Expert Evidence

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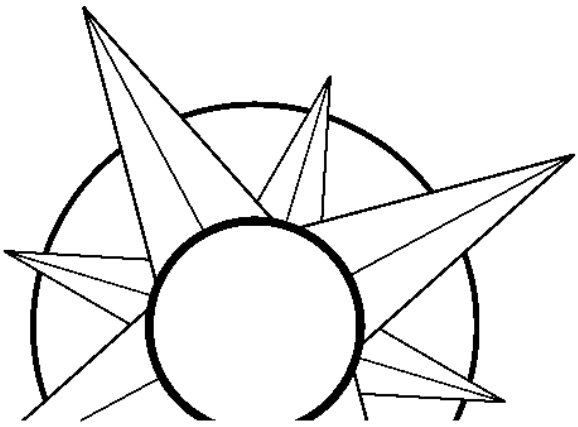

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Contents

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INTRODUCTION: THE IMPORTANCE OF EXPERT EVIDENCE

Expert evidence forms the foundation of almost every claim before the courts in personal injury and clinical negligence. When experts are instructed, they will be instrumental in the success or failure of your case. Usually they are among the first to be instructed (after statements are taken or medical records are obtained) when considering whether to bring a claim; and their opinion is vital to success. All too often, however, there is a failure to treat their potential testimony with the respect it deserves; to ensure that they are prepared and briefed as they should; and to ensure that they are provided with all the information that they require in order that they can express a properly informed opinion that can be presented to the court.

Regularly experts in Scotland (in contrast to those in England) are unaware of their obligations to the court and the parties – which is most unfortunate as not only might they lose the case for you, but they may end up being sued by one party or the other for failure to do as they should. They should be made aware of *Jones v Kaney*[1], a decision of the Supreme Court, which ruled that the immunity from suit that had existed in all time, was no longer appropriate in the present day and age. It should be noted that this case, although English, ought to be applied in Scotland. Lord Hope dissented, along with Lady Hale. He relied upon Scottish authority for so doing, but it should be observed that the majority distinguished the Scottish case, and no suggestion was made to the effect that different rules would be applied in Scotland to the rest of the UK.

Accordingly, it would appear that they can certainly be sued by their own side (per *Jones v Kaney*); but there would appear to be no logical reason as to why they cannot be sued by the other side if put to unnecessary expense due to their failure to observe the obligations incumbent upon them.[2]

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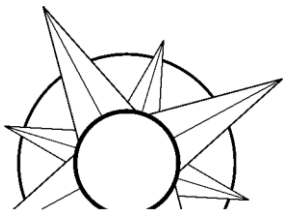
[1] [2011] 2 AC 398.

[2] The argument that could be presented is that on the basis of *Caparo v Dickman*, it is foreseeable, proximate and fair, just and reasonable that an expert who fails should be liable to the other party in the litigation.



KENNEDY V CORDIA: WHAT YOU NEED TO KNOW

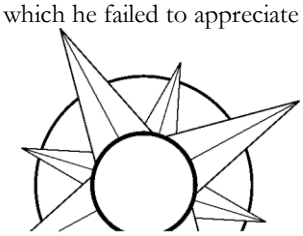
The Supreme Court made clear in its judgment in *Kennedy v Cordia*[3] that there are certain obligations upon solicitors and indeed counsel, in regard to the briefing of experts.

This discussion seeks to advise on what is expected not only of experts, but what is to be expected of those instructing the experts – principally the lawyers, both solicitors and counsel. It is hoped that by the end of the seminar, those attending will have a better understanding of the importance of their own role; of the expert's role; how to make sure that the solicitors and counsel fulfil their role; and make sure that the expert does too. Equally, it is hoped that by the end of the seminar, you will have gained significant confidence in analysing what expert evidence is about, how to choose and prepare your expert, and most importantly to ensure that your expert gives you the best chance of success in your case.

Some suggestions will be made about practical matters to be attended to, such as where to find information on what the expert's obligations are, how to compile a suitable letter of instruction, how to ensure that the expert report is suitable, and how to prepare experts for giving evidence.

In a number of recent cases, judges have rejected the evidence of experts (for example in road traffic cases[4] the evidence of road traffic reconstruction experts, and medical experts). The reasons for rejection of those experts was their failure to observe the rules to follow. A damaged expert is not just damaged goods for that one case, but the criticism will follow them to other cases.[5]

[3] 2016 S.L.T, 209. Andrew Smith QC, Ian Mackay QC and Jillian Martin-Brown, all of Compass Chambers, appeared at all stages in that case.
[4] *McCreery v Letson* [2015] CSOH 153; *Little v Glen* [2013] CSOH 153; *Jackson v Murray* [2012] CSOH 100.
[5] Dr.Searle, in *Little v Glen*, came rather unstuck as a consequence of what was said about him in an English case, in which he failed to appreciate the importance of the criticism of him.



A good expert may have his evidence rejected, but for good reason. But it has to be said, if the expert is properly instructed, and is a good expert, he should never be rejected. His opinion insofar as it is wrong, should be flushed out prior to the proof: it may be a counsel of perfection, but if your expert is complying with all the requirements then his evidence should be unimpeachable. It may be that he tells you in advance that your case is not good; but better to find that out before the proof rather than during it.

It is proposed to consider the issue of expert evidence in a number of chapters.

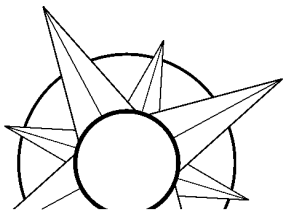
First is WHAT IS EXPERT EVIDENCE? Or more correctly, why would I wish to instruct an expert in this case?

Second: WHAT TYPE OF EXPERT SHOULD I INSTRUCT, HAVING IDENTIFIED THE MATTER AS ONE FOR EXPERT EVIDENCE?

Third: WHAT ARE THE OBLIGATIONS ON EXPERTS? And where can I find them?

Fourth: HOW CAN I CORRECTLY INSTRUCT MY EXPERT, AND MAKE SURE THAT THEY PRESENT IN THE BEST WAY THAT THEY CAN? HOW CAN I AVOID THE PITFALLS?

As the talk proceeds, there will be some practical issues discussed – such as what is the test for certification of experts? Is it *necessity* (as is apparently indicated in *Kennedy*) or *reasonableness* (as is anticipated in the relevant rule of court)?



The background to the entire talk though, is that there is a growing perception (stated in the Inner House in *Kennedy*, and reiterated by the Supreme Court) that there is an unnecessary proliferation of experts. There is no mechanism in Scotland to take aggressive control of the instruction of experts, although it is made clear in *Kennedy* that where the courts have powers to restrict the numbers of experts, they should use that power (it would seem to be envisaged by the UKSC that the commercial courts, or cases under chapter 42A, or new rules should be brought in to effect it). [6]

[6] The position is in contrast to English procedure. Under Part 35 of the Civil Procedure Rules ("CPR") a party is not permitted to lead evidence from an expert witness (and hence will not be paid for same) unless and until the court has given permission for the instruction of the expert. The CPR heavily regulates the instruction of experts, and the provisions of the CPR will be referred to below in a bit more detail – largely because experts in Scotland regularly apply the English declaration that they have complied with the CPR requirements. This is not only wrong, but sloppy and can irritate Scottish judges.

WHAT IS EXPERT EVIDENCE?

This rather fundamental question is one not just for the academics. It is the question that instructs the answer to the question of "do I need an expert to speak to this matter?"

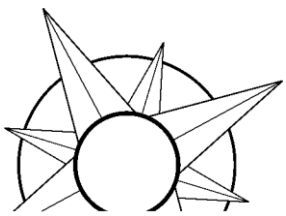
Generally speaking, evidence of opinion is irrelevant and inadmissible in Scotland (as in England). This is so unless the opinion being expressed is one relating to an ordinary life event: "in my opinion, that car was travelling too fast for the road conditions".

But, where the question is one that is not an ordinary life event, the evidence of opinion is inadmissible. Thus, asking a bystander if he thought that the skid marks showed that the car was driving too fast, is inadmissible. Or asking whether in his opinion the pursuer is truthful, cannot be admitted in evidence.

The exception to the rule is that of expert (or more correctly in Scotland, "skilled") witnesses.

In Scotland there is no equivalent of Part 35 of the CPR. In theory, a party can lead any witness he wishes and seek to have him held to be an expert. He can lead as many experts as he wishes on any discipline. He can even lead evidence on matters that may not be an expert discipline at all. The only possible sanction he will face is that the court might not certify the expert as being suitably required as an expert (so that the successful party, having instructed that person, would not recover the expenses of the exercise from his unsuccessful opponent).[7]

[7] RCS 42.13A "(1) If, at any time before the diet of taxation, the court has granted a motion for the certification of a person as skilled, charges shall be allowed for any work done or expenses reasonably incurred by that person which were reasonably required for a purpose in connection with the cause or in contemplation of the cause.
(2) A motion under paragraph (1) may be granted only if the court is satisfied that—
(a) the person was a skilled person; and
(b) it was reasonable to employ the person."



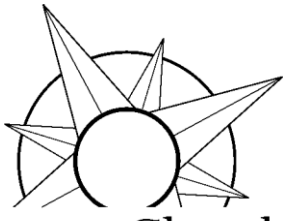
In practical terms, when a witness is presented as an expert, it is difficult for his evidence to be stopped by objection. There is no requirement for his report to be lodged as a production. Therefore a witness being presented as an expert might arrive in the witness box and it is not until late in his evidence that it is clear that he is providing evidence as an expert, without knowing why or how he is qualified to give such evidence. Equally, someone presented as an expert might commence his evidence and it is then clear that he is not truly an expert or that his evidence is not in fact expert evidence.

There have been a number of cases in which judicial concern has been expressed about the limits of what that to which an expert might properly speak in particular cases.[8] On some occasions, the disposal reflects that disquiet. In *esure Insurance Ltd v Direct Line Insurance plc*, an expert witness was called to opine that a logo of a computer mouse on wheels was likely to be confused with a logo of a telephone on wheels.[9] Jacob LJ commented:

> 72 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] In a road traffic accident case, *Liddell* v *Middleton* [1996] PIQR 36, Stuart Smith LJ pointed out: "We do not have trial by expert in this country; we have trial by judge. In my judgment, the expert witnesses contributed nothing to the trial in this case except expense. For the reasons that I have indicated, their evidence was largely if not wholly irrelevant and inadmissible. Counsel on each side at the trial succumbed to the temptation of cross-examining them on their opinions, thereby lengthening and complicating a simple case… In road traffic accidents it is the exception rather than the rule that expert witnesses are required."

[9] [2008] RPC 34.



73 In essence Mr Blackett's "evidence" consisted essentially of a series of assertions of fact, including an assertion about the ultimate question, namely that which the court had to decide:

> "It is my opinion that people would confuse the esure mouse on wheels with the Direct Line Telephone Device and the Direct Line company and business."

74 His reasons for the assertion are simply argument.

75 It is, of course, permissible for an expert to opine on the ultimate question if it is one of fact, not law, as I said in my judgment (with the concurrence of the other members of the Court) in *Technip France SA's Patent* [2004] RPC 46 I repeat part of it here:

> "[13] But it also is permissible for an expert witness to opine on an 'ultimate question' which is not one of law. I so held in *Routestone Limited* v *Minories Finance Limited* [1997] BCC 180 and section 3 of the Civil Evidence Act 1972.
>
> [14] But just because the opinion is admissible, it by no means follows that the court must follow it. On its own (unless uncontested) it would be 'a mere bit of empty rhetoric' Wigmore, *Evidence*, at paragraph 1920. What really matters in most cases are the reasons given for the opinion. As a practical matter a well-constructed expert's report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not."

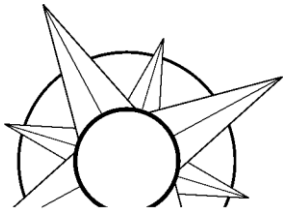
76 Assertions of the sort I have set out seem to me to fall within that vivid phrase, 'empty rhetoric' and are of no value."

In Scotland, there would appear to be a restriction upon the circumstances under which an expert can express a view on the ultimate issue as laid down in *Davie v Magistrates of Edinburgh* the ultimate issue is always for the trier of fact, be that judge or jury. The Lord President (Cooper) stated in *Davie*:[10]

> "Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court ……..Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge or jury. In particular the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert. I refer to *Best on Evidence* (12th ed.) p. 434 ff.; *Phipson on Evidence* (9th ed.) p. 400 ff.; *Dickson on Evidence* (1st ed.) vol. ii, sec. 1999; *Wills on Circumstantial Evidence*, (7th ed.) p. 176, and to the many authorities cited in these works."

There is, however, no obvious procedural mechanism for stopping evidence being led which breaches the rule.

[10] 1953 SC 34 at 40.



Not all expert evidence is of the same type. Often the courts will be faced with what is considered to be expert evidence of a new scientific type such that commented upon by Leveson LJ in his lecture to the Forensic Society.[11] Other examples encountered by the Supreme Court of Canada (*R v Trochym*[12]) include the use of "post hypnosis" testimony in criminal trials extracted from eye witnesses who testified against the accused, or the use of expert evidence as to the suggestibility of an accused and the soundness of his apparent confession (for example *Pora v The Queen*[13], in which the evidence of Professor Gudjonsson was rejected by the Supreme Court on the grounds of admissibility, in a similar way to the rejection of his evidence in *Wilson v HMA*[14]). The Canadian Supreme Court commented in *Trochym* as follows:

"[33] …Under this test, a party wishing to rely on novel scientific evidence must first establish that the underlying science is sufficiently reliable to be admitted in a court of law. This is particularly important where, as here, an accused person's liberty is at stake. Even though the use of expert testimony was not in itself at issue in the present case — this appeal concerns the application of a scientific technique to the testimony of a lay witness — the threshold reliability of the technique, and its impact on the testimony, remains crucial to the fairness of the trial.

[34] The central concern in *Mohan* was that scientific evidence be carefully scrutinized because, in Sopinka J.'s words, "[d]ressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves" (p. 21). The situation in the case at bar is similar in that the evidence reveals a risk that post-hypnotic memories may be given more weight than they should. In *J.-L.J.*, the Court went a step further, establishing a framework for assessing the reliability of novel science and, consequently, its admissibility in court."

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[11] King's College, London 16th November 2010.
[12] [2007] 1 S.C.R. 239, 2007 SCC 6.
[13] [2015] UKPC 9.
[14] 2009 JC 336.

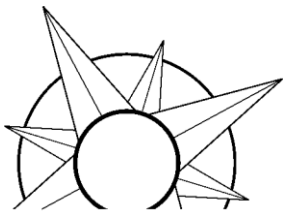
Expert evidence which is presented on a scientific footing has the advantage that it can be objectively tested by others in that field and is often subject to study according to accepted principles of research (such as standard statistical analysis) and peer review publication in high quality literature. It can be tested by cross-examination. As Leveson LJ points out, if one does not have some measure by which the type of expert evidence is considered as well as its content, it could open the door "to astrologers, soothsayers and witch doctors giving evidence in proceedings under English Law."[15]

So, in the light of Kennedy, what amounts to expert evidence?

"54. Reliable body of knowledge or experience: What amounts to a reliable body of knowledge or experience depends on the subject matter of the proposed skilled evidence. In *Davie v Magistrates of Edinburgh* the question for the court was whether blasting operations in the construction of a sewer had damaged the pursuer's building and the relevant expertise included civil engineering and mining engineering. In *Myers, Brangman and Cox*, as we have said, the subject matter was the activities of criminal gangs; a policeman's evidence, which was the product of training courses and long term personal experience as an officer serving with a body of officers who had built up a body of learning, was admitted as factual evidence of the practices of such gangs.

55. In many cases where the subject matter of the proposed expert evidence is within a recognised scientific discipline, it will be easy for the court to be satisfied about the reliability of the relevant body of knowledge. There is more difficulty where the science or body of knowledge is not widely recognised. *Walker and Walker* at para. 16.3.5 refer to an *obiter dictum* in Lord Eassie's opinion in *Mearns v Smedvig Ltd* 1999 SC 243 in support of their proposition that:

[15] page 5.



> "A party seeking to lead a witness with purported knowledge or experience outwith generally recognised fields would need to set up by investigation and evidence not only the qualifications and expertise of the individual skilled witness, but the methodology and validity of that field of knowledge or science."

56. We agree with that proposition, which is supported in Scotland and in other jurisdictions by the court's refusal to accept the evidence of an expert whose methodology is not based on any established body of knowledge. Thus in *Young v Her Majesty's Advocate* 2014 SLT 21, the High Court refused to admit evidence of "case linkage analysis" because it was the subject of only relatively recent academic research and a methodology which was not yet sufficiently developed that it could be treated as reliable. See also, for example, *R v Gilfoyle* [2001] 2 Cr App R 5, in which the English Court of Appeal (Criminal Division) refused to admit expert evidence on "psychological autopsy" for several reasons, including that the expert had not embarked on the exercise in question before and also that there were no criteria by reference to which the court could test the quality of his opinions and no substantial body of academic writing approving his methodology. The court also observed that the psychologist's views were based on one-sided information and doubted that the assessment of levels of happiness or unhappiness was a task for an expert rather than jurors."

THE GOLDEN RULES

Is the court capable of reaching a conclusion without the "expert"?

The answer to this question may not be obvious, and the tendency of solicitors (and counsel) will be to err on the side of caution, risking not obtaining certification. Sometimes the answer will be obvious.

Do your investigations require or call for an expert to assist in investigating your case?

Further, there is a legitimate purpose in instructing an expert to advise on the line to be taken.

In a case many years ago, an expert advised in a case where a schoolboy at a class had suffered amputation of a finger when a lathe he was using spun round and the chuck key he had put in it had not been removed.

The expert advised that the type of chuck key that should be used was a spring loaded one, which would have prevented the accident. That type of information is invaluable, but once the expert has pointed you in the direction of the point, it does not require his continued attendance. He is a guide; and once he has given you the map, he is no longer required.

Might it be said that an expert can marshal masses of information from a variety of sources?

This was recognised in *Kennedy* as being legitimate. A good example is expert reports in mesothelioma cases, or noise induced hearing loss cases or more commonly care reports. Experts can pull together a lot of information from witness statements and from a variety of publications, summarise them for the court and save the judge time in trawling through the material.

Strictly speaking this is not "expert" evidence as it does not contain opinion – or should not contain opinion. It is summarising the information to make it palatable for the court. With care experts, they should be able to provide the shopping list; and we can all add up the figures ourselves. Quite why they are called to give evidence is a mystery in many cases.

If the issue is one of science, is it testable objectively?

This matter touches on what appears below about checking out the strength of the expert's qualifications and experience. As we all know, an expert's opinion is only as good as the facts and research upon which it is based. As is observed in *Davie v Mags of Edinburgh*, the bare *ipse dixit* of an expert, no matter how eminent, can never be enough. The Supreme Court in Kennedy went further: they concluded that it is in fact inadmissible.

Therefore, can it be tested?

A good example of how such a position arose in the notorious case of *Shirley McKie*, which spawned a number of civil claims, criminal trials and enquiries.

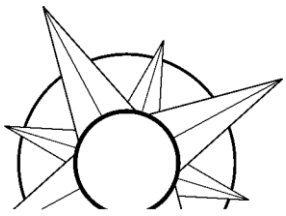
Crown experts maintained that in their opinion the fingerprint was a match to Ms McKie; she denied it. But the problem was that the crown experts relied upon their *ipse dixit* and could not provide an explanation to the jury of why they so concluded. Their evidence was punctuated with "because I am an expert" that they could see ridge endings etc. that no one else could see. Lord Johnstone in the trial, famously said "It just looks like a blob to me".

On the other hand, the American experts who attended to denounce the match, were able to demonstrate to the jury why it was *not* her fingerprint. They adopted the approach that all that they were was a guide: they have to be able to guide the jury to their own decision, by explaining their reasoning. They pointed to differences between the crime scene mark and the inked print of Ms McKie.

With scientific material and opinion, the expert should be able to demonstrate how he has reached his opinion and why. And the challenge is to ensure that he is aware of what is required of him in that effort.

SUMMARY SO FAR

Ask yourself the question: is this truly a matter of expert evidence? If not, then it is inadmissible.



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WHAT TYPE OF EXPERT SHOULD I INSTRUCT?

It is fundamental to the issue that you must be clear about what kind of expert to instruct to speak to the issue you think is in fact expert evidence. There is no point in instructing a general surgeon to speak to obstetrics, for obvious reasons.

In the video presentations to be shown at the seminar, there are a number of examples of surprising choices of experts: the *Pistorius* case saw an expert instructed to speak to whether the sound of a cricket bat being struck against a door could be confused with a gun shot. The defence expert was trained in geology, and attempted to suggest that his knowledge of scientific method gave him the ability to speak to the matter. This is as unreasonable as it is embarrassing to watch.

The default position for experts on the merits appears to be to get an engineer involved, or a health and safety expert. You should be extremely careful about instructing either of these disciplines unless you are satisfied that the expert has, through experience, research or investigation, acquired something extra which qualifies him if he is to provide an opinion.

Some instructions are obvious: you know which type of expert should be instructed. Others, less so. And be cautious: it may be that there is no such expert, as it is a matter that is not truly about expert evidence at all.

Within the disciplines there may be sub divisions: see for example *Walker v Smith Anderson Packaging Ltd.* [2012] CSOH 1

"[27] Moving on to Professor McQueen, her eminence in the field of orthopaedics, particularly in relation to the upper limbs, is well known and was not disputed. She is a world authority on wrist fractures. She is not, however, a member of the British Association of Hand Surgeons.

The moral is this: ensure that your expert is suitably qualified in the *particular* discipline that is before the court.

THE OBLIGATIONS UPON EXPERTS

In *Kennedy*, the Supreme Court said this:

"[52] The Scottish courts have adopted the guidance of Cresswell J on an expert's duties in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 in both civil and criminal matters: see Lord Caplan in *Elf Caledonia Ltd v London Bridge Engineering Ltd*, September 2, 1997 (unreported) at pp.225–227 and *Wilson v Her Majesty's Advocate* (above) at p.364, paras 59 and 60. We quote Cresswell J's summary (at pp.81–82) omitting only case citations:

> "The duties and responsibilities of expert witnesses in civil cases include the following:
>
> "1. 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.
>
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
>
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

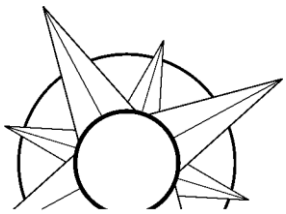
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

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

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports."

[53] In *Wilson v Her Majesty's Advocate* (at p.364, paras 59 and 60) the High Court of Justiciary quoted the first four duties and added the requirement that an expert witness "should in particular explain why any material relevant to his conclusions is ignored or regarded as unimportant." In *Elf Caledonia Ltd* , Lord Caplan quoted Cresswell J's guidance more fully. In our view, Cresswell J's guidance should be applied in the Scottish courts in civil cases, making such allowance as is necessary to accommodate different procedures. It is implicit that the seventh duty applies only in relation to items to which the opposite party does not already have access."

Some comment may assist to understand the qualification in the last paragraph from the quote.



In Scotland, generally there is no obligation to exchange expert reports (although in commercial actions and Chapter 42A cases, that might be so ordered). Thus the references to exchange of reports might require some refinement.

Further, there is authority in Scotland[16] to the effect that it is not possible to recover by specification precognitions upon which an expert report is based. Accordingly, the comment in paragraph 7 might be hard to argue.

But, it might be said that the directions in the above quoted paragraph must be adhered to slavishly; and it is of course, according to *Kennedy*, a requirement that the solicitors and counsel ensure that the expert is aware of his obligations. I refer below to some suggestions as to how to ensure that that duty is fulfilled.

For what it is worth, and it could be important, the position in England is procedurally but not substantively different.

Experts in England are governed by part 35 of the CPR, the associated protocols and practice directions. Any expert you instruct in Scotland ought to be familiar with those provisions and they are readily available on line for viewing. Nothing in them will be surprising; for example they require that the witness is aware that he is providing his evidence to the court and not the party. Much of the *Ikarian Reefer* is regurgitated.

The Academy of Expert Witnesses, that organisation which so many experts wish to herald their membership of, has on their website style reports and instructions for preparation of reports. Former members of the organisation have been two eminent Scottish judges, and therefore it will not do for Scottish experts to suggest that they are justifiably ignorant of what experts are required to do.

[16] *Amy Whitehead's Representative v Douglas and Anr* 2006 CSOH 178.

Furthermore, medical experts are bound by the protocols issued by the GMC on expert evidence, which directs their members to the relevant CPR, and to the Academy of Experts. It contains its own guidance for doctors. All of this ought to be familiar to any expert who wishes to provide evidence in Scotland. It is part of necessary preparation.

HOW CAN I CORRECTLY INSTRUCT MY EXPERT?

Having identified the expert, and that there is suitable expertise, what can you do to make sure that the expert is fully aware of his or her obligations? Remember of course that the Supreme Court has imposed that obligation upon you.

This section is designed not only to make sure that you comply with the obligation, but also how you ensure that you have the best chance of winning your case.

It will be helpful perhaps to style this as **the ten commandments of instructing experts**.

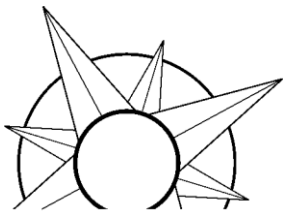
1. Ensure that your letter of instruction encloses the full papers, properly listed. This should enclose not only primary papers, but if the other side's expert report is available, that opposing report.

2. In your brief, provide a full letter of instruction and identify the questions that you wish the expert to address. It is no good simply asking "for your opinion".

3. Remind the expert of the obligations incumbent upon him. Provide him with the quotation from *Kennedy* (and *Ikarian Reefer*); and links to the protocol, part 35 CPR, and if appropriate the GMC website.

4. When instructing the expert, provide the papers in a proper form. In addition to making sure that they are complete, paginate them for ease of reference in the expert's report.

5. Ask for a draft report to be sent prior to finalising. The draft should be considered carefully; and if counsel is to be instructed, it is sensible to send the draft to counsel for consideration or even to consult with the expert prior to finalizing the report. This of course should be disclosed in the report that this was done.



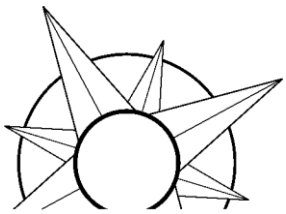
6. Prior to any proof ensure that the expert is made available for consultation with counsel in good time prior to the proof so that any additional information can be provided and if (in a disaster) a new expert can be obtained if your expert is not up to the job.

7. Make sure that the expert is familiar with Scottish court procedures. In particular, that the expert is aware of the best methods of presenting the case from the witness box. A number of professionally trained experts in England, who come to Scotland, have a habit as per their training of directing their answers to the judge and finish each answer with a turn to the court saying "That is my opinion, My Lord". At least one judge I know of has asked the witness to stop doing it, and just answer counsel.

8. It is a good idea to consider whether you wish and can manage to have your expert in court to hear factual evidence. If they do so, make sure that they sit at the back; not in "your team"; do not keep passing notes to you about the case; and give the appearance of total independence. The judge will see if they are engaging too much with you, and that will give the impression of bias and becoming an advocate for the case.

9. When lodging a CV, do not lodge one which is too lengthy. Some doctors are guilty of this. They should produce a brief CV, concentrating on what is relevant to the particular case. This makes it palatable, and avoids risks of blowing their own trumpet too loud.

10. Make sure that the report is edited well, grammatically sound, punctuated correctly, and looks like someone has spent time on its form as well as substance. Terminology should be explained, perhaps in an appendix. A chronology might be useful. Jargon should be avoided. The format of the report is dealt with in the next section to this paper.



THE FORM OF A LETTER OF INSTRUCTION

A suggested form of letter of instruction should contain the following:

1. A list of documents produced, suitably paginated.

2. A statement of the issues in the case, and if appropriate including the pleadings. That, though does not justify the solicitor in failing to outline the issues themselves.

3. A list of questions to which attention should be directed. For example "Please provide your opinion on the following matters: (i) Are you able to comment upon whether the pursuer has any illness as a consequence of the accident? (ii) If so, what is the injury suffered? (iii) How does it manifest itself? (iv) Can you causally relate all of the symptoms to the accident, and if so, why?...."

4. A reminder that the expert should list the sources of all information utilised, and provide reasoning for his opinion.

5. A reminder of what test in law is applicable ("You should apply the standard of the balance of probability" or "the test in law for professional negligence is…..")

6. A reminder that the expert should comply with the obligations in *Ikarian Reefer* so far as applicable, as reiterated in *Kennedy*.

7. A request that a draft report be produced in the first instance for discussion prior to finalising the report.

THE FORM OF AN EXPERT REPORT

The essential components of an expert report are as follows. Although no particular order is essential, the order below might be thought to be logical.

1. Introduction outlining the basic facts.

   "The Pursuer, Mr Jones, was involved in an accident at work on [x]. I have been asked by Bloggs and Co to provide a report for the court to assist in the resolution of the case."

2. A list of information provided.

   "I have been provided with the following information and documentation…"

3. A statement of the questions asked to comment on, taken from the letter of instruction.

4. A statement of why the expert is qualified to provide the opinion.

   "My experience is contained in the abbreviated CV attached as an appendix. In short, I have for 20 years been engaged in research relating to Parkinsons' Disease, and have written several published peer reviewed papers on the subject, and several chapters in text books. In addition I run the main central Scotland clinic and see over 400 patients a year who have the disease."

5. Each question in turn considered and answered. Reasons provided for the opinion or lack thereof.

   "I am unable to answer question 4 as I have insufficient information. I require x, y and z before making comment and will do so in a supplementary opinion once that information is provided to me."

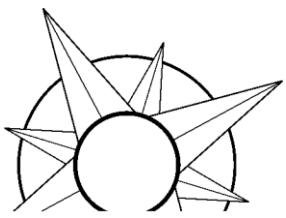
6. Summary of opinion.

7. A declaration.

   "Although I am aware that the provision of the CPR in England do not apply in Scotland, I confirm that as far as the principles contained therein can be applicable in Scotland, I have complied with those provisions. In particular, I confirm that I have disclosed the sources of all information provided to me, I consider that I have the relevant experience and training to provide an expert opinion, and that I have not concealed any matter which is adverse to the interests of the pursuer. I will advise if I change my opinion on any material matter at any time.

   I have been directed to the observations of the Supreme Court in *Kennedy v Cordia* and confirm that I have read the relevant passages about experts, and complied with the duties therein mentioned so far as I can."

8. Appendix: CV, glossary, and all papers such as published material that are founded upon in the opinion.



BIOGRAPHIES

Andrew Smith QC

Andrew has 30 years of experience of litigation in courts at all levels. He has practised at the Scottish Bar (call 1988, silk 2002) with a particular interest and experience in personal injury, medical negligence and other professional negligence claims. In 2006, he was called to the English Bar, and took silk in England in 2016 having established a busy and successful junior's practice.

He has appeared in many complex and important cases on both sides of the border, with eight appearances in the Supreme Court (including *Montgomery v Lanarkshire Health Board* and *Kennedy v Cordia*); and several more in the House of Lords and Privy Council. He has led in several applications to the ECtHR.

Andrew has particular expertise is in high value and complex clinical negligence and PI claims. He is instructed and retained in many multi party actions in both jurisdictions (hips, PIP, vaginal mesh, Vioxx, Celebrex) and works closely with attorneys in the USA and Canada regarding these and other potential claims.

He has extensive trial (over 500) and appellate (well over a hundred) experience in all courts. He has been rated in Band 1 in Chambers for Medical Negligence work and praised in the directories for his attention to detail, meticulous preparation and ability to innovate.

He splits his time evenly between London and Edinburgh.

Chambers UK Bar Guide 2016

"*You instruct him for his tactical skills in complex cases.*"

Legal 500 Scottish Bar 2015

"*Recommended for medical negligence cases involving neurological issues*."

Compass Chambers

Ian Mackay QC

Ian called to the Bar in 1980 and took silk in 1993. He has a wide experience in many areas of civil litigation. He specialises in property damage, professional negligence (including medical negligence) and personal injury work in which he is instructed on behalf of both Pursuers and Defenders through Insurers, Loss Adjusters, Local Authorities and Trade Unions. He has appeared in the House of Lords in seven cases. He regularly appears in the Court of Session and Sheriff Court.

He has particular expertise in catastrophic injury claims, including head and spinal injury cases, claims in respect of industrial diseases, psychiatric injury and fatal claims.

Chambers UK Bar Guide 2016

"*He's very knowledgeable. He manages expectations and fights the client's corner. His experience helps to make sure the client gets the best settlement possible."*

"He's known to be one of the best cross-examiners."

Legal 500 Scottish Bar 2015

"*Experienced in catastrophic injury claims.*"

Compass Chambers

Jillian Martin~Brown

Jillian called to the Bar in 2010, having worked as a solicitor with Shepherd + Wedderburn and Dundas & Wilson for over six years. She has practised in a wide variety of areas and in particular has developed expertise in the fields of personal injury, medical negligence and professional negligence, for which she has achieved a Band 1 Ranking in the Legal 500 since 2014. She is a member of the Chartered Institute of Arbitrators and the Scottish Arbitration Centre.

Between 2006 and 2009, Jillian represented the Scottish Prison Service in over 25 Fatal Accident Inquiries at Sheriff Courts throughout Scotland. In 2016, she was appointed to the Working Group on FAIs for the Scottish Civil Justice Council.

In 2015, Jillian was appointed as Standing Junior Counsel to the Scottish Government and regularly appears in actions for judicial review before the Outer and Inner House. She is a member of the Steering Committee for the Scottish Public Law Group.

She was junior counsel on behalf of the defenders in the landmark Supreme Court case of *Kennedy v Cordia*. She acted as second junior counsel for former MSP Tommy Sheridan on perjury charges in 2010. She was also junior counsel in the first successful prosecution of a corrupt British policeman in *HMA v Richard Munro* in 2012.

Legal 500 Scottish Bar 2015

"*She is technically minded and has a great manner with clients.*"

Legal 500 Scottish Bar 2014

"*Particularly strong in medical negligence cases.*"

Compass Chambers