

Expert Evidence; History and background

The admission of expert evidence was recognised long ago by Mr Justice Saunders when he admitted evidence of “other sciences or faculties”.

Buckley v Rice Thomas (1554)

In *Shell Pensions Trust Limited v Pell Frischmann & Partners (a firm)* (1986), Judge John Newey referred to Lord Mansfield’s judgment in *Foulkes v Chadd* (1782) where he confirmed that the Courts would recognise “the opinion of scientific men upon proven facts may be given by men of science within their own science”.

Lord Mansfield's Test

Lord Mansfield's test encompassed:

- opinion evidence by a person experienced or qualified in that field of science;
- an opinion based on proven facts, not supposition or speculation;
- an opinion confined to the expert's field.

Rules of the Supreme Court 1873-1967

Rules of Supreme Court 1883 Order 30. Rule.2 (2) where the Court or Judge c

e) order no more than a specified number of expert witnesses be called and

f) appoint a Court expert under Order 37A.

Court expert

In 1934 the Rules of the Supreme Court 1883 were amended ^[1] to provide for the appointment of a court expert in matters of fact and opinion in any non-jury action not involving law or construction of a document. ^[2]

Such expert was to provide a written report.

The parties were free to agree the choice of expert and the questions put to him.

If they could not agree then the court would nominate the expert and settle the questions or instructions for that expert. The report was addressed to the court. The parties were jointly and severally liable for his fees. Such expert could be appointed in cases to be tried before official referees. ^[3]

^[1] R.S.C. (No 2), 1934.

^[2] R.S.C. (1883) Ord.37A.

^[3] Fishenden v. Higgs and Hill Ltd. (1935) 153 L.T. 128, C.A.

Court expert

In *Badische v. Lewisham* (24.Ch.D.156) June 1883 Professor Roscoe made his report to Mr Justice Pearson of the Chancery Division the trial Judge, he did not hear evidence but conducted chemical experiments personally in the presence of each side's chemist.

Two significant aspects arise from the Judgment.

The degree of control exercised by the Court over the expert.

The expert was directly briefed by the Judge – similar in fact to the briefing of the architect Mr l'Anson as a special Referee in the case of *Broder v. Saillard* (2.C.D.694). This independent Court expert was appointed with consent of the parties and according to the Judge had power to appoint him under Section 56 of the Supreme Court Judicature Act 1872 – i.e. : enquiry and report by an Official or Special Referee.

[1] [1962] 3 All E.R. 92

In Mellin v. Monoco (3.C.P.D.142/149) Bramwell, LJ stated that a Special Referee was not to dispose of the action and not even to determine any matter in issue between the parties but “to find materials upon which the Court is to act”. It is confusing as the Judge never referred to Roscoe as Special Referee but as a Court expert. It is likely in practice the two were confused and the confusion may have led to reservations about usage especially in an adversarial system such as ours.

In Colls (v. Home and Colonial Stores Limited (H.L.))[1904] A.C.179 Lord MacNaughten considered that where the Judge had relied upon the Jury to view the premises and determine the degree of diminution in such cases the Court ought to appoint an expert to report to it.

In 1962 Lord Denning in Re Saxton [1] expressed the hope that in the future careful consideration would be given to the appointment of a court expert. Despite this, the profession was reluctant to use them.

Reform

The Law Commission: Law Report Committee
17th Report October 1970. pp. 8, 31).

- did not favour the use of Court experts they concluded that “.. the introduction of a general “court expert” system is not desirable”.
- But noted the practice in personal injury cases in the Queens Bench Division for parties to exchange medical reports and that this often resulted in agreement.
- The Commission recommended the disclosure and exchange of such expert reports.

Vinn Committee

suggested fairer rules regarding the admission of expert evidence

Lord Woolf

Interim Report suggested wider use of single or neutral experts provoked serious opposition.

Lord Woolf was not convinced and felt the greater injustice was the question of cost.

Lord Woolf adopted the Official Referees' practice in his recommendations so that the Civil Procedure Rules set out a regime of expert evidence including:

- the exchange and disclosure of expert reports prior to trial (CPR Part 35 Rule 9)
- and the meetings of experts for the purposes of narrowing issues of fact in dispute (CPR Part 35, Rule 12).

Official Referee's Legacy

Judge Newey's standard orders in this respect were:

- “Experts of like discipline to meet without prejudice to try to narrow issues and agree facts by [date]”.

And

- “Experts to seek to agree a joint statement indicating those parts of the evidence on which they are, and those on which they are not in agreement”. (see *The Expert Witness in Construction*. Blackwell Scientific Publications. Oxford (1988) Michael P Reynolds.

Assisting the judge

“... to furnish the judge 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”.

Davie v Edinburgh Magistrates (1953)