

EXPERT EVIDENCE: SEMINAR 1
THE THEORY OF EXPERT EVIDENCE

ANDREW SMITH KC
EDINBURGH COMPASS CONFERENCE 22ND
NOVEMBER 2024

INTRODUCTION

- 1.1 Expert evidence is at the heart of almost any factually disputed case. Understanding what is required of an expert, what expert evidence is and choosing the right expert are all critical to success. Such an understanding by you, and your opponent's failure to address the issue can ensure your success and their failure. Never underestimate the importance of getting it right from the start. And to get it right, you need to know where you are heading and why.

- 1.2 This seminar is one of three. For those attending only this seminar, hopefully you will achieve a basic understanding of what expert evidence actually is. What appears here is the product of over 30 years of litigation experience, which has evolved over time. I have worked with hundreds of experts over that time: and it is fair to say that there have been the good, the bad and the very ugly. I have lost count of the number of cases where experts have caused a case to fail – either because the court disliked them, or they were ill prepared or more critically because they had not been properly instructed. At the end of the day, the fault lies solely with the legal team for a failure. Either the expert should not have been instructed if he is hopeless; or he was not properly instructed. The buck stops with the lawyers.
- 1.3 Expert evidence almost always involves seeking the expert’s opinion on a matter. This obvious point, contains a sting: what is “an opinion”? And under what circumstances can an opinion be offered to the court? If you do not address this question, you risk either failing to fill a gap that should be filled, or instructing an expert on something inadmissible as expert evidence, or not recovering the costs of instructing an expert that you paid out your client’s cash to instruct.
- 1.4 This seminar will contain a number of anecdotes and examples in an attempt to point out the principles that I am seeking to impress upon you. I don’t pretend that what I say is gospel, but I suspect that in terms of attention to the theory of expert evidence I have a considerable experience and you should learn from my mistakes rather than make them yourself. The seminar is directed at advocates, solicitors, trainees and even experts themselves. We can all learn how to make this a pivotal part of your cases.
- 1.5 The leading case to go to is *Kennedy v Cordia*, 2016 SC (UKSC) 59 which is the authoritative case on the entire project of expert evidence. Within it are numerous references to other important cases (in particular the *Ikarian Reefer*, and *R v Bonython*) and includes references to non UK authorities, such as *Daubert v Merrell Dow*.
- 1.6 The main points to bear in mind about expert evidence, all of which can be taken from *Kennedy* are:
- Generally speaking evidence of opinion is **irrelevant and inadmissible** where this is outwith the ordinary experience of life. For example, it is perfectly open to ask a lay witness whether they considered that the car was going too fast, or a box was too heavy for a small person to lift. That is every day experience and we are all qualified to speak to it.

- However, where the court cannot reach a view based upon its own knowledge, then expert opinion is indeed admissible. But there are certain rules that must be followed.
- The opinion of an expert must be a **reasoned opinion**, capable of scrutiny: what is important is the reasoning and not the opinion (Lord Prosser, *Dingley v Chief Constable*, cited in *Kennedy*)

2 WHY IS EXPERT EVIDENCE IMPORTANT TO THE LITIGATOR?

- 2.1 To digress considerably from the detail of the theory of expert evidence, it may help to know why expert evidence is a topic that can be of immense importance.
- 2.2 There is a great danger to assume that all your troubles can be left at the door step of an expert and an assumption that the expert will grab hold of them, solve them and be so impressive that the Court will be bound to accept the evidence and find in your favour.
- 2.3 Any such approach is dangerous, and might lead to a wholesale unravelling of your case during a proof.
- 2.4 The courts and counsel had, for most of the years I spent at the Bar, dealt with evidence at a superficial level without looking at the underlying theory discussed in *Kennedy*. It is also now clear that *Kennedy* has attracted quite a bit of traction in the UK, leading to challenges to expert evidence because it fails to fulfil the requirements laid down in *Kennedy*, or adverse commentary by judges.
- 2.5 A couple of examples of the importance of expert evidence and when questions might have been asked can be derived from two cases in which I had personal involvement: the *McKie* case concerning fingerprints; and a case involving “age assessments”, both of which will be explained below.

FINGERPRINTS: AN EXAMPLE

- 3.1 The *McKie* case was the prime example of how important expert evidence might be. The case was complicated as to how the issue came before the Court: but expert evidence was at its heart. A fingerprint was attributed to an accused, to become a pursuer in due course, that she denied was hers. It was maintained that her fingerprint was found at a place that it should not have been and as a serving police officer if it was her fingerprint, then she was liable to be disciplined. The stakes were increased when she stated on oath

in a murder trial that it could not be her fingerprint; and for so doing she was herself prosecuted for perjury. The crown case was “it is your fingerprint: and when you denied that you were at the locus, you lied on oath.”

- 3.2 We have often used the term “your fingerprints were all over it” or “you may as well have left your fingerprints at the scene”. There was an assumption that fingerprint evidence is absolute.
- 3.3 What is clear is that fingerprints are unique. Thus if you have an unknown print of good quality and a known print of a suspect, if they can be matched then it calls for an explanation as it is certain that the fingerprint was left by the suspect. But, is that fact or opinion? Is there room for dispute that the unknown print (the latent) matches?
- 3.4 At this point, the battle began. On the one hand, the Crown experts provided opinions that stated, repeatedly, that in their opinion the latent was that of Ms McKie. They provided no reasoning for their opinion other than a series of photographs bearing to show the comparison. However, when challenged in court about where a particular point of similarity was, they resorted to saying that they could “see” it using their decades of experience. But, Ms McKie had instructed two US based experts who brought with them an American attitude to expert evidence. Their position was that if you cannot demonstrate it to the jury, it does not exist. An expert does not have any ability to see things that don’t exist. Their testimony could be summed up as “if I cannot demonstrate it to you, don’t accept it.” They concluded that there were several differences between the latent print and the known print, and with one difference the print could not be the same. But, they said, do not take my word for it: I will show you the differences but it is up to you as the jury to make the decision.
- 3.5 And the jury did: they unanimously acquitted Ms McKie, holding that the print was not hers.
- 3.6 The powerpoint slides may give an idea of the issue. Comparison of fingerprints allows for features on the known and the unknown to be mapped. However, as the later slides show if the latent print is (as they usually are) smudged or otherwise weak, then some element of experience may assist. But the difference is that the Scottish experts said that their experience allowed them to see things that they could not demonstrate to others: but the Americans maintained that if they could not demonstrate it, the jury should reject it.

AGE ASSESSMENTS

- 4.1 Another example is age assessments. The scenario is this. An asylum seeking young person claims to be under 16. He has no paperwork. Our law says that if a minor arrives, he has to be subsumed into the system; but if he is not a minor, he is generally at risk of being sent back to his country of origin.
- 4.2 So how is age assessed? There is no litmus test. Some medical examinations can give a guide, but many include xrays, or medical examination that requires consent. This case gives insight into methodology:
<http://independentageassessment.co.uk/caselaw/ISA%20v%20Angus%202012.pdf>.
- 4.3 The challenges in the case were that there was no accepted methodology for assessing age of alleged children, and there were no obvious experts of sufficient independence permitting such expert testimony.

ARE THERE LIMITS TO EXPERT TESTIMONY?

- 5.1 So what types of “expert evidence” might there be? There is unlikely to be any limit to the type of testimony that could be considered to be “expert”. Ask yourself the following questions:
- On the issue of fact, do we need an “expert” at all? Or is this something that can be presented without expert evidence? An example might be a pattern that matches between one thing and another. Can the judge make his or her mind up alone?
 - What is the field of expertise that is required? An example arose in a case awaiting judgment concerning toxic fumes entering an aircraft alleged to cause harm to long haul crew including pilots. The pursuer instructed a medical professor with experience in toxicology about the levels of chemicals that might cause harm; and the defenders instructed a toxicologist that had a non medical knowledge of toxicology, but could speak to occupational exposure limits and the like. Both were clearly eminent in their field, but which is the correct “field”?
 - Is the proposed expert truly an expert in that field?
 - Is there an established science?
 - If not, is there an obvious logical and justifiable basis for an opinion?
 - Can the expert provide proper reasoning?

6 SLIDES SHOWING PATTERNS ON JEANS

6.1 Included in the slides is an example of a novel approach to identification. A bank robber is photographed and a pattern is seen on the seams of his jeans. A suspect is identified, and on a search of his house a pair of jeans is found showing a pattern. The pattern is compared between the robber jeans and the found items. They appear to match.

6.2 Some questions to be considered:

- Would expert evidence be required to show a match, or is this for the judge or jury to conclude without expert evidence?
- If it is a matter of expert evidence, then what kind of expert would be appropriate to speak to the match?
- Would it be relevant that there is an accepted science or body of literature? Or could a browse by someone through several piles of jeans show that there was little match be enough?
- Do you need to know the chances of a match from more than one pair?
- Is it a matter of weight of evidence or a matter of admissibility?

7 DIRECT LINE

7.1 One case in point about whether expert evidence was required at all is the *Esure v Direct Line* case. The slide contains the quotation from Sir Robin Jacob as follows:

It will be noted that in my summary of the relevant evidence I have not referred to the “evidence” of the branding expert Mr Blackett. This was simply not of assistance. For instance he said in his first report:

“In my capacity as an expert on branding I think the Direct Line Telephone Device is both striking and original.

It is my opinion that the Direct Line Telephone Device is now very well known and has achieved iconic status.”

Well you do not need an “expert” to tell you any of that. The facts speak for themselves. And if that had not been so, then an assertion to the contrary would have been wrong.”

8. ANALYSIS OF EXPERT EVIDENCE: TESTING YOUR OWN, AND ATTACKING THE OTHER SIDE

8.1 Although probably better placed in another talk, there are some things to think about when the possibility arises of engaging an expert.

- Do I really need an expert? Is this an area of expert evidence or common knowledge in life?
- Can the expert assist from his own knowledge and/or research into the topic?
- Can the expert provide compelling reasoning that I can follow?
- Is this particular expert one who is confident enough to defend his opinion yet concede where he has to?
- Is this expert one who might be considered to be “damaged goods”?

FOR THOSE NOT ATTENDING THE SUBSEQUENT SEMINARS...

The most important aspect is understanding the duties of experts; making sure that they do so too; and utilising the court procedures to best advantage. A good expert is one who is not only well prepared but is reasonable. The worst kind is one who is dogmatic, and arrogant and will not concede that there may be an opposing view.

ANDREW SMITH KC
COMPASS CHAMBERS