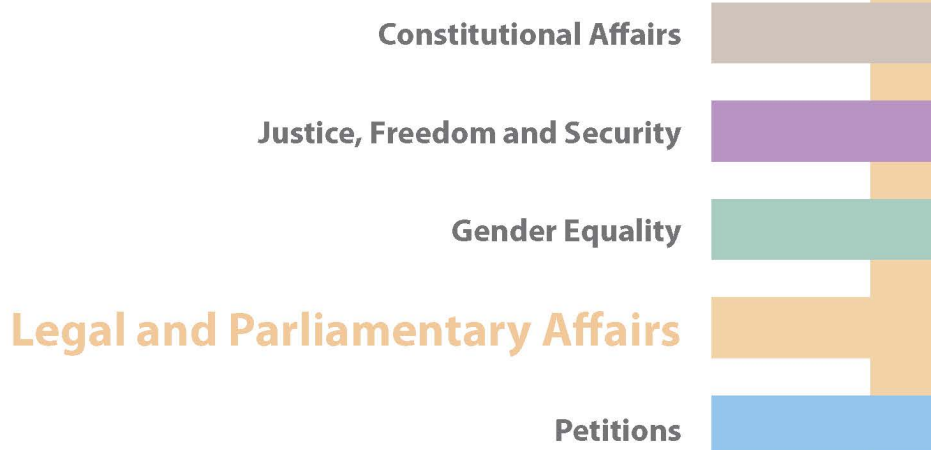


DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Civil Judicial Experts in Cross-Border Litigation: The Common Law Perspective

In-depth analysis for the JURI Committee





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Civil Judicial Experts in Cross-Border Litigation: The Common Law Perspective

IN-DEPTH ANALYSIS

Abstract

Upon request by the JURI Committee, this in-depth analysis examines the use of expert witness evidence and testimony in cross border legal actions and the comparison of the differing systems of law in which such litigation might take place. It further analyses how the common law system has successfully evolved to facilitate the employment of civil expert witnesses across the Member States of the European Union.

DOCUMENT REQUESTED BY THE COMMITTEE ON LEGAL AFFAIRS

AUTHOR

Barry Turner BA MPhil, Senior Lecturer in Law, University of Lincoln, United Kingdom.

RESPONSIBLE ADMINISTRATOR

Roberta Panizza
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@ep.europa.eu

LINGUISTIC VERSION

Original: EN

ABOUT THE EDITOR

Policy Departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny.

To contact the Policy Department or to subscribe to its monthly newsletter please write to: poldep-citizens@ep.europa.eu

European Parliament, manuscript completed in May 2015.
© European Union, Brussels, 2015.

This document is available on the Internet at:
<http://www.europarl.europa.eu/studies>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

LIST OF ABBREVIATIONS	4
EXECUTIVE SUMMARY	5
INTRODUCTION	6
1. THE EXPERT IN THE COMMON LAW SYSTEM	8
2. QUALIFICATIONS OF THE EXPERT	9
3. THE COMMON LAW SYSTEMS: EXPERT WITNESS EVIDENCE IN THE UK, AUSTRALIA AND CANADA	13
3.1. Expert Evidence in the United Kingdom (England and Wales)	13
3.2. Expert Witness Evidence in the United Kingdom (Scotland)	14
3.3. Expert Witness Evidence in Australia	15
3.4. Expert Witness Evidence in Canada	16
4. IS THERE STILL A COMMON LAW PERSPECTIVE IN THE CIVIL COURTS?	18
5. CROSS JURISDICTIONAL LITIGATION	21
6. HARMONISATION OF THE LAW AND THE EXPERT	23
7. HIRED GUNS OR SINGLE JOINT EXPERTS	24
8. CONCLUSION	26
REFERENCES	28
TABLE OF CASES	29
TABLE OF STATUTES AND REGULATIONS	30

LIST OF ABBREVIATIONS

- CCR** County Court Rules
- CLR** Criminal Law Review
- CPR** Civil Procedure Rules
- EEC** European Economic Community
- EU** European Union
- FCR** Federal Court Rules (Canada)
- PD** Practice Direction
- RSC** Rules of the Supreme Court
- SOR** Statutory Instrument Regulations (Canada)

EXECUTIVE SUMMARY

Expert witness testimony is an essential element of both civil and criminal litigation in all Member States of the European Union. The complexity of evidence is enormous and in a bewildering range of areas is incomprehensible to all but those with the education and experience to understand it. Nevertheless it is by this very evidence that many trials and civil actions are decided.

The regulations and legal controls on expert witnesses vary considerably over the 28 Member States of the EU, as indeed to the legal systems and traditions themselves and it has long been discussed whether this range of differences could in any way affect the quality of evidence and even the fairness of litigation. The author of this paper is involved in a Europe wide project involving judges, lawyers, experts and academics to examine to the finest detail the problems of cross border litigation and the employment of experts within the courts of the Member States of the EU.

This paper examines the development of the use of experts and expert witness testimony within the common law of the United Kingdom and how the differences and for that matter the similarities between the common and civil law systems can be reconciled. The future looks promising.

The common law system in the UK has undergone dramatic change in the last 20 years or so. The practice and procedural elements of the common law have largely been brought under the control of a civil law model in the Civil Procedure Rules. These changes have made the employment of experts from non common law jurisdictions far less difficult. The change has worked both ways. An expert from the common law system of the United Kingdom, familiar with Part 35 of the Civil Procedure Rules will have no difficulty in recognising and feeling comfortable with similar rules used by our common law neighbours in Europe.

In conclusion the moving tighter of legal philosophies and the harmonizing of legal practice and procedure means that the common law perspective to which the title of this paper alludes should be seen as a pathway to ever more efficient justice rather than a barrier to it.

Aim

The aim of this paper is to describe the common law rules of civil evidence and to examine the operation of experts across all main legal traditions of the European Union.

INTRODUCTION

Traditionally papers that have sought to compare the common law system with that of the civil codes of most of the countries in Europe have emphasised the differences between the two systems. To some extent this paper will follow the same well-trodden path but it will also be examining the often-overlooked similarities between the two where the use of expert witness evidence is used. The *common law* is a system of jurisprudence originating in England and by historical serendipity now extends in one form or another to all English speaking nations and many parts of what was at a time part of the British Empire. This system, also often referred to as *Anglo-Saxon Jurisprudence*¹ differed in many ways to the continental systems but the most obvious one was in its lack of codification.

English common law has seen many changes in recent decades and it is no longer the case that the law is not codified. The introduction of the Civil Procedure Rules, while not repealing the old common law traditions placed the emphasis in civil litigation on a procedural basis and the CPR is as codified as any system originating in Roman Law² or *Code Napoléon*³. This essay will attempt by analysis of the two models to reconcile them rather than dwell on the differences.

It is of particular interest that since the adoption of the Civil Procedure Rules that as many differences can be found between common law systems of justice and those based on continental models. The United States has a common law system as mentioned previously as a result of its history but while the system of jurisprudence is structurally the same as in England and Wales in practice it is markedly different. This is particularly clear in the different approaches to expert testimony in the two countries.

Similarly Australia and Canada have evolved their common law systems and those differences will be illustrated in this paper.

The expert witness plays an essential role in a significant amount of litigation in the common law process, indeed without the contribution of the experts report and in some cases testimony the litigation would not be possible at all. The involvement of expert witnesses extends beyond the usual role of the witness in that they are not simply present to tell a story as many non-experts are but to give opinions and detailed explanations of the meaning of the evidence presented at the trial. A clear difference exists between an eye-witness, who is there to tell the court what they saw and an expert who is there to tell the court what they should understand.

This introduces, at least superficially the idea that the expert witness is rather more like an *officer of the court* than for instance an eye-witness would be. The expert interacts far more with the evidence than would an ordinary witness. They will experiment with it, measure it, interpret it and describe it from a position of authority. In the main that authority is often much more difficult to challenge than the testimony of one who is simply telling the court what they saw at a particular time on the day of the incident.

In order to understand the role of an expert in the common law system it will be necessary to commence with a brief description of how that system works and the peculiar legal philosophy on which it is based.

¹ Anglo-Saxon jurisprudence is notable for the large range of evidence which is excluded from the trier of fact (at least when the trier of fact is a jury in criminal cases). Evidence may be excluded, including forensic-autoptical evidence if its prejudicial effect outweighs its probative value. Wigmore on Evidence (3rd Ed. 1940 Vol 1. 1 s.57).

² The civil law codes originate with the *Corpus Juris Civilis* of the Emperor Justinian (527-565 AD). The *Corpus* was an all-embracing set of laws arising out of statutory restatement of the Roman Civil Law. It is contrasted with the common law by having a single point of origin rather than multiple origins evolving over time, as in case law.

³ The *Code Napoléon* provided the pattern whereby many continental countries, especially those under direct rule or influence of The Emperor Napoléon Bonaparte codified their public and private law into a written format rather than the 'unwritten' traditions of the common law.

The common law is a system almost exclusively employed by the English-speaking world and is a product of a very long historical evolution. The central feature of the common law system is the reliance on *precedent*, the guidance provided by decisions in earlier similar fact cases. The tradition of precedence has been explained as having two main reasons, one psychological the other purely practical⁴. In psychological terms almost everyone who makes a decision, be it a legal decision or otherwise is keen to justify it, usually by reference to some authority. The learned decisions of others usually emanating from a higher legal authority provide ideal justification and are of course referred to in the English Legal System as *authority*.

This system of reliance on preceding decisions along with statutory interpretation is the very basis of the common law legal tradition. The law has adapted over many centuries to continue to be guided by decision taken, in some cases centuries ago⁵.

The common law system is a living legal system and succeeds in the main in keeping up with changes in society or in human conduct. In the case of the use of expert evidence changes in human knowledge or the basis of the expertise can be accommodated far more effectively than in a legal system based on inflexible decrees. While the older precedents are there to guide they are flexible and can be moulded to fit the times in which the litigation takes place.

⁴ James' Introduction to English Law 13th Ed. Shears P. Stephenson G (1996) Butterworth's. p.14.

⁵ *Pinnels Case* (1602) 5 Co. Rep. 117 QB, an old standard of English contract law is still 'good law' more than 400 years after it was decided.

1. THE EXPERT IN THE COMMON LAW SYSTEM

One of the most obvious features of the common law system is its adversarial nature. One of the most notable differences in how experts interact with the legal system in the adversarial system from the civil law systems is in their appointment. In the civil law systems it is most common for the expert to be court or judge appointed. In the adversarial or common law system the tradition was that parties appointed the expert not unlike the way they appointed their advocates. These differences in tradition are now subject to considerable change in many common law systems especially in the UK.

The common law evolved as an adversarial system of justice in which the parties appointed advocates to argue their cases. This forensic battle between champions, as it became known was indeed not unlike the philosophy underpinning the old mediaeval chivalric tradition adopted in trial by combat. While the battle between champions no longer resulted in bloodshed it is clear that adversarial justice occasionally leads to a situation where it is not the righteousness of the claim that decides the outcome but the muscle and skill of the champion.

Putting aside the effects of the introduction of evidence for a moment the oratorical skill of the advocate and a carefully selected armoury of legal precedents was often the deciding factor in who won or lost a case. Fairness, justice, morality and even truth had little impact on cases decided on purely legal arguments. Put bluntly adversarial courts were not a forum in which the parties sought to establish the truth but one in which they were determined to win.

It is logical then to expect that a party seeking victory in a legal action will be seeking a powerful advocate with hopefully a more persuasive argument than that pursued by the opponent. If we reintroduce the idea of the effects of actual evidence in the trial then we can naturally assume that the 'better' expert will have a more persuasive effect on the *trier of fact* than one deemed to be less qualified or experienced. The dream team in any litigation would therefore be the very best advocate supported by the most 'expert' of experts.

2. QUALIFICATIONS OF THE EXPERT

The need for some sort of qualification or measure of expert witnesses was recognised a long time ago. Indeed, as early as 1554, Saunders J remarked in the case of *Buckley v Rice-Thomas*⁶

« if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.»

Certain matters were recognised to be so specialised that for a court to make any sensible conclusion concerning them that it would be essential that those matters were explained by experts. In *Folkes v Chadd*⁷ Lord Mansfield affirmed that an expert witness may give opinions to assist in resolving issues concerning matters of knowledge which can only be acquired by special training or experience.

It is well established that an expert giving evidence either in the civil or criminal courts must be qualified in the sense of having specialised knowledge. This is a question for the trial judge in each case. Expert qualification therefore is not qualification in terms of certificates or admission to professional bodies it is essentially a function of evidential relevance:

«The bogus testimony of a charlatan contributes nothing worthwhile to proceedings, and as evidence of neither truth nor falsehood it is, literally, irrelevant.»⁸

Because it will never be possible to draw up a closed list on the full range of matters which may be described as 'expertise' qualification has always been a matter of competence rather than qualification in the sense of certification or of the passing on an examination.

The common law approach to deciding who is and who is not an expert for legal purposes was largely guided by precedent, the very foundation stone of the common law system itself. In the UK the courts have traditionally adopted a rather relaxed attitude to who might qualify⁹ and in a number of cases 'qualify' will have nothing to do with actual qualifications in an academic or professional sense. In *R v Silverlock* [1894] the expertise in question was in handwriting, a specialist form of expertise for which there were no qualifications or professional standards by which the expertise could be measured. Nevertheless the expert, a solicitor by profession was permitted to give evidence on it.

This illustrates a state of affairs not confined to experts acting in the common law courts. The range of potential subjects in which expertise can be acquired is enormous and many of these types of expertise are potentially of a variety that could be used in litigation evidence. It is well recognised in the courts that expertise is not restricted to subjects for which a professional body may grant authority to practice. In *R v. Robb*¹⁰ Bingham LJ illustrated a basic observation of principle.

«The old-established, academically based sciences such as medicine, geology or metallurgy, and the established profession such as architecture, quantity surveying or engineering, present no problem. The field will regarded as one in which expertise

⁶ (1554) 1 Plowd 118, at p. 124.

⁷ (1782) 3 Doug KB 17.

⁸ P. Roberts, 'Reflections on Expert Evidence in Canadian Criminal Proceedings: More Lessons from North America', in H. Reece (ed.), *Law and Science: Current Legal Issues* (Oxford University Press: Oxford, 1998) 178.

⁹ *R v. Silverlock* [1894] 2 QB 766, *R v. Oakley* (1979) 70 Cr. App. Rep 7.

¹⁰ (1991) 93 Cr.App.R. 161 CA.

may exist and any properly qualified member will be accepted without question as expert».

Bingham may be pointing out the obvious and stating that our courts are happy to accept the judgement of the professional bodies when it comes to handing out qualifications. Society is comfortable with the long established professional standards of such bodies, why should the courts, as representative of societal values not similarly be satisfied. The next part of Bingham's deliberation succinctly illustrates the problem when we extend the meaning of expert outside the established professional or academic disciplines.

«Expert evidence is not, however, limited to those core areas. Expert evidence of fingerprints, handwriting and accident reconstruction is regularly given. Opinions may be given of the market value of land, ships, pictures or rights. Expert opinions may be given of the quality of commodities or on the literary, artistic, scientific or other merit of works alleged to be obscene...some of these fields are far removed from anything which could be called a formal scientific discipline».

This clear statement demonstrates the problems associated with expertise, much of it will be on subjects so obscure or so subject to the fickle changes in taste that no formal or centralized professional body could ever maintain a uniform standard.

Lord Bingham was of the opinion that there may be some subjects that the courts would never accept as the product of expertise either learned formally or acquired by experience.

«...the courts would not accept the evidence of an astrologer, a soothsayer a witch doctor or an amateur psychologist».

Bingham then returned to the ruling in *Silverlock* describing the statement of Lord Russell of Killowen CJ as "characteristically pragmatic".

"Thus the essential questions are whether study and experience will give a witnesses's opinion an authority which the opinion of one not so qualified will lack, and (if so) whether the witness in question is [skilled and has an adequate knowledge] ...if these conditions are met the evidence of the witness is in law admissible".

The seminal case on determining the necessity of expert testimony is that of *R v. Turner*¹¹. Lawton J, in this case determined the qualifications of an expert by suggesting where an expert was not necessary.

«An expert's opinion is admissible to furnish the court with scientific information which it is likely to be outside the experiences and knowledge of a judge and jury. If on proven facts a judge or jury can form their own conclusions without help, then the opinion of experts is unnecessary».

Whether the witness is in possession of formal qualifications and membership of professional bodies or whether the expertise in question is one so esoteric that no such formal qualifications exist, the burden of proving that they are an expert lies with the party seeking to adduce expert evidence. The judge however is ultimately responsible for endorsing that qualification or acceptance of expertise and should intervene even where there is no challenge to the expert's credibility by the other party. In *R v Inch*¹² the judge failed to intervene to refuse the evidence of a medical orderly as to the cause of a wound. Although the defence counsel had themselves not objected to this witness it was for the judge to have intervened as to their qualification.

¹¹ [1975] QB 834.

¹² (1990) 91 Cr.App.R 51.

Perhaps the most succinct definition of the qualification of that expert is that stated by Murphy.

«Qualification to give expert evidence is technically a matter of competence, and the court should investigate the credentials of a proposed witness before permitting him to give expert evidence. No doubt a witness who lacks any apparent qualification should not be heard, but if the witness has some claim to expertise, the modern practice is to receive his evidence, though its weight may be open to serious adverse comment if the apparent expertise is not translated into reality».¹³

A final position on qualifications is based on the common law of hearsay and states that an expert need not have personal knowledge of every relevant matter with the field of his expertise. Once a person qualifies as an expert he is entitled to base his report or testimony on professional publications, academic textbooks, and research data from the professional work of others. This is clearly a reflection of the world of the academic or research expert who would by necessity be drawing on published literature and earlier experimental work when for instance writing a paper. In *H v. Schering Chemicals Ltd.*¹⁴ the expert witness in a civil case for damages against a pharmaceutical company was ruled to be perfectly properly referring to findings from articles in the academic press written by others with similar expertise. The court regards references to reputable authority within the expert's field as supporting inferences. The fact that in strict interpretation this material would count as hearsay did not disqualify him as an expert or the evidence as relevant to the case in question.

While it remains the case that experts may be chosen by the parties in civil proceedings when it comes to the actual assessment of the qualifications of the expert the judge will have the final say. The introduction of expert evidence is a two stage process. The first stage is the determination of the process or technique being accepted and recognised by the current consensus, for instance a recognised scientific theory or technique for obtaining data. The test will be in most cases whether the experts particular expertise is recognised by the courts. In terms of scientific evidence this would usually be determined by the academic qualifications, current research publications and possibly the current post held by the expert. An expert giving evidence on the toxicity of poisons would normally be a chemist with post-graduate qualifications, a record of publications in high impact academic journals and a current post in a research environment. This set of qualifications would be the most likely criteria to convince even the most skeptical of lawyers that the person was in fact and expert in the field of assessing the toxicity of substances.

It would not be usual to accept that a 'general practitioner' in science was an expert. The field of natural science is immense and the advancement of all these disciplines is often rapid and sometimes surprising. A scientific polymath is unlikely to be permanently up to date with all of the current advancements in multiple disciplines. This has now been recognised for a long time and was succinctly described in an article in the *Criminal Law Review* in 1987.

At one time a practitioner of forensic medicine would be competent to give reliable evidence based on the state of knowledge then available, on problems in the fields of morbid anatomy, toxicology, the examination of blood, of hairs and fibres and of some stains by biological fluids. But now the disciplines of morbid anatomy and toxicology have moved a long way apart and the knowledge available in the area of blood grouping, serology, immunology and genetics has expanded vastly and as a consequence has produced several separate specialities.¹⁵

¹³ Murphy P. *A Practical Approach to Evidence* 3rd Ed. (1988) p.288.

¹⁴ [1983] 1 WLR.

¹⁵ Gee D.J. 'The Expert Witness in the Criminal Trial [1987] Crim LR 307.

The adversarial nature of the civil law act as a further scrutiny on the competence of the expert in spite of the evolution of civil litigation via the application of the Civil Procedure Rules. The Civil Procedure Rules represented the largest shift in legal philosophy in a century and took the civil litigation process some distance from the traditional common law model. The process of civil litigation post 2000 became less of a battle between champions and more of a search for resolutions. The overriding objective of the civil courts since the introduction of the CPR is no longer to provide a legal battleground in which counsel and their appointed experts fight it out to victory or defeat. The Civil Procedure Rules came into effect following the publication of Lord Woolf's report published in 1996¹⁶. The purpose of these rules, replacing the Rules of the Supreme Court and the County Court Rules was to ensure access to justice. In many ways this was to be achieved by making the rules simpler. The principles are neatly contained within Part 1 'The Overriding Objective' and it is immediately clear that this contains matters directly relevant to expert witnesses.

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

There was no imperative under the old common law to see that parties were on an 'equal footing'. Indeed one of the most damning condemnations of the old system was that the parties with the most access to funds were going to be the ones with the advantage of appointing the 'best' counsel and seeking out the most expert of experts. In both cases such legal and technical support is obviously going to be the most expensive.

¹⁶ *Access to Justice Final Report*, by The Right Honourable the Lord Woolf, Master of the Rolls, July 1996, *Final Report to the Lord Chancellor on the civil justice system in England and Wales*.

3. THE COMMON LAW SYSTEMS: EXPERT WITNESS EVIDENCE IN THE UK, AUSTRALIA AND CANADA

The United Kingdom, Australia and Canada share a common legal system as a result of history. The system is in principal adversarial but has over the last couple of decades moved towards a more inquisitorial nature in practice if not in theory. This is clearly demonstrated in the use of expert witness testimony where, while the expert is still appointed by the parties the job they do is for the benefit of the court and the administration of justice. In the UK the expert is now firmly under the control of the civil procedure rules and likewise in the other two jurisdictions practice directions keep the role of the expert confined to assisting the judge and other triers of fact in understanding technical evidence.

3.1. Expert Evidence in the United Kingdom (England and Wales)

This section describes the role of the expert in the UK as a whole while recognising that Scotland, part of the UK has a distinct legal system of its own with its own variations on the use of evidence. The UK employs a common law system in both civil and criminal law however since the advent of the Civil Procedure Rules in 1999 the civil procedure is very much more like a codified process than it was prior to that date use of experts in civil and criminal procedure is governed by a strict system of rules.

Traditionally witnesses in the common law system in the UK were not allowed to give opinion evidence. By s.3 (1) of the Civil Evidence Act 1972 a witness is able to give their opinion on any matter in which they are qualified. 'Qualified' here means they have the knowledge and expertise not necessarily that they hold formal qualifications. In the majority of cases however part of the measure of qualification will be a formal degree or professional qualification. There is no statutory register of experts in the UK but the Expert Witness Institute and the Academy of Experts have private registers from which litigants and the courts can obtain suitable experts.

The role of the expert is now governed by Part 35 of the Civil Procedure Rules and although it is still the parties that appoint the expert the clear duty of the expert is to the court rather than to them. Prior to the adoption of the Civil Procedure Rules Some judges had already placed significant professional responsibility on the experts themselves to ensure the reliability and probative value of their evidence. A number of specific responsibilities were spelled out by Mr Justice Cresswell in *The Ikarian Reefer*¹⁷ and are as follows:

«Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation».

«Independent assistance should be provided to the court by way of objective unbiased opinion regarding matters within the expertise of the expert witness».

«Facts or assumptions upon which the opinion was based should be stated together with material facts which could detract from the concluded opinion».

«An expert witness should make it clear when a question or issue fell outside his expertise».

¹⁷ *Naviera SA v. The Prudential Assurance Co.* [1993] 2 Lloyds Report 68.

«If an experts opinion is not properly researched because he considers that insufficient data is available the this should be stated with an indication that the opinion is no more than a provisional one».

«If, after exchange of reports an experts opinion changes his view on a material matter having read the other sides expert report or for any other reason, such a change of view should be communicated (through the legal representatives) to the other side without delay and when appropriate to the court».

Once again the duties of the expert to the court, along with a reminder on the ethical and legal duties to the parties are clearly described as they had been so many times before and since¹⁸.

Rule 35.3 specifically states that the duty to the court overrides any obligation to the person who is instructing them.

The court decides the issue of whether an expert is required and Rule 35.1 restricts the appointing of experts to matters on which their expertise is reasonably required to resolve the problem. Expert evidence is only admissible where the matters in question fall outside the knowledge and experience of the court.

The expert will submit evidence in the form of a written report and this is ostensibly to save money. Questions may be put to the experts on matters contained in the report.

By Rule 35.7 where both parties wish to submit expert evidence the court may direct that a single joint expert is appointed. The instructing parties are encouraged to agree as is the spirit of the overriding objective of the Civil Procedure Rules but if they cannot agree the court may appoint on its own volition although even in these circumstances the expert is not considered court appointed and the responsibility to pay their fees remains with the parties instructing.

Experts are required to be impartial, unbiased and ethical. Since the landmark case of *Jones v. Kaney*¹⁹ experts have become liable to civil proceedings where they have acted negligently and in criminal cases would be subject to perjury or perverting the course of justice in certain circumstances²⁰.

The report must by Practice Direction 25 (2002) be submitted to the court and not to the parties and the report must contain a statement of truth. The courts are not bound by the experts conclusions and may disregard any opinions put forward that are considered to be either outside the expert's stated mission or of a nature within the knowledge of the judge or the parties. In accordance with the role of the expert their purpose is to assist the trier of fact, be it judge or jury to make up their own minds as to the facts. The expert therefore has no deciding role of their own as to the ultimate issue of proof.

Since in the UK the expert is appointed by the parties as their technical assistant the fees of the expert will be paid by the parties.

3.2. Expert Witness Evidence in the United Kingdom (Scotland)

In Scotland the judge can suggest to the parties that the Court would like to have the opinion of an expert on a particular subject where the expertise is outside the knowledge of

¹⁸ These duties were described again by Laddie J. in *Cala Homes (South) Ltd. v. Alfred McAlpine Homes East Ltd* [1995] CILL 1083.

¹⁹ [2011] UKSC 13

²⁰ The Criminal Procedure Rules 2010.

the judge or the parties. This is described as a particular question should be "remit to a man of skill". There is no statutory register of experts in Scotland as all experts are technical counsels for the parties but the Law Society of Scotland does publish a list of experts. The parties are responsible for appointing the experts but the judge may also call upon expert opinion if necessary to explain a technical issue.

The expert's duty as in the majority of jurisdictions is to the court although this is by convention rather than statute²¹. The experts must have no financial incentive or conflicts of interest that might interfere with their duty to the court. An expert may be recused if they are perceived to be biased or in any other way acting contrary to the interests of the court. An expert who knowingly provides false evidence can be sued for perjury and contempt of Court. In its judgement, the court can publicly criticise an expert who has been incompetent.

Neither the judge or jury is bound by the expert's testimony and as in the other jurisdictions the *trier of fact* has final say on the ultimate issue having considered all evidence in the case.

3.3. Expert Witness Evidence in Australia

In Australia the use of experts is governed by practice directions and statute much the same as in the UK. The expert has an overriding duty to the court²² and as in the UK they are not advocates of the party instructing²³. As appears to be universal in all jurisdictions the expert is there to assist the court in areas where the matters in question are outside the knowledge and understanding of the judge and the parties. Consequently an expert may not be employed where the matters at issue are within that knowledge.

Experts in Australia are not required to demonstrate impartiality and an expert taking a particularly strong view, so long as it is based on their knowledge and expertise is not seen as necessarily lacking objectivity this is supported by the experts declaration at the end of the report.

[the expert] has made all the inquiries that [the expert] believes are desirable and appropriate and that no matters of significance that [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court."

Similarly there is no bar on experts who have relationships with the parties from giving evidence. All that is required in those circumstances is that the expert identifies the party with whom they are connected and describes the nature of that relationship. Expert evidence presented to the Court however should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation²⁴.

The experts evidence is given in the form of a report on which both parties have the ability to challenge. An expert's written report must give details of the expert's qualifications and of the literature or other material used in making the report. All assumptions of fact made by the expert should be clearly and fully stated.

Where assistants have been used in collating the evidence the report should identify and state the qualifications of each person who carried out any tests or experiments upon which

²¹ Walker and Walker, *"The Law of Evidence in Scotland"* (3rd ed. 2009).

²² Part 3.3 – Opinion, The Evidence Act 1995.

²³ *Sampi v State of Western Australia* [2005] FCA 777 at [792]-[793], and *ACCC v Liquorland and Woolworths* [2006] FCA 826 at [836]-[842].

²⁴ *Whitehouse v. Jordan*, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce.

the expert relied in compiling the report. Where several opinions are provided in the report, the expert should summarise them. The expert is required to give the reasons for each opinion.

The expert can be recused if it is evident that they are acting outside their mission or area of expertise. As in other jurisdictions the expert can be recused for bias but a forcefully held opinion in their area of expertise is not to be interpreted as lack of objectivity. If however as a result of refusing to consider an alternative view or acknowledge difference of opinion from similarly qualified experts they may be considered to have compromised their objectivity.

In Australia, unlike most of the jurisdictions within Europe expert witnesses are immune from being sued by the party that engaged their services for negligence or breach of contract²⁵. Australian courts can however follow precedent set in the UK courts and since *Jones v Kaney* there is a possibility that this might change. In the case of *James v Medical Board of South Australia and Keogh*²⁶, a case involving a medical expert, the courts stated that although in the interests of public policy a medical expert would retain immunity from suit they should be answerable to their professional body for any breach of ethical codes or unacceptable practice.

There is an increasing intolerance in Australian courts to conflicting expert evidence and a system known colloquially as 'hot tubbing' encourages experts to get together in conference to form a consensus on the evidence, to avoid the adversarial nature of opposing experts, who by rules of the courts are not to act as advocates to the parties.

3.4. Expert Witness Evidence in Canada

The role of the expert witness in Canadian trials was summed up tidily in *Regina v. Abbey*²⁷, Mr. Justice Dickson of the Supreme Court of Canada stating:

«With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary».

As we have seen now in so many differing jurisdictions the almost universal principle applies that an expert may only be called where the court needs the particular knowledge that they possess, which goes beyond the understanding of the *triers of fact* in courts. All of the rules determining the qualifications and appointments of experts are now codified in the Federal Court Rule 52²⁸.

As is common within the common law legal systems the expert is chosen by the parties²⁹ to the dispute but at all times owes their duty to assist the court³⁰. This duty overrides any duty or responsibility to the parties whether instructing or not. Two or more of the parties

²⁵ *Cabassi v Villa* (1940) 64 CLR 130.

²⁶ [2006] SASC 267.

²⁷ [1982] 2 S.C.R. 24.

²⁸ SOR/2010-176 August 3, 2010

²⁹ Section 52.1 Federal Courts Rules

³⁰ Federal Courts Act (*Rules Amending the Federal Courts Rules (Expert Witnesses)*) P.C. 2010-964 August 4, 2010

may jointly name an expert witness. The courts are keen to have experts confer and agree evidential issues and can order this conference to take place in the presence of a judge. It is possible to recuse an expert and a party to a proceeding shall, as early as possible in the proceeding, raise any objection to an opposing party's proposed expert witness that could disqualify the witness from testifying. This again follows the usual pattern of bias, personal interest in the outcome of the case or incompetence. The expert witness is required to sign an affidavit to the effect that they are competent to perform the role and that they have read the Code of Conduct for Expert Witnesses set out in the schedule to the *Federal Courts Rules* and agree to be bound by it.

The experts report is governed by the Rules 52.3 and 52.4 which comprise the following:

- An expert's report submitted as an affidavit or statement referred to in rule 52.2 of the *Federal Courts Rules* shall include
 - (a) a statement of the issues addressed in the report;
 - (b) a description of the qualifications of the expert on the issues addressed in the report;
 - (c) the expert's current *curriculum vitae* attached to the report as a schedule;
 - (d) the facts and assumptions on which the opinions in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule;
 - (e) a summary of the opinions expressed;
 - (f) in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions;
 - (g) the reasons for each opinion expressed;
 - (h) any literature or other materials specifically relied on in support of the opinions;
 - (i) a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of any other party was present;
 - (j) any caveats or qualifications necessary to render the report complete and accurate, including those relating to any insufficiency of data or research and an indication of any matters that fall outside the expert's field of expertise; and
 - (k) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.
- An expert witness must report without delay to persons in receipt of the report any material changes affecting the expert's qualifications or the opinions expressed or the data contained in the report.

The judge is not bound by the report and can disregard all or part of it. This complies with the universal legal principle that the trier of fact has the final say on the ultimate issue of proof and that the appointment of an expert is not in any way delegating the judicial function to the technical counsel.

These are by no means the full range of adversarial common law systems operating globally but it is beyond the scope of this paper to examine the very large number and variations that now are established all over the world.

4. IS THERE STILL A COMMON LAW PERSPECTIVE IN THE CIVIL COURTS?

Having taken a close look at the expert witnesses role in the common law systems it is now necessary to examine how this can work, be compatible in litigation that might involve experts from common law systems operating in countries with codified civil law systems and vice versa. Most of our European partners operate the *Civil Law* system of jurisprudence, which as this essay has described above evolved from different traditions. Since the two traditions evolved quite separately and under different influences it is logical to expect that different rules apply in the appointment and functions of expert witnesses.

The most obvious difference in the appointment and function of the expert is in the selection of them. Traditionally the appointment of experts in the common law systems is the privilege of the parties. That right had been firmly established by the middle of the 17th century and is illustrated in the case of *Rex v. Pembroke*³¹, a case where both the prosecution and the defence had called medical experts to testify as to the causes of signs observed in an autopsy.

In the Civil Law systems the judge has that right and responsibility. Other differences most apparent are in the roles of the experts. In many of the legal systems operating in the EU the expert may be differentiated between those who are technical experts required to draft reports and others who may be required to testify. There is no such distinction in the common law system and anyone who is acceptable by established criteria may perform both functions.

Prior to the adoption of the Civil Procedure Rules the expert was appointed by the parties to give opinion evidence within their field of expertise. This was supported by the common law authorities found in precedent. The general rule at common law was that

«a witness may not give his opinion on matters which the court considers call for the special skill or knowledge of an expert unless he is an expert in such matters»³².

While appointments of the expert remained with the parties the decision on whether an expert was needed at all always remained with the judge. The Civil Procedure Rules could be argued to have removed the presumption that a party may call an expert altogether. Since the control of the experts testimony is entirely governed by the CPR and the acceptability of the evidence governed by the judge it is difficult to maintain any argument that the parties have any real control over this process beyond suggesting a suitable person to act as 'their' expert.

The authority of the old common law principles had been put to challenge long before Lord Woolf's reforms led to the introduction of the CPR. As early as 1968 in a judgement on an obscenity case³³ Lord Parker CJ had mooted the fading role of the common law in his judgement. Obscenity had long been a difficult 'fact' to determine. Lord Parker stated in general terms a useful observation regarding common law principles as they applied to experts.

«I cannot help feeling that with the advance of science more and more inroads have been made into the old common law principles. Those who practice in the criminal courts see every day experts being called on the question of diminished responsibility, and although technically the final question 'Do you think he was suffering from diminished responsibility?' is strictly inadmissible, it is allowed time and time again».

³¹ (1678) How. St. Tr. 1310.

³² Cross & Tapper on Evidence (8th Ed.) p.556 citing *Sherrard v. Jacob* [1965] NI 151 (HL) at 157 (Lord MacDermott).

³³ *DPP V. A & BC Chewing Gum Ltd.* [1968] 1 QB 159.

This observation of course related to the matter of ultimate issue but even in that respect illustrates that any rigid adherence to common law rules of evidence was being eroded by events beyond the control of an ancient system of jurisprudence. The common law principles would inevitably be challenged by the inevitable march of progress be it scientific progress of a reform of the law itself.

In the light of this acceptance that the common law could not always provide a fully functioning system of rules for the admission of evidence then adaptation of the law should, while creating a number of technical problems not affect the fundamental principles. There should be no real difficulty in adopting civil law processes while simultaneously maintain the old standards of fairness maintained by the common law.

The comments of Lord Parker in *DPP V. A & BC* were directed at the old principle that ultimate issue should be decided by the court, either judge or jury. The expert had no role in deciding ultimate issue, only a duty to assist the court in finding its own verdict. There was no conflict here between the common law and codified civil law. Both took the view that the ultimate issue was for the trier of fact. The rationale behind the ultimate issue rule was that the witness might be seen to be usurping the function of the trier of fact especially where the trier of fact was a jury. Cross and Tapper have argued that this was never a convincing argument³⁴ since the trier of fact always had the discretion to reject the views of the expert and that to argue otherwise confused the difference between admissibility and conclusive weight.

Dennis goes further to state that if the rule was strictly applied in common law style that it would prevent the expert witness giving the trier of fact the full benefit of their expertise³⁵. The trier of fact will need in many cases not only a view of the expert findings but a full explanation of their significance to the ultimate issue the court has to decide. The distinction between the description of significance and 'ultimate issue' is going to be very slim indeed.

The inconvenience of applying the rule literally in court proceedings and the lack of justification for such a rule in a search for the truth resulted in its abolition by statute in civil cases³⁶. An expert may now give evidence on any matter 'relevant' to the proceedings and that can include matters which might be seen as 'deciding the ultimate issue'. Since civil proceedings are presided over by judges in common law courts just as they are in civil law jurisdictions it is accepted that the judges will be sufficiently experienced, or sufficiently legally skeptical to make up their own minds as to how they apply the evidence to the ultimate issue.

Just how much of the common law perspective survives in the UK following the Civil Evidence Act and the Civil Procedure Act 1996 is debatable. As is clear very much of the old fashioned ideas about precedent have largely evaporated as our civil law has become more codified. In terms of cross-jurisdictional litigation this must be a positive evolution. The accession of the UK to the European Union necessitated a set of fundamental changes to legal thinking right down to the very basic tenets of the common law. The first and most obvious change was the transfer of sovereignty to a supra-national body. Although this transfer is theoretically concerned with EU wide matters only the reality was that all member states would eventually have to modify systems beyond that narrow interpretation and that law would naturally evolve into what is often described as harmonisation.

English Civil Law has managed this remarkably well and the evolution of civil litigation in the UK to a more civil law style has happened with little practical difficulty and with remarkably little political objection. That there is no perfect system is a given. That the Civil Procedure Rules are beginning to show their age and it is well known that lawyers are

³⁴ Cross & Tapper on Evidence, 8th ed. p.519.

³⁵ Dennis I. H. The Law of Evidence 2nd Ed. 2002 Sweet & Maxwell.

³⁶ Civil Evidence Act 1972, section 3.

just as happy to use relatively minor errors in procedure as 'grounds' for set aside or strike out of a claimants action or a defendants defence. Nevertheless this 'continental style' system is a vast improvement on what went before and has shifted civil litigation far more towards finding a resolution rather than determining a winner.

As an example of the shift away from strict precedent and common law principles in civil law there is a fine example in the law of defamation. Although this is a matter rarely relying on expert testimony it demonstrates neatly how a case precedent based set of legal principles can be relatively easily adapted to a codified piece of legislation. Prior to 2013 the law of defamation was hugely reliant of a mass of case law extending back at least two centuries. Cases from the early part of the 19th century remained good law and many anomalies had crept into the great wealth of case law relied upon in defamation actions. If any example of common law precedent was showing its age then it was here. Prior to the introduction of the new legislation³⁷ the law was defined from definition of the tort itself through all its defences by cases. This caused huge complexity and uncertainty and in spite of the common law claim that the accumulation of differing opinions in cases makes the law more flexible in this area it was certainly causing more harm than good.

The introduction of a codified structure for defamation law has brought the law not only up to date but has simplified it and made it fairer. This has not necessitated the abandonment of the principles on which the tort was established but has made defending an action far simpler while protecting the claimants right to an unblemished reputation. Legal principles based on the interpretation of judicial pronouncements, many over a century old are now written in 21st century language following 21st century legal philosophy rather than 19th century philosophy applying.

³⁷ Defamation Act 2013.

5. CROSS JURISDICTIONAL LITIGATION

That litigation across borders is now much more common than in the past is an inevitable consequence of living in a global society. Business has always been conducted across borders so it is not surprising that contract law and even employment law as its offshoot now has an international flavour. Similarly many more people travel abroad in this century than did a century ago making fertile ground for legal actions in tort and inevitably in criminal law. To most people the law is a manifestation of the nation state. The colorful description Anglo-Saxon Jurisprudence used by American courts to describe the law harks back to an even more fundamental cultural foundation and identification for our legal system. In reality law is now an international affair in a huge number of areas.

The accession of the UK into the European Economic Community in 1973 introduced a new concept to the common law traditions in British society. The idea that from this point on that our law would have new sources and that the isolation of common law process would need to adapt considerably to accommodate those sources. Added to parliamentary statute, case law and tradition we would now have European Law and this influence on our legal system would, it was recognised would increase over the years and decades to come. Lord Denning famously stated in *Bulmer v. Bollinger*³⁸

«But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.»

It is not the purpose of this essay to draw conclusions or to make judgments as to the virtue of 'continental laws' influencing our common law system; there is plenty of commentary elsewhere on that topic. We can however look at how ostensibly foreign concepts have influenced the development of the common law since our accession to the EU. In *Schmidt v Secretary of State* [1968] 2 Ch 14 Lord Denning again referred to a legal concept that originated in European Law. Denning in considering the revocation of a study visa for two American students suggested they had a right to have that decision at the very least examined.

«The speeches in *Ridge v Baldwin* show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say... If his permit is revoked *before* the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right - and, I would add, no legitimate expectation - of being allowed to stay.»³⁹

The expression that introduced this foreign concept⁴⁰ was that of "legitimate expectation". This is one of the fundamental underpinnings of human rights law and was deployed to great effect in *Campbell v. Mirror Group Newspapers*⁴¹ where the court, in developing a judge made privacy law, in the absence of a statute referred to the claimants 'reasonable expectation of privacy'.

While it might be the case that the influence of foreign legal traditions have made some uncomfortable the reality is clear that where we wish to operate globally and within supra-

³⁸ [1974] Ch 401.

³⁹ [1964] AC 40.

⁴⁰ The principle common to European administrative courts originated in the German legal doctrine of *Vertrauensschutz*.

⁴¹ [2004] UKHL 22.

national bodies such as the EU that a cross fertilisation of legal ideals and doctrines is not only inevitable but to a large extent desirable. The influences do extend both ways, while England has been adopting more and more facets of the civil law not only into its Civil Procedure Rules but into legal doctrines themselves Italy, in its criminal law has moved the other way. The Penal Code of 1990 moved away from the old system of inquisitorial trials towards the adversarial ones more familiar in common law jurisdictions.

The United Kingdom has for a very long period acknowledged and made provision enabling parties to obtain evidence from abroad⁴². The UK is a signatory to the Hague Convention on the taking of Evidence Abroad in Civil and Commercial Matters (1970) and this was ratified following the enactment of the Evidence (Proceedings in Other Jurisdictions) Act 1975. The legislation permits the examination of witnesses in respect of civil proceedings⁴³ the production of documents⁴⁴ and the inspection of property⁴⁵. The courts are not encouraged to assist evidential 'fishing expeditions' but the term civil proceedings is construed widely.

Since evidence is well established as a procedural matter⁴⁶, meaning that the central questions relate to burden of proof and standard of proof. It has regularly been pointed out that the law of evidence is a close relation of the method of trial. This was eloquently described, in relation to Anglo-Saxon Jurisprudence by the legal historian James Thayer (1831-1902). Thayer suggested that the nature of the adversarial trial made it necessary to limit the evidence received by a jury⁴⁷. The question on admissibility when it comes to expert evidence is clearly the central issue. In *Bain v. Whitehaven* Lord Brougham stated:

«Whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether a certain evidence proves a question of fact or not, that is to be determined by the law of the country where the question arises».

This statement in itself however should create no problem for the expert operating across differing jurisdictions and methods of trial. Since the ultimate issue is for the court the expert, and for that matter the parties need only comply with the procedural rules of the country in question. The evidence itself, being a product of the expert's expertise should not be subjected to any other test than that as to its quality. The distinction is between facts that need to be proved (accepted by the court as fact) and the evidence by which those facts are demonstrated.

The simple fact appears to be that expert evidence need only comply with the rule on relevance and necessity to be admissible. The courts should be able to rely on the evidence as evidence on which facts are established. Since reliability is the substance of relevance and necessity, or as put by Helen Brady:

«Any assessment of relevance and probative value must involve some consideration of the reliability of the evidence – it must be *prima facie* credible. Evidence which does not have sufficient indicia of reliability cannot be said to be either relevant or probative to the issues to be decided»⁴⁸.

Clearly a major influence on that reliability must be a harmonisation not of the legal systems in which experts operate but in qualification, accreditation and competence of the expert.

⁴² Originally via the Supreme Court Act 1981, s.36 RSC Ord. 39 r.1.

⁴³ Evidence (Proceedings in Other Jurisdictions) Act 1975, s.2(2) (a).

⁴⁴ *Ibid*, s. 2(2)(b).

⁴⁵ *Ibid*, s. 2(2)(c).

⁴⁶ *Bain v Whitehaven and Furness Rly* (1850) 3 HLC; *Re Fuld's Estate (No 3)* [1968] P 675.

⁴⁷ *A Preliminary Treatise on Evidence at Common Law* (1898).

⁴⁸ Brady H, *The System of Evidence in the Statute of the International Criminal Court* (2000) p.290

6. HARMONISATION OF THE LAW AND THE EXPERT

There are still substantial differences in the legal procedures and the underpinning philosophies of the member states of the EU and the question that must be confronted above all is: does this create problems when considering the role of the expert in cross jurisdictional litigation? The major differences are in procedure and in the main do not affect the actual evidence that the expert is required to adduce to the court. The methods by which the trials are conducted should also not represent an obstacle to a scientific report or the delivery of testimony. Experts in the main are there to assist the court in its findings rather than in its process so processes matter only in so much as they affect the delivery of evidence rather than the evidence itself.

English Courts have never had difficulties dealing with matters where the law is ostensibly foreign and the law of contract has frequently to deal with matters where foreign legal principles are not necessarily congruent with the law of England. A case in point is *St Pierre v. South American Stores Ltd.*⁴⁹ Branson J, after considering that the contractual terms in question was governed by Chilean law stated:

«I have no hesitation in holding that the proper law of contract is Chilean law. It is my duty, therefore in ascertaining the rights and duties of the parties under contract, to apply the canons of construction which would be applied in a Chilean court and to admit and consider such evidence as a Chilean court would admit and consider, in order to arrive at the intentions of the parties».

The judge decided that evidence of prior correspondence and subsequent documentation could be admitted even though in an English contract case this would have broken a fundamental rule of evidence, the parole evidence rule. The Court of Appeal subsequently upheld the decision to admit the evidence.

This bold and almost cosmopolitan approach is a clear indication of why UK courts readily assimilate legal consideration of other jurisdictions and may even go some way to explaining the choice of the UK as a forum for dispute resolution in the courts.

There should be no real obstacle to any expert operating across the internal frontiers of the EU. Provided their qualifications are recognised and that sufficient attention is given to translation of documents an English expert giving evidence in a Greek court should be in no way handicapped by the procedural requirements in Greek civil law. Most of the member states of the EU require the expert to be judge appointed. The UK courts are unusual in still allowing the parties to choose their expert but most of the problems that this used to cause have been addressed by the implementation of a codified procedure and the use of the single joint expert.

⁴⁹ [1937] 1 All ER 206.

7. HIRED GUNS OR SINGLE JOINT EXPERTS

In coming to a conclusion it is perhaps necessary to examine what caused the problems in the use of experts generally in the civil litigation process. There has never been any doubt that the role of the expert is to assist the court in coming to a conclusion on the probative value of the evidence. The expert, while appointed by the parties has an overriding duty to the court and there is no real conflict of interest between that duty and their duty to those appointing them. This is such a fundamental rule that it can be detected in some of the very earliest cases involving expert witnesses. Nevertheless it was well recognised that some experts often failed to draw a distinction between their role and that of counsel. A graphic example of this was illustrated when describing the testimony of an expert in a major class action medical negligence case⁵⁰. Mr Justice Moreland remarked in his judgement:

«Professor Behan, Professor of Neurology at Glasgow was called for the plaintiffs. At times he descended into advocacy, was speaking with hindsight and was given to colorful language which no doubt fills his lecture halls...».

It was far from the most savage criticism made by a judge against an expert. In 1993 a Canadian judge threw out a case because the expert was too boring:

«Beyond doubt the dullest witness I have ever had in my court...he speaks in a monotonal voice...and use language so drab and convoluted that even the court reporter cannot stay conscious...I've had it. Three solid days of his steady drone is enough. I cannot face the prospect of another fourteen indictments. Its probably unethical but I don't care»⁵¹.

Both of these cases occurred before both the introduction of the Civil Procedure Rules and *Jones v. Kaney*⁵² brought the practice of the hired gun to an end⁵³. The CPR as its main objective was to cut down the proliferation of expert evidence which was seen as being the cause of delay and increased costs under the Rules of the Supreme Court which had preceded it. Part 35 of the CPR especially that of Part 35.4(1) states that no party may call an expert or put evidence in an experts report without the courts permission. While this does not go as far as continental systems, where the judge directly appoints the expert it places a tighter degree of control on that appointment. Rule 35.7 allows the court to direct that the expert evidence be given by a single joint expert. The instructing parties need to agree on who the expert should be by reference to the overriding objective of the CPR. If they cannot agree then the court may:

- a. Select the expert from a list prepared or identified by the instructing parties or;
- b. Direct that the expert be selected in a manner as the court may decide.

The emphasis on cost and fairness again give the judge very wide discretion in the actual appointment of the expert witness.

Many commentators have suggested that the most effective end to the 'hired gun' expert witness came out of *Jones v. Kaney* and that the removal of immunity from negligence actions enjoyed by experts before that case acted as a strong disincentive to do other than

⁵⁰ *Plaintiffs v. The Medical Research Council of the United Kingdom and the Secretary of State for Health* (1996) unreported.

⁵¹ Judge Ends Court Bore; Inns and Outs. Law The Times, 14.12.93

⁵² [2011] UKSC 13

⁵³ *The end of the hired gun? - Expert Witness immunity abolished.* The Vinden Partnership Blog Monday 5th May 2011.

act as a responsible witness to the court. It is most likely that the combination of costs incurred by the parties for flouting the overriding objective of the CPR and the danger of damages in negligence being awarded against errant experts has brought the more colorful or boring practices of the expert described above to its final conclusion.

8. CONCLUSION

On a more positive note and one on which this essay can come to conclusion is the now much more professional approach to expert witnessing that has been influenced by proper training and membership of expert witness professional bodies. In the UK in the last 30 years there has been a concerted effort to bring experts within independent professional bodies. In 1987 the Academy of Experts was founded with the aim to:

- Promote the use of the independent expert (both in the United Kingdom and elsewhere).
- Achieve a cost effective resolution of disputes.
- Promote a forum in which experts may exchange views.
- Maintain a code of practice for experts.
- Organise programmes of further education or training.
- Provide a comprehensive information service for experts.
- Maintain a detailed directory of members.
- Ensure international awareness of the excellence of experts who are members of the Academy.
- Maintain a register of qualified mediators and neutrals.
- To make representations to, and co-operate with, judicial and legal authorities, government departments, official and private enquiries and other appropriate tribunals to ensure, for the benefit of the community, that the best use is made of expert advice.

The aims of the organisation was primarily to benefit its members but if its training is geared towards improving the performance of a witness in court then it can only be encouraged. The need for training has been further recognised by the establishment of another organisation encompassing the expert.

On the 8th of November 1996 The Expert Witness Institute came into being. It was launched by its President Lord Woolf MR with a stated aim to:

- Encourage, support, educate, train and certify experts to be better witnesses and so improve their quality and status.
- Work closely with all professional bodies and co-ordinate their expert witness sections.
- Provide a helpline for existing and prospective expert witnesses.
- Have close liaison with the Law Society and the Bar Council and cement the relationship between lawyers and experts.
- Have its independence and integrity guaranteed by its Board of Governors.
- Be the voice of experts, collectively and individually.

The motivating force behind the organisation was Bond Solon Training, a company established in 1992 to address some of the problems faced by expert witnesses and those

who employ them in an earlier press release⁵⁴. The company explained its aims for improving expert testimony as follows:

Dress smartly but not ostentatiously. Arrive at the court on time. Listen to questions and confine answers to them. Deliver answers slowly and carefully. Address the bench. Do not argue with the barristers. Don't offer opinions unless asked. Have answers prepared. Don't try to baffle the court. Don't use technical terms unnecessarily.

While these may seem obvious perhaps with hindsight anyway they are common problems with expert testimony and this is not the first time that experts had been warned. Lionel R.C. Howard in his article in 1979⁵⁵ described the court as "an abattoir for sacred cows" and advised experts of the different roles they have and the different beliefs that the expert has from the lawyer.

With all of this sound advice and now well established and competent structures in place the UK based expert should be as ready to operate in any jurisdiction within the EU. Similarly any EU member state based expert should have no difficulty in giving evidence in a UK court in spite of the differences in the legal traditions. All member states of the EU now recognise the necessity for a harmonized system of accrediting expert witnesses with a view to them appearing on national and international registers. This is in the main a matter of harmonizing procedures rather than legal traditions, a matter of agreeing ethical principles and forms of witness evidence such as reports or testimony. The common law traditions of the United Kingdom have successfully evolved both in legal principles and doctrines and in the adoption of civil procedure rules to make this harmonization a painless experience.

⁵⁴ Frances Gibb. Please Call the Witness. The Times. Law. 12 Sept. 1995. p.35.

⁵⁵ The Psychologist as Expert Witness. Psychology Law and Legal Process. Macmillan 1979.

REFERENCES

- James' Introduction to English Law 13th Ed. Shears P. Stephenson G (1996) Butterworth's.
- Wigmore on Evidence (3rd Ed.) 1940 Vol 1.
- P. Roberts, 'Reflections on Expert Evidence in Canadian Criminal Proceedings: More Lessons from North America', in H. Reece (ed.), *Law and Science: Current Legal Issues* (Oxford University Press: Oxford, 1998)
- Murphy P. *A Practical Approach to Evidence* 3rd Ed. (1988)
- Gee D.J. 'The Expert Witness in the Criminal Trial [1987] Crim LR 307
- *Access to Justice Final Report*, by The Right Honourable the Lord Woolf, Master of the Rolls, July 1996, *Final Report to the Lord Chancellor on the civil justice system in England and Wales*
- Walker and Walker, "*The Law of Evidence in Scotland*" (3rd ed. 2009)
- Cross & Tapper on Evidence (8th Ed.)
- Dennis I. H. *The Law of Evidence* 2nd Ed. 2002 Sweet & Maxwell
- Thayer J. *A Preliminary Treatise on Evidence at Common Law* (1898)
- Brady H, *The System of Evidence in the Statute of the International Criminal Court* (2000)
- *The end of the hired gun? - Expert Witness immunity abolished.* The Vinden Partnership Blog. Monday 5th May 2011.
- Judge Ends Court Bore; Inns and Outs. Law The Times, 14.12.93
- Frances Gibb. Please Call the Witness. The Times. Law. 12 Sept. 1995.
- The Psychologist as Expert Witness. Psychology Law and Legal Process. Macmillan 1979.

TABLE OF CASES

- *ACCC v Liquorland and Woolworths* [2006] FCA 826
- *Bain v Whitehaven and Furness Rly* (1850) 3 HLC
- *Buckley v Rice-Thomas* (1554) 1 Plowd 118
- *Bulmer v. Bollinger* [1974] Ch 401
- *Cabassi v Villa* (1940) 64 CLR 130
- *Cala Homes (South) Ltd. v. Alfred McAlpine Homes East Ltd*
[1995] CILL 1083
- *Campbell v. Mirror Group Newspapers* [2004] UKHL 22
- *DPP V. A & BC Chewing Gum Ltd.* [1968] 1 QB 159
- *Folkes v Chadd* (1782) 3 Doug KB 17
- *H v. Schering Chemicals Ltd* [1983] 1 WLR
- *James v Medical Board of South Australia and Keogh*
- *Jones v. Kaney* [2011] UKSC 13
- *Naviera SA v. The Prudential Assurance Co.* [1993]
2 Lloyds Report 68
- *Pinnel's Case* (1602) 5 Co. Rep. 117 QB
- *Plaintiffs v. The Medical Research Council of the United Kingdom*
and the Secretary of State for Health (1996) unreported
- *R v Silverlock* [1894] 2 QB 766
- *R v. Robb* (1991) 93 Cr.App.R. 161 CA
- *R v. Oakley* (1979) 70 Cr. App. Rep 7
- *R v. Turner* [1975] QB 834
- *R v Inch* (1990) 91 Cr.App.R 51
- *Re Fuld's Estate (No 3)* [1968] P 675
- *Regina v. Abbey* [1982] 2 S.C.R. 24
- *Rex v. Pembroke* (1678) How. St. Tr. 1310
- *Ridge v. Baldwin* [1964] AC 40
- *Sampi v State of Western Australia* [2005] FCA 777
- *Schmidt v Secretary of State* [1968] 2 Ch 14
- *Sherrard v. Jacob* [1965] NI 151 (HL)
- *St Pierre v. South American Stores Ltd* [1937] 1 All ER 206
- *Whitehouse v. Jordan*, [1981] 1 W.L.R. 246

TABLE OF STATUTES AND REGULATIONS

- Civil Evidence Act 1972
- The Criminal Procedure Rules 2010
- Evidence (Proceedings in Other Jurisdictions) Act 1975
- Supreme Court Act 1981
- Civil Procedure Act 1996
- Federal Courts Act (*Rules Amending the Federal Courts Rules (Expert Witnesses)*) P.C. 2010-964 August 4, 2010
- The Evidence Act 1995
- Defamation Act 2013

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

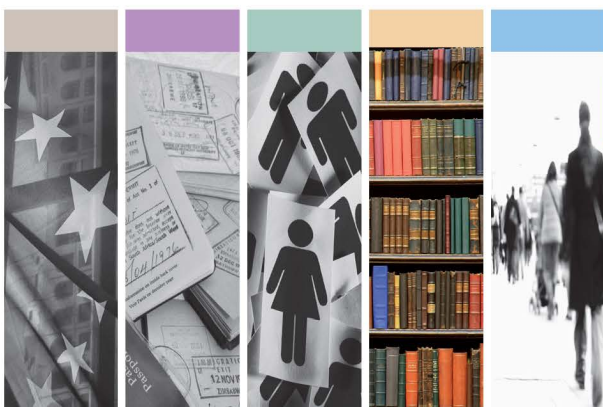
Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website: <http://www.europarl.europa.eu/studies>

PHOTO CREDIT: iStock International Inc.



ISBN: 978-92-823-7128-2
doi: 10.2861/64297