A LIGHT THAT ILLUMINATES THE OBSCURE

Expert evidence may be exciting and dramatic but it must be relevant and, to deserve the appellation of 'expert', should provide information or analysis that is not within the common knowledge of the non-expert decision-maker, says *Mark Hinchliffe*.

I HESITATE TO BEGIN by reference to the 'problem' of expert evidence, and yet there *are* problems. These can relate to untested claims to expertise, the provenance of facts relied upon, the suspicion of an underlying agenda or a lack of professional objectivity, unchallenged expert evidence from only one side, irreconcilable conflict between two experts and the relationship of an expert witness with a specialist tribunal with its own expertise.

There is an argument that judicial testing of the sufficiency of expertise is, on occasion, insufficiently rigorous. Arguably, it is part of tribunal culture to 'let it all in' and then weigh everything up in the round without becoming too analytical. It could be time, however, for this to change. The judgments from the High Court and Court of Appeal are far from consistent, and some (it respectfully seems to me) have raised expectations that are a little unrealistic. Having said that, it does appear that a more pragmatic trend is emerging, and it is a trend that, thankfully, recognises and respects our expertise.

Integrity

Of course, it must be recognised that there are many cases where we need the help of the specialist experts and where justice depends on their integrity and upon our willingness, when appropriate, to put our faith and trust in them. We are duty bound, in every case, to receive and consider expert evidence with a completely open mind.

However, just because a witness is a professional person, they are not necessarily an expert and many professional witnesses remain witnesses of fact and of history. They have an opinion and their experience of, say the pupil or patient, will be valuable, but this does not necessarily trump the independent expertise of the panel, and the witness may not have the depth of involvement, or of professional knowledge, to justify the label 'expert'.

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The courts are used to looking beneath the surface when it comes to claims of expertise, whereas tribunals – with no duty to protect a jury from material that is superficially impressive but that lacks the essential characteristics of expert evidence – have generally been more sanguine. The proliferation of expert evidence has been hard to control, although tribunals have used case management as one possible way. Further, tribunals have struggled to explain in their decisions why an expert's opinions have not been embraced, especially when the evidence was unchallenged or, at least, un-contradicted. For a panel member's concerns not to be raised during the hearing, and the decision not to incude any reasons, is an approach with which the appellate courts have disagreed.

In *English v Emery Reimbold and Strick Ltd* [2002] 1 WLR 2409, the Court of Appeal felt that 'a coherent, reasoned opinion expressed by a suitably qualified expert should be the subject

of a coherent, reasoned rebuttal' and that the decision-maker 'should provide an explanation as to why he has accepted the evidence of one expert and rejected that of another', although the case did not involve a first-instance decision-maker that could call upon its own expertise.

Types

Expert evidence encompasses various forms of testimony and it is important to recognise exactly what sort you are dealing with. There is a difference between:

- Evidence of the latest theoretical understanding of a specialist subject.
- Case-specific evidence of fact.
- Case-specific evidence of opinion.

The following types of expert evidence may be identified:

- Evidence of relevant facts – the observation, comprehension and description of which does *not* require expert explanation to properly comprehend or interpret.
- Evidence of relevant facts (such as properly conducted examinations) – the observation, comprehension and description of which *does* require expert explanation.
- Relevant background information.
- Explanation of relevant technical subjects or terms.
- Expert opinion on inferences from relevant facts where based upon specialist knowledge.

The relevance of the evidence is key and the tribunal must retain a clear understanding of the material issue and ensure that the expert does not either stray outside their expertise or beyond the field of inquiry. Expert evidence may be exciting and dramatic but it must be relevant and, to deserve the appellation of 'expert', it should provide pertinent information or analysis that is not within the common knowledge of the non-expert decision-maker.

Expert disciplines

In many cases, there are significant difficulties in establishing whether the expert is properly described as such and whether the field of expertise is a recognised specialty. Is an area of expertise always in a recognised discipline, governed by professional standards and rules of conduct?

Tribunals should not just take it for granted that professional evidence is 'expert' evidence without exploring further what the specialty is, what the precise connection is between the witness's profession and the specialty claimed, and its relevance to the case.

. . . a witness can be invested with expert status without there being any evidence of academic study. . . .

Regulation

Not all fields of expertise are subject to any formal regulation. Although this will not rule out a witness's claim to special expertise, heightened judicial scrutiny will be required. Moreover, there are degrees of expertise. One expert may be a competent practitioner but lack the academic understanding needed for detailed explanation. Experts must stay within their field of expertise and competence.

In psychiatry and psychology, the appropriate professional bodies have codes of practice in relation to professional conduct, which will cover the professional obligations of their members when offering an expert opinion. But many fields do not have such schemes, and accreditation can be little more than a register to which you can add your name for a fee. Moreover, it has long been recognised that there is no pre-requisite that a witness possesses formal qualifications or training, and a witness can be invested with expert status without there being any evidence of academic study and without the witness having passed any test or assessment of knowledge. Expertise can be acquired solely by means of practical experience. For this reason, tribunals are entitled to carefully explore the backgrounds, and experience, of experts.

Structure

In the case of *R v Parenzee* [2007] SASC 143, a South Australia Supreme Court decision, the court suggested a structured list of helpful questions, which can be condensed as follows:

- Is the evidence offered something that the panel needs expert help with?
- Is the expert really an expert?
- Is the evidence within the expert's field of expertise?
- Is the claimed speciality recognised, tested and accredited?
- What is the source of the factual matrix relied upon?
- What case-specific work has the expert done?
- Is the expert banging a drum?
- Are good reasons given for opinions and recommendations?
- Is there any alternative expert evidence?
- Has there been any opportunity to obtain alternative expert views?
- Do the decision-makers have their own expertise, which either confirms or raises doubts about the reliability of the expert evidence?
- Can the decision-maker reject the expert's opinion in favour of its own expert view?

Answers to these questions may provide the basis for accepting or rejecting expert opinions.

Jurisprudence

In the special educational needs and mental health jurisdictions, case law is showing an increasing willingness by the courts to respect our own independent specialist knowledge and, subject to the rules of natural justice, to permit us to rely upon our own expertise, especially when choosing between two different professional or expert opinions. With the advent of the Upper Tribunal, we may well see this trend continue.

In *R (L) v London Borough of Waltham Forest and Another* [2003] EWHC2907 (Admin), the judge said that if a tribunal rejects expert evidence 'it should state so specifically', in some circumstances saying why it rejects it, and where it uses its expertise to decide an issue, 'it should give the parties an opportunity to comment on its thinking and to challenge it.' In *X and X v Caerphilly Borough Council and SENDIST* [2004] EWHC 2140 (Admin), Keith J found that:

> '. . . in the absence of any reasoned justification for the approach that the tribunal adopted, the tribunal's conclusions must be regarded as flawed in law.'

To many at the time, these judicial strictures did not seem to fully grasp the relatively informal nature of tribunal proceedings and imposed too high a burden on decision-writers. Thankfully, the jurisprudence referred to above can now be seen as qualified by more recent judgments.

In *W v Leeds City Council and SENDIST* [2005] EWCA Civ 988, the Court of Appeal took the opportunity to re-state the law on giving reasons. Wall LJ confirmed that a tribunal decision should not be an elaborate, formulistic product of refined legal draftsmanship. It simply had to contain an outline of the story that gave rise to the case, a summary of the tribunal's basic factual conclusions and a succinct statement of reasons explaining why it reached the conclusion that it did on those basic facts. In short, the parties were entitled to be told why they had won or lost. At a recent JSB course, Lord Justice Sullivan reminded delegates that a decision is primarily 'a letter to the loser' although there also had to be a sufficient account of the facts and of the reasoning to enable an appeal court to see whether any question of law arose.

In *F Primary School v Mr and Mrs T and SENDIST* [2006] EWHC 1250 Admin, James Goudie QC, sitting as a Deputy High Court judge, said:

> 'Of course, tribunals must not give evidence to themselves which the parties have had no opportunity to challenge. But this tribunal

> was not giving evidence to itself. It was, in my judgment, performing its function as a specialist tribunal, of evaluating all the evidence before it at the hearing and legitimately using its specialist expertise for that purpose.'

At about the same time, in *R (H) v West Sussex County Council* [2006] EWHC 1275, Holman J approved of the way a tribunal had dealt with (and rejected) the evidence of two psychiatrists and a psychologist. He thought that the tribunal members clearly had these expert opinions 'in the forefront of their minds' and added that:

> '. . . it is not necessarily requisite that a specialist tribunal such as this, precisely because it is bringing its own expertise to bear, has to give detailed reasons for preferring its own expertise over some expert evidence . . . placed before it.'

Further support for a more benign approach from the appellate bench comes from the dictum of Baroness Hale in the case of *AH (Sudan) and Others v Home Secretary* [2007] 1 AC 678:

> 'This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field, the tribunal will have got it right . . . Their decisions should be respected unless it is quite clear that they have misdirected themselves in law.'

Commenting on this passage, Waller LJ in *H v E Sussex CC and Othrs* [2009] EWCA Civ 249 thought that the point made by Baroness Hale was particularly important to bear in mind where the rejection was of expert evidence offering an opinion in the very area where the tribunal has its own expertise and on the very point that the expert tribunal has, itself, to decide. Nevertheless, the panel should tell the parties in brief what it thought about the evidence. In *Jones v Norfolk CC and SENDIST* [2006] EWHC 1545 (Admin), Crane J allowed an appeal against a decision of SENDIST where it preferred the evidence of one witness to that of others without properly acknowledging the range of opinions and explaining its selection. In essence, there is a world of difference between using specialist knowledge to displace a witness's assessment of the position by substituting your own views without giving anyone the opportunity to respond, on the one hand, and using your specialist expertise to help decide which of two conflicting courses supported by evidence should be preferred, on the other.

Mental health

The mental health jurisdiction demonstrates an unashamedly participatory approach to the deployment of its own expertise with a member of the tribunal – invariably the medical member – examining the patient before a hearing in order to form an opinion of the patient's medical condition. The member may examine the patient in private, examine records and take notes and copies of records. The results of this examination are then reported to the panel before it hears evidence from witnesses. The judge will endeavour to convey to the parties the 'significant findings' arising from the examination but, importantly, those findings must only be a preliminary view. As Stanley Burnton J said in *R (S) v MHRT* [2002] EWHC 2522 (Admin), the medical member must not form his or her final opinion until the conclusion of the case 'since otherwise the outcome of the hearing would be prejudged, and the hearing an ineffective charade'.

The issue was further considered by Munby J in *(RD) v MHRT and SSHD* [2007] EWHC 781 (Admin), where he held that:

> 'The communication by the medical member of her "very preliminary" view was manifestly lawful . . .'

Upper Tribunal

One of the first authoritative decisions of the Upper Tribunal relates to an error of law in relation to the treatment of expert evidence in the Mental Health Tribunal. In *BB* [2009] UKUT 157 (AAC), Mr Justice Walker, sitting with two Upper Tribunal judges, considered the way the original panel had dealt with the independent expert evidence of one Dr Cripps:

> 'It is not our function to decide whether Dr Cripps was right. The only question for us concerns the adequacy of the tribunal's reasons for disagreeing with Dr Cripps. Counsel for BB submitted that it was not sufficient to rebut the careful and detailed analysis of Dr Cripps simply to refer to the experience and role of the responsible clinician.
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> 'If the tribunal were preferring the evidence of the responsible clinician over that of Dr Cripps, then at the very least the tribunal needed to give some explanation as to the substantive content of what the responsible clinician had said in answer to Dr Cripps and why it was a persuasive answer. It would of course be open to the tribunal to form its own views independently of those of the responsible clinician, but in the Reasons for Decision the tribunal gave no indication of whether or the extent to which it had adopted such a course.'

As stated earlier, imaginative use of case management may offer a partial solution to the challenge of controlling expert evidence so that it can be used properly and confidently. Rule 15(1)(c) of the First-tier Tribunal (HESC) Rules 2008 allows a tribunal to give directions as to whether the parties are permitted, or required, to provide expert evidence and, if so, whether the parties must jointly appoint a single expert to provide such evidence. But then we come up against parties who are not used to being managed and who are reluctant to be pinned down. In the special educational needs jurisdiction, an issue arose recently as to disclosure of instructions. In *LM v London Borough of Lewisham* [2009] UKUT 204 (AAC), the Upper Tribunal proposed a direction in the following terms:

> 'If the further evidence sent in by either party includes specialist reports, then any such report must state the substance of any material instructions (other than instructions protected by legal advice privilege) supplied, whether written or oral, on the basis of which the report was written and include details of all records and reports seen by the specialist. No specific document of instruction need be disclosed but a party may append such a document to the report instead of including the substance of the instructions contained in the document in the report itself.'

We should never lose our critical faculties, nor our willingness to be persuaded, when appropriate.

Similarly in civil cases, an expert report must, more often than not, disclose the written instructions upon which he or she is acting.

In the end, it boils down to this. Expert evidence can be the key to the case or it can appear to do the opposite. We need, always, to recognise what we are dealing with and ask a few basic questions. We should never lose our critical faculties, nor our willingness to be persuaded, when appropriate. And those of us on expert tribunals are entitled to hope that experts called before us *as experts*, rather than as professionals who are involved in the case on a day-to-day basis, will add something extra and shine an illuminating light into dark corners that, without their help, would remain hidden and obscure. For if they don't do that, what use are they?

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