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THE NEW CRITERIA FOR EXPERT EVIDENCE IN BRITISH COURTS – CASE LAW, STATUTORY RULES AND A NEGLIGENCE CASE STUDY

Paul Eisenberg
University of Portsmouth, University House Winston Churchill Avenue, Portsmouth PO1 UP, United Kingdom
eisenberg.scholar@gmail.com

Abstract

This work aims to analyse the legislation proposed by The Law Commission in Great Britain in order to establish statutory criteria for expert evidence in court. The proposal is assessed against the amendment of the Criminal Procedure Rules (CPR) initiated by The Government. From this comparison implications for expert witnesses are derived. For illustrative purposes, the case study of fictitious divorce proceedings of Peter Morgan is dealt with. The study shows legal remedies available to a party against its expert witness in negligence cases. Methodologically, expert evidence admissibility criteria are discussed on the background of common law rules and the Criminal Procedure Rules (2015). Legal academic literature is consulted to enrich the argument. The findings show that the Criminal Procedure Rules (2015) are rooted in settled case law, albeit stressing expertise enhancement and professional qualifications. The discussion of the Peter Morgan case study provides for a legal route for negligence claims based on the case law of Jones v Kaney. The originality of this work is based

upon a thorough analysis of case law and legal writings, with the focus on newly introduced Criminal Procedure Rules and recent landmark cases.

Keywords

Expert Witness, Expert Evidence, Expert Admissibility, Criminal Procedure Rules, Negligence, Case Study

1. Introduction

The criminal justice of England and Wales has been shaken by several convictions based on expert witness statements which have proved unreliable (Livesey, 2017; Edmond and Roberts, 2011). In *R v Dallagher* the defendant was sentenced because of the expert's opinion that the defendant's ear-print matched the ear-print on a window of the crime scene. In *R v Clark* the expert failed to disclose test results and thus did not meet professional and academic standards. Moreover, the expert had made statements about the statistical probability of two cot deaths in the same family, which was not his area of expertise (Great Britain. The Law Commission, 2009). In *R v Cannings* several medical experts have falsely excluded genetic predisposition of infant deaths in a family (McKie, 2012; Raposo, 2015). Finally, in *R v Harris and others* the expert's presumption was challenged that head injuries of babies could only result from murderous shaking (Ward, 2013). According to *Burgoyne v Pendlebury* expert reports in breach of court procedure rules can nevertheless be considered by the trial judge. To prevent the courts from following a generous approach to admissibility of expert evidence the Law Commission demands a statutory expert reliability test (Rozenberg, 2014). The proposed legislation should establish statutory criteria for expert evidence (Great Britain. The Law Commission, 2011). The Government opposes the proposal. It is afraid of additional litigation about experts' admissibility (Roberts, 2016) and higher administrative costs (Great Britain. The Ministry of Justice, 2013). Instead, it initiates the amendment of the Criminal Procedure Rules (CPR). The purpose of this work is to evaluate the recommendations of the Law Commission and to show what implications the new CPR have for expert witnesses.

The rules governing expert witness statements are exemplified by the case study of the fictitious divorce proceedings of Peter Morgan. The trial judge directs Peter's expert witness to prepare a Joint Statement with Mr. Smith, the expert witness of Peter's wife Mable. This court order is induced by the diverging assessment of Mable's net worth by the two experts of £11

million (Peter's expert) and £250,000 (Mr. Smith), respectively. During the expert meeting Peter's expert agrees with Mr. Smith's assessment due to overfatigue, alcohol consumption and confusion and signs the Joint Statement accordingly. As a result, Peter forfeits the possibility to claim a higher share of Mable's assets. This work investigates whether Peter is entitled to sue his expert for negligence (Laird, 2018) and on which law and grounds to base his action. Finally, any defences to Peter's action are evaluated.

2. Methodology

Current and previous criminal procedure rules concerning the admissibility of expert evidence are used as a benchmark for discussion. The common law on expert admissibility can be traced back to *R v Turner*. It incorporates the following four requirements (Henneberg, 2015).

2.1 Assistance

An expert's opinion has to be scientific. Speculations (*R v Gilfoyle)* and unscientific methods like astrology (*R v Robb)* are inadmissible. The opinion must be outside of a judge's or jury's knowledge, for example investment banking expertise (*Barings Plc (In Liquidation) v Coopers & Lybrand (No.2).* This makes the opinion assisting and necessary to understand the case at issue *(R v Mohan).*

2.2 Relevant Expertise

Sutherland (2009) points out that expert should be academically or professionally qualified (*R v Bonython*; *Dole v* Johnson*).* Courts use guidelines to assess academic expertise, for example in cases involving medical evidence (*R v Henderson and others)* or DNA evidence (*R v Weller).*

2.3 Evidentiary Reliability

This requirement calls for an established field of expertise for the evidence to be derived from (*R v Reed*; *R v Broughton*). This may be research results and techniques generally accepted by scientists (Ormerod, & Barsby, 2002).

2.4 Impartiality

Civil common law requires expert's impartiality (*Clonard Developments Ltd. v Humberts*; *Anglo Group v Winther Brown & Co., Ltd.*; *Field v Leeds City Council*; *Liverpool Roman Catholic Archdiocesan Trust v David* Goldberg *QC; Toth v. Jarman).* However, for

criminal proceedings partisanship does not affect admissibility (*R v Stubbs*; *Leo Sawrij v North Cumbria Magistrates' Court).*

Expert admissibility is also governed by CPR 2015, which follow the four common law requirements (Forensic Science Regulator, 2015). The previous CPR 2013 were amended with regard to admissibility on five accounts. Rule 19.2(1)(b) requires the expert to assist the court's case management and to follow the court's directions. Rule 19.2(3)(a) obliges the expert to define his "area or areas of expertise". Rule 19.2(3)(b) makes him to "draw the court's attention to any question to which the answer would be outside the expert's area or areas of expertise". Rule 19.3(3)(c) requires the party introducing the expert to notify the court about anything that may detract the expert's credibility (Brian, & Cruickshank, 2017). Rule 19.4(h) makes the expert include in his report information so that the court may decide about his reliability (Forensic Science Regulator, 2015).

In addition to the CPR amendments mentioned above, Rule 19.2(1)(a) enumerates the expert's duties as "giving opinion which is objective and unbiased, and within the expert's area or areas of expertise". According to Rule 19.2(2) "this duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid". These rules correlate with the common law in *National Justice Cia Naviera SA v Prudential Assurance Co., Ltd*.

Although supporting the court, an expert must not assume a deciding position (Lazo, 2018) – the case is for the jury to decide (*R v Stockwell).* However, the jury is not obliged to accept expert evidence (*R v Lanfear).*

The Civil Justice Council has issued a Protocol for the Instruction of Experts (2009) which may have impact on experts giving evidence in criminal courts. Moreover, experts can derive their duties from The Expert Witness Institute Code of Practice (2005).

3. Discussion

3.1 What implications do the new rules have for expert witnesses?

The new CPR 2015 rules narrow the expert witness' focus of expertise (Rule 19.2(3)(a) and Rule 19.2(3)(b)) and scrutinise the expert's credibility (Rule 19.3(3)(c)) and reliability (Rule 19.4(h)). The new rules mitigate former case law where expertise and qualification had not been properly considered by the judge (*R (Doughty) v Ely Magistrates' Court*). Therefore,

accreditation and training may become more important for expert witnesses to prove their specialisation and to substantiate their credibility and reliability (Rothwell, 2010).

Expert witnesses are expected to closely collaborate with the court (Rule 19.2(1)(b)). Criminal courts can order a pre-hearing discussion among experts to reduce controversial issues. Courts can also punish non-compliance by prohibiting that expert's evidence (Rule 19.6(4)). Courts can direct that evidence is to be given by a single joint expert and engage in expert selection (Rule 19.7(2)(b)). Hence, experts should be compliant to avoid punishment under Rule 19.6(4) and should be accredited and qualified in order to be selected under Rule 19.7(2)(b).

3.2 Was the Law Commission justified in making the recommendations suggested in its initial report?

In view of the recent High Court case *R (on the application of Wright) v CPS* the focus of the new CPR 2015 is on preventing experts from giving evidence not covered by their expertise (Jackson, & Stockdale, 2015). Hence, it may be argued that the Law Commission's goal –which is to scrutinise expert evidence more thoroughly – has entered the new CPR 2015. By the way, the Commission's suggestions had already been part of settled case law. Thus, an expert should disclose an issue falling out of his expertise (*R v Harris).* Parties have to persuade the judge to admit expert evidence on the basis of expertise (*Clarke (Executor of the Will of Francis Bacon) v Marlborough Fine Art (London) Ltd*.). Facts rendering experts inadmissible should be reported to the court as soon as possible (*R (Factortame Ltd. and Others) v Secretary of State for Transport, Local Government and the Regions (No 8).* The defendant may introduce any evidence to exonerate himself (*R v Lowery).* But no expert will be admitted under common law in matters of fact (*Re ISG Group Ltd.* (No 2), of obvious observations *(Thermos Ltd. v Aladdin Sales & Marketing Ltd.; Isaac Oren v Red Box Toy Factory Ltd.*) or of interpretation of commercial contracts, which is genuine judicial work (*J.P. Morgan Chase Bank v Springwell Navigation Corporation).* Finally, courts have been aware of budgetary constraints (*R v Jisl).* The Law Commission's suggestion to allow criminal courts to disapply the proposed test at court's discretion for the sake of procedural economy raises the question of whether the test is necessary at all (Great Britain. The Law Commission, 2011).

4. The case study of Peter Morgan

4.1 Is Peter Morgan entitled to sue?

The expert owes Peter a duty of care in contract and tort (Doyle, & Fentem, 2011). The duty of care is based on Peter's reliance on his expert and on the proximity between them (*Muirhead v Industrial Tank Specialities Ltd.).* The reliance is induced by the expert holding himself out as a specialist in the field (*Mutual Life & Citizens Assurance v Evatt*). Peter's expert has been in control of his conduct (Herstein, 2010). Hence, Peter could expect the expert to conduct his work with reasonable skills and care (*Bolam v Friern Hospital Management Committee).*

Furthermore, the duty of care must have been breached (Marks, 1989). Producing a flawed Joint Statement that substantially devalues Peter's case is not in Peter's interest, constituting a breach. The breach of duty can be established without Peter's expert being aware of the precise amount of the damage caused (*Hughes v Lord Advocate; Bolton v Stone; Paris v Stepney Borough Council*).

Peter must suffer damage from the expert's breach of duty (Zipursky, 2009). The damage must have occurred but for the expert's breach of duty (Goldberg, 2011). Peter would have hardly restricted himself to Mr. Smith's number of Mable's net worth but for the Joint Statement (*Barnett v Chelsea and Kensington Hospital Management Committee).* The Joint Statement as signed by Peter's expert materially contributes to Peter's damage (*McGhee v National Coal Board; Fairchild v Glenhaven Funeral Services Ltd.).* Therefore, Peter is entitled to sue his expert for negligence.

4.2 What is the law on this issue?

Historically, expert witnesses have enjoyed immunity from suit for negligence (Doyle, & Fentem, 2011). Centuries ago courts established immunity from liability due to slander (*Cutler v Dixon)* and defamation (*R v Skinner)* for statements in court proceedings. Over time, immunity from breach of duty of confidence (*Watson v M'Ewan),* from conspiracy (*Marrinan v Vibart),* from false and malicious evidence (*Roy v Prior)* and from sexual discrimination (*Heath v Commissioner of the Metropolitan Police)* at court has become settled case law. However, for lawyers (*Saif Ali v Sydney Mitchell & Co)* and for expert witnesses (*Palmer v Durnford-Ford)* the courts differentiated between immunity from statements made during proceedings and liability for advice given on other occasions. The distinction was driven by public policy

considerations to preserve effective trials without putting experts at risk of follow-up suits (Bal, 2009). However, this policy has been limited by *Meadow v General Medical Council*. The Court of Appeal cancelled expert witness' immunity against professional disciplinary proceedings resulting from poor performance as expert in court. The abolishment of the lawyers' immunity by *Arthur JS Hall v Simons* has shown that trial effectiveness has not suffered and that barristers have not been deterred from providing legal services in the aftermath (Shapiro, 2011). *Arthur JS Hall v Simons* also had effects on non-legal experts: if advocating the case of their clients instead of merely supplying expert evidence, they could no longer rely on immunity (Tromans, 2011). These legal developments have led to the Supreme Court' ruling in *Jones v Kaney* which has aligned the abolishment of immunity for expert witnesses with that for lawyers (Van Dellen, 2011). The long-established policy considerations have been regarded subordinate to the rule that remedy should be provided for a wrong suffered (*Darker v Chief Constable of West Midlands).* Consequently, Peter can base his suit for negligence on the case law of *Jones v Kaney*.

4.3 On what grounds could Peter Morgan base his action?

The way Peter's expert conducts the Joint Statement negotiations offers several grounds on which to base the action. The negotiations are conducted in a bar over a bottle of wine. Goodliffe and Brooke (1996) point out that alcohol can compromise care exercised by a legal professional. The meeting takes place after a conference at which Peter's expert has attended several speeches and workshops. Furthermore, at that evening hour, he suffers from jet-lag and is hardly able to concentrate due to this fatigue. Ming (2003) shows that pharmacists increasingly make dispensing mistakes when they are tired, violating professional standard of care towards patients. Khalafi (2014) stresses that lack of concentration at work due to sleepiness can result in performance losses. Indeed, Peter's expert forgets to take relevant documents to the negotiations and even confuses Peter's case with another appointment.

The adverse expert Mr. Smith applies different aggressive negotiation techniques to make Peter's expert giving in (Schatzki, 2009). He exercises pressure by recalling an alleged deadline and by making overbearing statements, pushing for an immediate agreement to be met at the same night. Also, it is Mr. Smith who orders a bottle of wine and keeps refilling Peter's expert's glass, which further decreases his concentration. However, Peter's expert is not obliged to drink alcohol and to response to Mr. Smith's claims. Instead, he could ask to postpone the meeting to be better equipped at a later point in time. The probability of breach of duty from conducting the

negotiations despite the overfatigue, alcohol consumption and confusion is reasonably foreseeable (*Overseas Tankship (UK) Ltd. v Morts Dock and Engineering Co Ltd.).* Conducting the expert meeting under such circumstances violates what can be reasonably expected of professional skills and care (*Bolam v Friern Hospital Management Committee).*

The next day Peter's expert suffers from nervousness ahead of the lecture to be held by him at the ongoing conference. *Thus,* he signs a copy of the Joint Statement prepared by Mr. Smith without even reading the copy. Such conduct of Peter's expert may be reasonably considered as careless (Moore, 2003). It also amounts to the expert's conduct in *Jones v Kaney*. In that case a draft Joint Statement was signed under alleged pressure and without reference to the underlying documentary evidence.

4.4 Are there any defenses to Peter Morgan's action?

In order to defend him from Peter's action the expert may rely on the case law of *Stanton v Callaghan*. In that case the court ruled that an expert may depart from his previous advice in order to support the court in reaching an honest result for the parties. The court held that an expert should strive for achieving agreement on as many issues as possible during expert negotiations without breaching a contract with his instructing party or becoming liable in tort of negligence. This overriding duty to the court is stated in Rule 35.3(2) Civil Procedure Rules. The expert could also point to the rulings in *Clonard Developments Ltd. v Humberts* and *Anglo Group v Winther Brown & Co., Ltd.* In these cases, the courts held expert evidence to be inadmissible if the expert was considered partial and biased. Thus, the expert may bring forward the defence that he signed the Joint Statement to support the court in finding a solution to the case and to demonstrate independence from Peter. However, this would constitute a self-serving assertion unsupported by any evidence (*Hopkins v Hopkins).* Hence, the court would probably dismiss this defence *(Ulster Bank (Ireland) Ltd. v De Kretser & Anor).*

Peter claims that the expert failed to liaise with his lawyers before signing the Joint Statement. *Stanton v Callaghan* provides defence for experts agreeing on issues that were not previously discussed with the client's solicitor. However, Peter's expert did not refrain from consulting the solicitors on the basis of his professional judgement. To the contrary, he signed the Joint Statement without any professional judgement at all. From a lack of professional judgement negligence can be concluded (Griffiths, 2000). Finally, following *Jones v Kaney* it may be argued that the public goal to encourage experts to operate without close control of

solicitors and without the threat of litigation is now considered subordinate to the rule that a wrong should be mitigated by a remedy (Shapiro, 2011). From the above analysis, it follows that no defence is available to the expert against Peter's action.

5. Conclusion

The Law Commission recommends to streamline and to clarify the traditional judge-made law by statutes (Sales, 2012). However, due to settled case law and budgetary constraints, the Government takes the middle way and amends CPR. The new rules stress the expert witness' need to enhance expertise and qualification and to strive for accreditation. Therefore, future studies could analyse how experts could gain and broaden proficiency under time and costs constraints (Price, 2018). Other possible venues for future research could deal with expert opinion as opposed to established majority opinion (Powers, 2017). Parallel research on expert evidence covers jury perception with regard to gender (Maeder, McManus, McLaughlin, Yamamoto, Stewart, & Walla, 2016) and the psychological dimensions of individuals involved in court proceedings (Case, 2016). Gender and psychology are not covered by this article, which may be considered a research limitation.

The fictitious scenario of Peter Morgan shows that a careless expert witness cannot rely on immunity from suit for negligence any more. The landmark case Jones v Kaney provides the reasoning for the abolishment of immunity. Expert witnesses volunteer to supply evidence at court against a fee (Wall, 2009). Thus, they cannot be compared to (lay) witnesses of fact who are obliged to appear in court and are not rewarded (Abbott, 2011). Witnesses of fact remain immune (Cooper, 2011). Hence, it appears justified that expert witnesses should exercise reasonable care in exchange for a monetary reward and that they should bear monetary losses if falling short of standards of care. Finally, *Jones v Kaney* abolishes the paradox that experts would accept a duty of care towards clients only in case of immunity from suit for breach of duty (Freckelton, 2012). This, also, may be considered to be fair.

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