony to be based on sufficient facts, data or products of a credible source of test and tried principles and methods. ⁷

It is evident that in both UK and US jurisdictions, the fundamental rationale for calling expert assistance is to assist the trier of fact (be it judge, jury or arbitrator) 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 UK, this requirement is set out in the Civil Procedure Rules

² R v Turner [1975] AB834

³ FRE, 702(a)

⁴ Lord Mansfield, Folkes v Chadd (1782) 3 Doug 157

⁵ FRE, r 702

⁶ UK Register of Expert Witnesses, Factsheet 02: Expert Evidence, available at <http://www.jspubs.com/experts/fs/02.pdf>

⁷ FRE, r 702 (b-d)

(“CPR”), Practice Direction (“PD”) 35⁸ and in US under the Federal Rules of Evidence (“FRE”), 702.⁹

Irrespective of the standing and experience of the expert witness, the Judge (jury or arbitrator) 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”¹⁰ define tests that may be applied to determine whether investigations 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:

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

Furthermore, on January 2013, the UK Ministry of Justice published, ‘Report on the implementation of Law Commission proposals’ stating that there should be a new statutory reliability test of expert evidence in criminal proceedings.¹¹ Though there is no mention of introducing statutory tests in civil proceedings, it can be speculated that such tests could also be introduced, if it proves to be successful in criminal cases.

Differences between UK and US Expert Witness Law

Notwithstanding the similarities, there are three notable differences between the English and US practice in relation to expert witness evidence as follows:

	United Kingdom	United States
Conduct of Expert Witness	Expert’s “duties to the Court override any obligation to the person from whom they have received instructions or have been paid by”. ¹²	Expert’s duty is not formally defined under the Federal Rules of Civil Procedure /Evidence.
Depositions	Expert evidence is examined before the Judge (or Arbitrator).	Expert evidence can be compelled to deposition
Ultimate Issues	Expert opinion on ultimate issue is not admissible.	Expert opinion on ultimate issue is admissible.

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. In the UK for example, cases such as, “The Ikarian Reefer”¹³ and *Davies v Magistrates of Edinburgh*,¹⁴ 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 they are aware of their duties and have 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 jurisdiction 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.

⁸ Accessible by http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35

⁹ Accessible by <http://www.law.cornell.edu/rules/fre>

¹⁰ Daubert Trilogy: *Daubert v Merrell Dow Pharmaceuticals, Inc.*, U.S. 579 (1993), *General Electric Co. v Joiner*, 522 U.S. 136 (1997) and *Kumho Tire, v Carmichael*, 526 U.S. 137 (1999)

¹¹ Accessible by https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162168/law-commission-proposals-report.pdf.pdf

¹² Civil Procedural Rules 35.3(2)

¹³ *Ikarian Reefer* 1993 2 LILR 68, 81-82

¹⁴ *Davies v Magistrates of Edinburgh* 1953 SC 34, SLJ 54

Depositions

Under the US Federal Rules of Civil Procedure (“FRCP”), r 29, any party may take the testimony of any person by the form of oral¹⁵ or written¹⁶ deposition unless the Court orders otherwise. If the deponent fails to attend, they could be compelled to do so by subpoena.¹⁷ The use of deposition is considered to be 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 in civil proceedings is uncommon in the Courts of UK (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 (barrister) 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 (or jury or Arbitrator) is ultimately required to decide. Under FRE 704(a), the expert is permitted to opine on the “ultimate issue”, it explicitly states that “an expert’s testimony is not objectionable just because it embraces an ultimate issue”.

In contrast, experts who operate under the UK jurisdiction 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.¹⁸ In the words of Lord Cooper, (a former past 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”.¹⁹

Expert Witness or Expert Advocate?

Under the adversarial litigation systems in place in both UK and US, parties are entitled to choose the expert they hire. This gives parties the opportunity to appoint not the more experienced expert in their field of practice but an expert who may be willing to best support the party’s view. 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,²⁰ 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 scrutinized in the landmark case of *Jones v Kaney*, in which resulted in the expert’s immunity from being abolished by the Supreme Court of UK.²¹

Similarly, in the US, there is also 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.*,²² the Judge highlighted, “These 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 (LJ) (A member of the Appellate Court of England and Wales) produced reports²³ concluding that the cost of appointing experts was becoming disproportionate.²⁴ 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 was developed in Australia in 1980, where experts are 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 a common resolution. As the “hot tubbing” method had encountered a mixture of response, it was proposed by LJ 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 reports²⁵ the response to the pilot scheme was promising and the evaluations have shown no significant signs of 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 1st April 2013, amendments were made to CPR PD 35 (para 11.1-11.4) so that, “At any stage in the proceedings the court may direct some or all of the experts from like disciplines to give evidence concurrently”.²⁶

¹⁵ FRCP, r30
¹⁶ FRCP, r 31
¹⁷ FRCP, r 45(B)

¹⁸ *Philips and Others Symes and Others 2* [2004] EWC 2330 (Ch), [2005] 4 ER 519

¹⁹ *Ibid*, 14, P40

²⁰ <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/contents.htm>

²¹ *Jones v Kaney* [2001] UKSC 13

²² *Harold Finkelstein and Marilyn Finkelstein v Liberty Digital Inc* [2005] C.A.No 19598

²³ Accessible by <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

²⁴ *Ibid*, 27, P379, para 3.2

²⁵ Accessible by <http://www.judiciary.gov.uk/JCO%2FDocuments%2FReports%2Fconcurrent-evidence-interim-report.pdf>

²⁶ Accessible by http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35#rule11.1

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 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, I do not know of 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, "The parties and the court found this 'hot tub' approach extremely valuable and enlightening".²⁷

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 the laws regarding the conduct of expert witnesses under the UK and US jurisdictions are in some ways considerably different.

Under the UK Jurisdiction, measures have been enforced by reassuring that integrity and independence is 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, my experience in providing expert testimony in US and UK jurisdictions has proved this theory to be incorrect. I find little difference between the professional conduct of the expert witness, lawyers and judges who participate in the legal proceedings.

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

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²⁷ Accessible by http://www.jonesday.com/room_in_american_courts/



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