

Psychiatric witnesses in court need to cultivate a calm, professional and confident manner. You must give all questions proper consideration, then answer with authority. You are advised to take only minimal material with you into the witness box and not to refer to any document without first seeking permission of the judge. You will be asked questions about your report, which is almost bound to be a court production available in advance to both sides. You will incur irritation if you start to thumb through case notes unless these are a production and have been handed to you in court. If you are uncertain, discuss the matter in advance with whoever is instructing you. You should leave the

court feeling that you have passed a challenging viva – hopefully you have.

References

- Casey, P. (2003a) Expert testimony in court. 1: General principles. *Advances in Psychiatric Treatment*, **9**, 177–182.
— (2003b) Expert testimony in court. 2: In the witness box. *Advances in Psychiatric Treatment*, **9**, 183–187.
Lord Chancellor's Department (1996) *Public Access: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Woolf Report). London: Stationery Office.

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INVITED COMMENTARY ON Expert testimony in court

Those who possess expertise or experience of a scientific or technical nature are often called to give evidence as a witness in a court or tribunal (in Scotland, he or she is known as a 'skilled witness'). In so far as the expert witness expresses an opinion, that evidence is, strictly speaking, an exception to the hearsay rule. However, since the 16th century, the courts have admitted opinion evidence from anyone, not just a 'professional', who can assist the court on a scientific or technical matter which is an issue in the case and is beyond the knowledge of the court or tribunal. Frequently, the expert witness will be giving evidence as to fact as well as opinion. For example, the forensic pathologist who conducts a post-mortem examination will be able to give a factual description of the condition of the body and, at the same time, give an expert opinion on the cause of death. The forensic psychiatrist will similarly describe what has been determined about the patient on examination of his or her symptoms and express an opinion on the patient's mental health. There will be cases where the expert is supplied with factual data on which to express an expert opinion.

Mental condition and fitness to plead

Psychiatrists and psychologists are frequently called to give evidence about an accused or convicted person's mental condition at the time of the criminal

event or at the time of trial. In the former instance, the issue will be one of insanity (rarely a defence plea since the abolition of the death penalty in 1965) or, since the Homicide Act 1957, diminished responsibility, which, if confirmed, reduces the offence of murder to one of manslaughter.

Occasionally, the issue will be the accused person's fitness to plead. From the early 19th century, doctors have been called to deal with the question of whether the defendant 'has significant intellect' to understand the evidence and to give it and, accordingly, to be able to instruct his or her legal representatives regarding defence. In *R v. Johnson* [2002], on a reference from the Criminal Cases Review Commission of a conviction for murder 26 years previously, the Court of Appeal (Criminal Division) accepted the evidence of Professor Kopelman and Dr Joseph (both Fellows of the Royal College of Psychiatrists) that the accused was psychotic and thus unable to participate effectively at his trial, at least at the moment (if not earlier) when he dismissed his legal representatives without any ostensible explanation. In accepting the evidence of the two psychiatrists, based merely on a study of the court reports of the trial, the court nevertheless overrode the evidence of a prison medical officer who, on a pre-trial examination of the defendant in prison, considered that there was no sign of mental illness and no suicidal thoughts. (The prison medical officer is still alive, but was not called by the Crown.)

The importance of the case was the citation of a recent individual opinion by Lord Hobhouse in a House of Lords' case, *R v. Pendleton* [2002]. This stated that courts should be cautious about accepting the views of psychiatrists about the mental health of a claimant or respondent, especially where such opinions were largely (if not entirely) based on what the patient himself or herself has said. The court in *R v. Johnson* [2002] noted that Lord Hobhouse's opinion was to urge caution, specifically about the evidence of psychologists in relation to confessions made by accused persons to police officers. It also said that Lord Hobhouse 'did not have in mind the evidence of medically qualified psychiatrists in the issue of fitness to plead'. The distinction drawn by the judiciary between the psychiatrists (who, by definition, are medically qualified) and the psychologist, in diagnosing and assessing an individual's mental health, is forensically unhelpful. It is encouraging to learn from Derek Chiswick's commentary (2003, this issue) that, in Scotland, it has been established that diminished responsibility (which existed in Scotland at common law, long before 1957) has been redefined to permit evidence of abnormality of mind to be given by psychologists and allows mental conditions recognised by 'the appropriate science' to be included within its ambit. Both disciplines have expertise and experience of evaluating the state of a person's mental health at any given time.

Registration and training of expert witnesses

Miscarriages of justice in the criminal jurisdiction led to the establishment of an independent

organisation, the Council for the Registration of Forensic Practitioners. The Council is compiling a register of accredited experts in the forensic sciences on a voluntary basis and will, in time, cover all the medical sciences, including psychiatry. Courts will be free to admit any psychiatrist to give expert evidence, whether or not he or she is registered with the Council. Those who are only occasionally available to undertake forensic work may well decide not to register. Initially, the register is concerned with criminal jurisdiction, but it is becoming clear that forensic scientists seeking registration will do so in order to validate their expertise in both criminal and civil cases.

The Council, as a registering and regulating body, does not intend to engage in training and education of experts. That is being left to the voluntary expert witness agencies (Casey, 2003, this issue: Box 2), which ensure high standards of service from experts assisting the courts on scientific and technological issues. One such agency has obtained VAT-exempt status in a decision from the Court of Appeal, which recognised its main function as promoting quality service in the administration of justice.

References

- Casey, P. (2003) Expert testimony in court. 1: General principles. *Advances in Psychiatric Treatment*, 9, 177–182.
Chiswick, D. (2003) Invited commentary on: Expert testimony in court. *Advances in Psychiatric Treatment*, 9, 187–189.

R v. Johnson [2002] Case No. 99/4665/52, 27.
R v. Pendleton [2002] 1 WLR 72.

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