EXPERT WITNESSES, THE APPOINTMENT OF QCS, RELIGION AND THE ENGLISH LEGAL SYSTEM

by Gary Slapper, Professor of Law, and Director of the Centre for Law, at The Open University, and a door tenant at 36 Bedford Row

Expert witnesses

In 2007, Gene Morrison, a conman from Hyde, in Cheshire, was convicted of 22 crimes, including deception offences and perjury, after having posed in court for years as a forensic psychologist. He had used the title "Dr" but when asked by police from which university he gained that qualification, he replied (on film) "Er, I have forgotten that." Worryingly, he was able to have given testimony in over 700 cases without being exposed by lawyers or judges as a fraudster.

Many legal disputes need the evidence of experts. Expert opinion is much more than what an American judge once condemned as "only an ordinary guess in evening clothes". Every week thousands of specialists like consultant doctors, accountants, authorities on art, and shipping experts, deliver testimony. Such expertise makes the discovery of truth much easier. But it does present occasional problems.

An incompetent expert can cause more misery than a psychotic gang member. When justice is miscarried because someone has given sham evidence from the witness box, the repercussions can be catastrophic: people get imprisoned, companies collapse, and children can be taken from parents.

The relatively unregulated nature of expert evidence also presents problems in the field of costs. In *Webster & Ors v Ridgeway Foundation School* [2010] EWHC 157 (QB) (05 February 2010) a minor celebrity headmistress claimed £200,000 for appearing as an expert witness for a school being sued by a pupil left brain-damaged in a hammer attack by classmates. Marie Stubbs, who won acclaim for her teaching of inner-city children, and whose career was dramatised in a television drama starring Julie Walters, charged the enormous fee for writing a 30-page report assessing the school's health and safety policies and for a three-day court appearance (Lois Rogers, *The Sunday Times* February 28, 2010).

Henry Webster, now 18, was left for dead with a fractured skull on a tennis court at the Ridgeway school in Wroughton, near Swindon in Wiltshire, three years ago, after being repeatedly beaten with the claw end of a hammer. Mr Webster had been hoping to win compensation from the school for its failure to protect him from the unprovoked attack by strangers who had entered school premises. Gus John, the expert witness recruited on behalf of the Websters, produced a 374-page report and charged about £70,000 for his time. Mr Webster's claim failed because the judge found no evidence the school could have foreseen the attack or prevented it. His family was told their insurance will not cover the costs of the six-week court case, which, including Stubbs's £200,000 fee, will exceed £800,000.

Stubbs's fee has yet to be formally approved at a costs hearing. The claim highlighted the unregulated nature of the expert witness industry. There is no limit to the fees that can be claimed and no requirement for experts to be vetted or trained.

Gus John and Marie Stubbs were both criticised by the trial judge, Mr Justice Nicol. He stated (para 13):

> I was not greatly assisted by either witness. Neither had experience of giving expert evidence in High Court proceedings before this case. The task is not an easy one. It is to provide assistance to the Court on matters which may be outside the Court's general knowledge and within the area of the witness' own expertise. It is not the role of the witness simply to become an extra advocate for the party which calls him or her.

In his *Review of Civil Litigation Costs* (December 2009) Lord Justice Jackson asks for improved control of costs and the use of experts (Part 6, section 38). He notes (p. 43) that experts' reports can generate "excessive costs". Jackson recommends (p. 385) that:

> "CPR Part 35 or its accompanying practice direction should be amended in order to require that a party seeking permission to adduce expert evidence [furnishes] an estimate of the costs of that evidence to the court."

http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf

An abiding challenge in the field of expert evidence is that a judge or a jury has to evaluate intricate testimony to do with science, technology, or finance, and to conclude which side of a case is supported by stronger evidence. Sometimes a trial does not get as much expertise as is later seen to be helpful. In February, 2007, in a retrial, Ian and Angela Gay were acquitted of having killed the three-year old Christian Blewitt, by poisoning him with salt. In this second trial, a new medical expert witness presented an alternative theory about Christian's fatally high sodium level. He showed how the boy's blood-salt concentration could have been attributable to osmoreceptor dysfunction - a medical condition that results in the body not being able properly to regulate its sodium levels.

In civil cases, one problem has sometimes been a profusion of specialist testimony, leaving the court, as one judge said adapting a line of Milton, "dark with excessive brightness". To avoid a trial becoming overborne by an abundance of obscure expertise, a court now has the power under the Civil Procedure Rules to direct that evidence is given by a single expert to serve "both sides" of the case. Rule 35.7(3) says that where the parties cannot agree who should be the expert, the court may select the expert from a list provided by the parties, or chosen in another manner "as the court may direct".

It is also important that when technical evidence is adduced (brought forward and offered) in court, that it can be understood by people outside of whatever discipline it comes from. Medical evidence, for example, however abstruse must be able to be explained in non-medical terms. And arguments about whether something is good practice must be such as could persuade a court not just a panel of doctors. In a House of Lords decision in 1997, Lord Browne-Wilkinson said that medical evidence must be "capable of withstanding logical analysis" (i.e. from a non-doctor) and that if it was not, "the judge is entitled to hold that the body of opinion is not reasonable or responsible." (*Bolitho v. City and Hackney Health Authority*, [1997] 4 All ER 771 at 779).

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Another point about expert evidence is that those giving it have a duty to justice above their duty to the person paying for their services. In criminal cases, expert witnesses have an obligation to assist the court, and they must remain objective and express only genuinely held opinions which are not biased in favour of either party.

Experts should ensure that developments in scientific thinking and techniques are not kept from the court, even where they remain at the stage of a mere hypothesis. This duty is facilitated by the Criminal Procedure Rules which enable opposing experts to consult together before the trial and, if possible, to settle their points of agreement or disagreement with a summary of their reasons.

Similarly, in civil trials, experts must be more than hired proponents of their side's case. The Practice Direction on Civil Procedure Rule 35 states that "It is the duty of an expert to help the court" and that this duty "is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom he is paid". The rules are strict and demand that an expert should provide objective, unbiased opinion, and should not assume "the role of an advocate."

In its paper *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales, Consultation Paper No 190*, (2009) the Law Commission expresses concern that defendants are at risk of being wrongly convicted on the evidence of "charlatan" and "biased" expert witnesses. A series of notorious cases in which convictions have been overturned after concerns over "flawed" expert evidence "represent the tip of the iceberg". It canvasses views on the suggestion that expert evidence is sometimes admitted into court too readily and there is a "pressing danger of wrongful convictions". In recent years, miscarriages of justice such as the cases of Sally Clark and Angela Cannings, both convicted of killing their babies and then cleared on appeal, have highlighted the difficulties.

The commission says there is a danger that juries sometimes have little option but to defer to the views of a particular expert witness. The problem is particularly pronounced with scientific evidence which is said to have an "aura of infallibility"; jurors might assume that just because it was scientific, it is reliable.

The Commission recommends that magistrates and judges act as gatekeepers and screen expert witnesses by applying a list of criteria, to be encapsulated in a new statutory test, before they can give evidence in court. The purpose of the test would be to ensure that juries are not exposed to unreliable experts.

The report says:

> ...6.6 Accordingly, as a general rule, and bearing in mind the provisional assumption of reliability, the trial judge would first need to determine whether the tendered expert evidence satisfies the following admissibility requirements:
> (1) Is the evidence logically relevant to a disputed matter?
> (2) Would the evidence provide the jury with substantial assistance?
> (3) Does the witness qualify as an expert in the field, and would he or she be able to provide an impartial opinion?
>
> 6.7 The party tendering the evidence would therefore need to explain at the outset how the expert's testimony is logically relevant to a matter in issue and demonstrate that it "is sufficiently tied to the facts of the case that it will aid the jury in resolving" it. If the evidence fails this preliminary test it will be inadmissible.

The commission concludes (1.2, p. 4):

> "We believe that our proposals, if adopted, would ensure that convictions and acquittals would be founded on expert evidence only if the hypothesis and methodology underpinning that evidence can be shown to be trustworthy."

And it adds: "We believe that the 'orthodoxy' that cannot be shown to be trustworthy should not be admissible." The absence of any effective screening test risked convictions of the innocent or the acquittal of the guilty.

A major danger to be averted is the problem of the partisan expert witness; the person hired to put a particular slant on the evidence as opposed to giving entirely professional neutral testimony. That sort of witness has been highlighted by Lord Justice Leveson who has referred (*The Times*, 17th November, 2009) to an orthopaedic surgeon who was known by the initials NWA — "never work again" (because that was the evidence he always gave about the impact of an injury on a litigant) and his frequent opponent in cases, another surgeon known by the initials BTW — "back to work" — because his expert evidence was always that the injured party was well enough to return to work.

The appointment of QCs

The title Queen's Counsel betokens seniority and allows such distinguished barristers to charge higher fees. The system of appointing barristers as Queen's Counsel arose in the sixteenth-century. Traditionally, the selection process was secret and carried out by a series of private 'soundings' being taken on behalf of the Lord Chancellor. That system was suspended in 2003 after criticism that the selection process was secretive and indirectly discriminated against women and applicants from ethnic minorities. From 2006, the system has been open and more meritocratic. Under the new scheme, a selection panel makes recommendations to Lord Chancellor (The Minister for Justice), who then remits them to the Queen. It is expensive to apply. Last year's applicants had to pay £2,702.50, including VAT, and another £3,500 if successful.

In the 2010 appointments, the Queen approved 129 QCs. In all, 275 barristers applied, of whom just under half succeeded. Despite efforts to improve diversity, 226 were men (of whom 108 were successful) and 46 were women (of whom 20 were successful). There were 35 ethnic minority applicants (17 were successful); 262 barristers (128) and three employed advocates (none was successful). From the ranks of solicitor-advocates, ten applied but only one was appointed. Only 16.7 per cent of applications came from women and 3.6 per cent from solicitors. An increase in the latter, where women are better represented, could change that.

Law arises from and reflects life. So, the greater the extent to which the body of legal practitioners reflects the humanity it serves, the better. Historically, 50 per cent of British humanity was excluded from practising law – at first by the axioms of earlier ages and then by explicit dictum: the eminent seventeenth-century judge and jurist Lord Coke stated that women could not be attorneys. Even once concessions were made at the entrance gates to legal academe during the nineteenth century, females experienced endemic chauvinism in their career progression.

In *Bebb v Law Society* [1914] 1 Ch 286, arising from an attempt of a woman to become a solicitor, even her lawyers dutifully accepted the proposition that women had no public functions, and (at 287) that "in the camp, at the council board, on the bench, in the jury box there is no place for them".

By 1964, there was still formal opposition to female barristers being admitted to some circuit meetings and dinners because they would "inhibit the atmosphere" and "completely alter the character and nature" of the events. It was also feared that some women might attend the meetings because they felt that "in so doing they are in some way advancing their professional chances". Something, naturally, that men would never dream of doing.

The English legal system and religion

Around the world, some nations are religious states. Those countries are governed according to religious principles. The modern English legal system is not such a nation. Citizens are permitted complete freedom of belief and practice within the general law. When we say freedom 'within the general law' all that is meant is that no-one can escape being governed by the general law – such as that of murder – by claiming freedom to act on a religious belief.

Blasphemy is still technically a crime at common law but it has been

prosecuted only twice in the last 90 years and the last case was over thirty years ago. The common law of England is now, in effect, dogma-neutral; it is not programmed with the doctrines of the Church of England. Traditionally, the offence of blasphemy was said to consist in denying the truth of Christianity. According to one legal theory Christianity was 'part of the law of England'. This issue was examined in *Bowman v The Secular Society* [1917] AC 406. In the case, the Secular Society (which said the main object of thinking people should be 'human welfare to the exclusion of all supernatural beliefs' was left a bequest in the will of a supporter. The next-of-kin of the testator (a person who makes a will) wanted the bequest and so he disputed the validity of the will. He argued that the will was invalid because the law would not allow money to be left to a body with unlawful purposes and the purposes of The Secular Society were unlawful. The question, therefore, was whether an anti-Christian society is incapable of claiming a legacy duly bequeathed to it merely because it is anti-Christian. The House of Lords ruled that the bequest was lawful. Lord Sumner, a firm Christian believer, ruled in favour of the Society enjoying the bequest. He did not accept that Christianity was an integral part of English law.

He concluded that what the law censors is not the mere *expression* of anti-Christian opinion but only such expression if it is offensive or likely to incite violence. In a much earlier case another law lord had said that the law did not protect those who contradict the Scripture but this was a proposition, Sumner observed, "which in its full width imperils copyright in most books on geology". He concluded that the thought that 'Christianity is part of the law of England' was not law but rhetoric.

This case was of considerable historic significance in supporting the freedom of a citizen to leave his wealth to whom he wanted. It is also solidified a great principle of British freedom of expression by ensuring that no legal disadvantage fell on people with dissentient ideas.

Historically, as society became more open and democratic, restrictive religious requirements were removed from the legal system and the system of civil life. Historically, at Oxford and Cambridge universities, it was necessary to be a practising member of the Church of England in order to study or teach any subject. That restriction on scholarship, learning and the development of knowledge was removed by the University Test Act 1871.

In 1884, Charles Bradlaugh, a well-known atheist (and founder of the National Secular Society), was elected to the House of Commons. To become an MP he was supposed to take a religious Oath of Allegiance to the Crown but declined to do so, opting for a civil affirmation instead. Someone sued him on the grounds that he was not entitled to sit and vote as an MP. The court held that Bradlaugh was not entitled to affirm (see *Bradlaugh v Gossett* (1884) 12 QBD 271; and *Clarke v Bradlaugh* (1881) 7 QBD 38). Bradlaugh's seat became vacant. He was then re-elected four times by the electorate in Northampton but was refused his seat in Parliament. In 1886 Bradlaugh was finally allowed to take the oath, and he later helped secure a change in the law - the Oaths Act 1888 which permitted anyone to affirm (solemnly swear to tell the truth in a non-religious way).

In 1959, the judge Sir Patrick Devlin said that he thought the criminal law of England should be largely based upon notions of sin. He said (*The Enforcement of Morals*, OUP, p. 4) that "a complete separation of crime from sin ...would not be good for the moral law and might be disastrous fro the criminal". He also noted that (p. 23) "I am very clear about the law's need for the Church". That, though, would not be a sentiment likely to be expressed by a senior judge today. In a religiously pluralistic society and one in which many people are atheist it would not be suitable to impose favour on citizens from one branch of philosophy.

In is not common for religious leaders to make a direct intervention into the law-making process in the UK but one example occurred in 2010. The Pope exhorted Catholic bishops to oppose the UK's Equality Bill with "missionary zeal", (*The Times*, 2nd February, 2010). The papal argument was that the draft legislation's affording of equal rights to homosexuals "violates natural law".

The Equality Bill currently before Parliament has two main purposes - to harmonise discrimination law, and to strengthen the law to support progress on equality. It will harmonise existing legislative provisions (such as the Sex Discrimination Act 1975; the Race Relations Act 1976; and the Disability Discrimination Act 1995) to give a single approach where appropriate. Most of the existing legislation will generally be repealed. The Bill will also strengthen the law in a number of areas. It will implement the principles of the Commission of the European Communities draft Directive (2008) which seeks the prohibition of discrimination on grounds of disability, religion or belief, sexual orientation and age, in access to goods and services, housing, education, social protection, social security and social advantage. Among other features, the Act will extend the circumstances in which a person is protected against discrimination, harassment or victimisation because of a protected characteristic.

Should a religious organisation be able to withdraw itself from the general law on the basis of its particular code of beliefs? Citizens, lawyers, and law students, of course, will have various views on that question. An opinion to counterpoise against that of the Pope is based on the assumption that the rules of the legal system must apply generally – particularly in a society of diverse cultures and belief system. The law should unite and unify citizens on core values not create a patchwork of dissimilar or oppositional legal norms. People are entitled to believe what they want, and to express that publicly – a great human advance from the times when some religious organisations systematically tortured people for what they believed. People's freedom to hold and express ideas will continue if the Equality Bill is passed into law. What people will not be able to do is to discriminate against someone in an employment setting because of that person's sexual orientation – a discrimination arguably as irrational as disfavouring someone who is left-handed.

The Pope has said the effect of the legislation will be to impose unjust limitations on "the freedom of religious communities to act in accordance with their beliefs" (*The Times*, 2nd February, 2010). A democracy, though, can and should impose limitations on certain groups to "act in accordance with their beliefs". The history of social change has been marked by such restrictions. The laws against slavery, child labour and treating single mothers as insane, all restricted certain people from "acting in accordance with their beliefs". Some groups favour beating school children with rods or using evidence in a court that has been obtained by torturing suspects – we allow those groups, rightly, to advocate their causes but the law stops them from "acting in accordance with their beliefs".

It is a highly contestable dictum of modern times in some quarters that a religious belief, *ipso facto*, is sacrosanct and beyond the law. Some churches have thus said that their right to discriminate against gay people should not be trumped by gay rights. In a democracy, however, that can and should happen if such law is made. A savage teacher who, in accordance with a religious tenet, has thrashed a child with a belt could not be heard by the UK courts to say "I don't want my religious beliefs trumped by children's rights".

If a white immigration official at an airport said he would not process people who were black or Asian because he had a religious or political belief against such immigrants, employment law would not protect him if he walked away from his desk any time a black person approached. He could not argue that he did not want his beliefs to be "trumped" by "black rights".

Putting into practice the principles of equality cannot permit exceptions for people who are simply against equality. When, in the Race Relations Act 1965, the law was changed so that it became unlawful for landlords to put up notices saying "Room to Let – No Jews, Irish or Blacks", there was, quite rightly, no cop-out clause by which landlords were still permitted to put up such notices if their religious convictions demanded such discrimination. There should not today be any escape clause in employment law for those who wish to discriminate on the basis of sexual orientation.