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COMMENTARY

The expert witness and the criminal courts†

COMMENTARY ON…WHEN IS AN EXPERT NOT AN EXPERT?

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†See pp. 259–303, this issue.

SUMMARY

This piece seeks to complement Professor Rix's article on expert competence and professional misconduct by examining a related issue, namely the increasingly strict approach of the criminal courts to the reception of expert evidence. It considers recent case law, rules of procedure and legislation, and addresses both the admissibility of expert evidence and the duties of expert witnesses.

DECLARATION OF INTEREST

None

As Professor Rix rightly explains (2015, this issue), psychiatrists who accept instructions to act as expert witnesses in criminal cases must now, more than ever before, ensure that they are fully competent to undertake the role and that they understand the duties of an expert witness. I have nothing to add to his analysis of professional misconduct issues, but will instead consider the approach of the criminal courts to the reception of expert evidence.

Competence and accreditation

In the past, the courts have sometimes been unduly lax in ensuring the competence of supposed 'experts' appearing before them. This enabled Gene Morrison to earn a good living for 27 years as a forensic psychologist, acting in over 700 cases, until he was exposed in 2007 as an unqualified charlatan and sentenced to 5 years' imprisonment for fraud, perjury and perverting the course of justice (McVeigh 2007).

As Professor Rix has noted, Part 33 of the Criminal Procedure Rules (Ministry of Justice 2014)[a] now stipulates a much stricter approach to the determination of competence, but there is still no general legal requirement of formal accreditation or approval. There are exceptions, notably section 37 of the Mental Health Act 1983, by which hospital or guardianship orders can be made by a criminal court only on the evidence of two registered medical practitioners, at least one of whom must be approved by the Secretary of State, in accordance with section 12 of that Act, as having special experience in the diagnosis or treatment of mental disorder.

Similar requirements apply in respect of verdicts of insanity (Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s. 1(1)) and unfitness to plead (Criminal Procedure (Insanity) Act 1964, s. 4(6)), and in some other cases under the Mental Health Act. Surprisingly, perhaps, no such requirement attaches to findings of diminished responsibility in murder cases. It would in practice be impossible to advance such a defence without the support of expert psychiatric evidence (as the Court of Appeal confirmed in *R v Bunch* [2013]) but one suitably qualified expert may suffice and need not be on any 'approved' list.

The role and duty of an expert witness

Even where a psychiatrist is fully competent to accept instructions as an expert witness, the admissibility of what that expert might wish to say may still be problematic. A number of considerations must be taken into account. Expert witnesses, even experienced and distinguished ones, are occasionally caught out by failure to take such considerations properly into account, and this may result in the total exclusion of their evidence. Two recent examples are noted towards the end of this article.

First and foremost, care must be taken to ensure that expert evidence accords with the 'overriding objective' behind the rules of criminal procedure, which is that cases are dealt with 'justly'. To that end, expert evidence must be objective and unbiased, and must not stray (as Professor Meadow's evidence notoriously did in *R v Clark* [2003]), beyond the proper limits of that witness's own expertise (Ministry of Justice 2014: rule 33.2).

This principle of objectivity has been restated many times in case law (notably in *R v Harris* [2005]) but is not always respected, and some experts still appear to see themselves as 'guns for

a. As of 5 October 2015, Part 33 will become Part 19 of the 2015 rules. The rule numbering will not change, so rule 33.2 will become rule 19.2 and rule 33.4 will become rule 19.4, etc. (www.legislation.gov.uk/uksi/2015/1490/contents/made).

hire'.[b] The law, however, is clear and the expert's duties go well beyond merely avoiding untruths or refraining from deliberately misleading the court or jury: there is a positive duty to present an expert report in a specified form, to draw attention to whatever range of expert opinion exists on the issues in question and to 'include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence' (rule 33.4).

Reliability and need

Historically, the reliability of expert evidence was generally considered a matter for jury evaluation rather than one pertaining to admissibility, but following the Law Commission's 2011 criticism of this *laissez-faire* approach, a stricter stance has been adopted. Expert evidence based on novel, controversial or inadequately tested theories, or on theories that appear to have no sound evidential basis on the facts of the case, may well be rejected before a jury ever gets to hear of it. This does not, of course, mean that a judge must accept the truth of such evidence before he or she admits it. Opposing experts who come to diametrically opposed conclusions may each be considered 'reliable', even though they cannot both be correct. What rule 33.4 requires is that expert evidence has a scientific basis that makes it worthy of serious consideration.

Expert evidence must also be 'necessary' to provide the court or jury with information outside its own knowledge and experience. This is sometimes referred to as the Turner principle, after the case of *R v Turner* [1975], in which it was held that psychiatric evidence had rightly been excluded in a case in which the accused had killed his fiancée when she told him that she was pregnant by another man. The psychiatrist wished to support a defence of provocation by advancing a sympathetic medical explanation for the explosive loss of self-control that had apparently led to the killing, but the judicial view was that, in the absence of any evidence of relevant mental abnormality, psychiatric evidence was inadmissible. 'Jurors', said Lord Justice Lawton, 'do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life'.

Usurping the role of the jury

Even where there is clear evidence of abnormality, the role of the expert witness is limited. The House of Lords in *Toohey v MPC* [1965] established that:

> 'Medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence. Such evidence is not confined to a general opinion of the unreliability of the witness but may give all the matters necessary to show, not only the foundation of and reasons for the diagnosis, but also the extent to which the credibility of the witness is affected.'

But this does not mean that a psychiatrist can tell the jury whether he thinks an affected witness or confession is truthful. That remains a matter for the jury alone (*R v Robinson* [1994]). A psychiatrist may identify and explain a mental health problem, but must then leave the jury to draw its own conclusions. Lord Justice Judge elaborated on this in *R v W (Richard)* [2003]:

> 'There is a distinction between evidence that a condition has been identified by experts, which may explain that the memory of an apparently truthful witness may, in fact, be false (which we describe as the syndrome) and evidence from an expert witness based on a study of identical or virtually identical material to that available to the jury which directly (or indirectly) informs the jury of the expert's opinion whether the witness in question was or was not to be believed'.

This distinction can be remarkably subtle, however. In *R v S (VJ)* [2006], the expert was careful not to say that she considered the complainant (a 13-year-old child with autism) to be telling the truth, but was allowed to testify that, in her opinion, a child affected by that syndrome would be incapable of inventing and/or maintaining a false story. There is a difference, on that analysis, between saying 'this witness is telling the truth' and saying that 'a witness such as this one would be incapable of lying'. One wonders what a typical jury would make of such a distinction.

Two recent cases

Against this background, two very recent cases on the admissibility of expert evidence show that these rules have sharp teeth. In *R v H (Stephen)* [2014], the Court of Appeal judges dismissed the appeal of a doctor who had been convicted of sexually abusing his daughter (X). His conviction rested almost entirely on her uncorroborated evidence, but although it was clear that X had serious mental health problems, the Court upheld the trial judge's exclusion of evidence from Dr Janet Boakes, a consultant psychiatrist and psychotherapist who had appeared in many criminal trials and had testified before a Parliamentary Select Committee. The Court noted that Dr Boakes would (if permitted) have advanced a theory that X was suffering from false (or recovered) memory syndrome and that her testimony even if honest,

b. The ease with which some experts can still be found to act as hired guns was exposed by the BBC TV programme Panorama in 'Undercover: Justice for Sale?' (9 June 2014: www.bbc.co.uk/programmes/b044p2gc).

was delusional. This was potentially a suitable subject for expert evidence, being well outside the experience of lay jurors. But the judges identified significant problems. The first was that they could see 'no sound evidential basis' for the theory that this was a case of false or recovered memory. Dr Boakes did not attend court to hear X's testimony, nor did she examine X before the trial. Moreover:

> 'X had never been subjected to hypnotherapy or serious psychological counselling during which any revelation of abuse first emerged […]. Nowhere in the extensive medical records had any doctor, nurse or psychologist recorded a claim by X or given an opinion that she had recovered or retrieved memories of the abuse during her illness or counselling or psychology sessions'.

The trial judge had also noted that Dr Boakes's reports were 'littered with wholly inappropriate adverse comments on the credibility and reliability of X':

> 'She had advanced her opinion in a wholly inappropriate way for an expert witness, and had assumed the role of the advocate arguing the case for the defence forcefully carrying out a deconstruction, if not demolition, of the reliability of this 16 year old girl.'

The Court of Appeal agreed, adding:

> 'The difficulty in the case was that the way in which Dr Boakes had formulated her opinion required the judge to untangle what was of assistance to the jury and what was confusing and inadmissible comment'.

Dr Boakes's evidence, it was concluded, would also have usurped the function of the jury by telling them whether X's account could be relied upon. That, said Lord Justice Leveson, was a matter for the jury alone to determine.

A similar approach was taken by the Judicial Committee of the Privy Council in *Pora v R (New Zealand)* [2015], in which the evidence of a leading clinical and forensic psychologist, Professor Gisli Gudjonsson, was rejected on the basis that, like Dr Boakes's evidence in the case of Stephen H, it purported to usurp the role of the court. His carefully argued expert report explained why, in his opinion, Pora's confessions could not safely be relied on as proof of his guilt. As Lord Kerr explained:

> 'It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case. Professor Gudjonsson trenchantly asserts that Pora's confessions *are* unreliable and he advances a theory as to why the appellant confessed. […] This goes beyond his role. It is for the court to decide if the confessions are reliable and to reach conclusions on any reasons for their possible falsity. It would be open to Professor Gudjonsson to give evidence of his opinion as to why, by reason of his psychological assessment of the appellant, Pora might be disposed to make an unreliable confession, but it is not open to him to assert that the confession is in fact unreliable'.

Nor, said Lord Kerr, could Professor Gudjonsson's evidence be 'filleted' to exclude only the offending parts; but luckily for Pora, a clinical neuropsychologist and a psychiatrist were allowed to give evidence of his fetal alcohol spectrum disorder and of the effect this might have on the reliability of any confession he might make. On that basis, his conviction was quashed as unsafe.

Conclusions

The cases of Stephen H and Pora serve as warnings that a more rigorous approach to the handling of expert evidence has been adopted by the courts. The law itself has not really changed, but expert witnesses and the lawyers instructing them need to be more careful to ensure that the rules governing admissibility are strictly observed. Revisions to the Criminal Procedure Rules (and the associated Criminal Practice Directions) that came into effect shortly after the Stephen H ruling emphasise that point. Failure to observe them may result (as in those cases) in the exclusion of an expert's entire evidence.

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