The Advocate and the Expert in a Testamentary Capacity Claim

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'Circumstantial evidence is a very tricky thing,' answered Holmes thoughtfully. 'It may seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different… There is nothing more deceptive than an obvious fact. You know me too well to think that I am boasting when I say that I shall either confirm or destroy his theory by means which he is quite incapable of employing, or even of understanding [by] *observation and inference. Therein lies my metier.'*

The Adventures of Sherlock Holmes The Boscombe Valley Mystery, by Sir Arthur Conan Doyle.

Introduction

In a testamentary capacity claim, *'Where the will is rational upon its face… the burden* [of proof] *shifts to the opposing party to raise a real doubt as to capacity. If that occurs the burden then reverts to the propounder of the will.'* The Vegetarian Society & anr v Scott [2013]. To remove the presumption of validity, the burden is then on those who challenge the will, to show sufficient doubt about the deceased testator's capacity. The showing of *'sufficient doubt'* does not require proof that the testator actually lacked testamentary capacity, merely that the evidence produced shows sufficient grounds for the court to accept there is *'a real doubt'* as to capacity, Turner v Turner [2011]. In most circumstances, failure by the propounder to produce evidence, results in a finding against the will, Ledger v Wootton [2008] (where the invalidity of the will was decided not on sufficient proof of incapacity but on the defendant's failure to discharge the burden of proof after real doubt had been raised). The standard of proof is the *'balance of probabilities'*, Fuller v Strum [2002].

The weight to be attached to expert evidence is entirely a matter for the trial judge, and expert evidence is neither automatically admissible in a testamentary capacity claim, nor necessarily a decisive factor. In Loveday v Renton and Welcome Foundation Ltd [1990] Lord Justice Stuart-Smith stated, *'In reaching* [a] *decision a number of processes have to be undertaken. The mere expression of opinion or belief by* [an expert] *witness, however eminent...*[in this case about whether a vaccine could or could not cause brain damage] *does not suffice. The court has to evaluate the witness and the soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witness's opinion by examining the internal consistency and logic of his evidence; the care with which he has considered the subject and presented his evidence; his precision and accuracy of thought as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic of a proposition put in cross-examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in the light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether or not a witness is biased or lacks independence. There is one further aspect of a witness's evidence that is often important; that is his demeanour in the witness box. As in most cases where the court is evaluating expert evidence, I have placed less weight on this factor in reaching my assessment. But it is not wholly unimportant; and particularly in those instances where criticisms have been made of a witness, on the grounds of bias or lack of independence, which in my view are not justified, the witness's demeanour has been a factor that I have taken into account.'*

The duty of the court is to consider the expert evidence in the light of the facts, not in isolation from them, and where a case involves substantial elements of both opinion and factual evidence the court may accord as much weight to each as it sees fit. As Lord Justice Mummery stated in Hawes v Burgess [2013] (Court of Appeal), in a testamentary capacity claim '*… the court has to consider and evaluate the totality of the relevant evidence, from which it may make inferences on the balance of probabilities… I should add a statement of the obvious in order to dispel any notion that some mysterious wisdom is at work in this area of the law: the freedom of testation allowed by English Law means that people can make a valid will, even if they are old or infirm or in receipt of help from those whom they wish to benefit, and even if the terms*

of the will are hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed. The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death.'

Civil Procedure Rules ('CPR')

A claim for a decree pronouncing for or against the validity of an alleged will is a probate claim (CPR r.57.1(2)(iii). All probate claims are allocated to the multi-track (CPR r.57.2(4)). Probate claims in the High Court are assigned to the Chancery Division (CPR r.57.2(2). Paragraph 4.8 of the *'Chancery Guide'* states, '[CPR] *Part 35 contains particular provisions designed to limit the amount of expert evidence to be placed before the court and to reinforce the obligation of impartiality which is imposed upon an expert witness. The key question now in relation to expert evidence is the question what added value such evidence will provide to the court in its determination of a given case.*

Fundamentally, Part 35 states that expert evidence must be restricted to what is reasonably required to resolve the proceedings and makes provision for the court to direct that expert evidence is given by a single joint expert. The parties should consider from the outset of the proceedings whether appointment of a single joint expert is appropriate.'

Questions in relation to the use of expert evidence are included in the directions questionnaire, and as part of its management of a case, the court will give directions about any expert evidence at the case management conference ('CMC'). In a multi-track case, the CMC is usually held a couple of months after the parties have exchanged statements of case. At the CMC the procedural judge gives directions for the future conduct of the case, and will consider:

(i) what expert evidence is reasonably required;
(ii) how and when that evidence should be obtained and disclosed; and
(iii) what arrangements should be made about putting questions to experts.

At the CMC the court will not give permission to use expert evidence unless it can identify each expert by name or field in its order and say whether his evidence is to be given orally or by the use of his report. *'Expert evidence is to be given in a written report unless the court directs otherwise. As a general rule the court is very unlikely to "direct otherwise" because the requirements in the CPR Pt 35 by which:*

(a) an expert must comply with CPR Practice Direction ('PD') 35 (which deals with the contents of reports;
(b) must declare that he understands, and has complied with, his duty to the court;
(c) must set out the substance of all material instructions and which permit the other party to use the disclosed evidence of another party's expert apply only to the expert's report.'

[Expert Evidence, paragraph 4-020]. If each party has its own expert then the court will normally direct mutual disclosure of expert reports. If a party does not disclose an expert's report, it cannot use the report or refer to it at trial without the permission of the court (CPR r.35.13).

The procedural issues and practice of the court are discussed in paragraphs 4.8 to 2.20 of the *'Chancery Guide'*. The court can at any stage direct a discussion between experts as regards the expert issues, and where possible that they reach an agreed opinion (CPR r.35.12). The court may also direct the experts to prepare a statement covering the issues on which they agree, and where they do not agree the reasons for disagreement.

CPR r.35.6 provides,

'(1) A party may put written questions about an expert's report (which must be proportionate) to
(a) an expert instructed by another party; or
(b) a single joint expert appointed under rule 35.7.

(2) Written questions under paragraph (1) –
(a) may be put once only;
(b) must be put within 28 days of service of the expert's report; and
(c) must be for the purpose only of clarification of the report, unless in any case –
(i) the court gives permission; or
(ii) the other party agrees.

(3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.

(4) Where –
(a) a party has put a written question to an expert instructed by another party; and
(b) the expert does not answer that question, the court may make one or both of the following orders in relation to the party who instructed the expert –
(i) that the party may not rely on the evidence of that expert; or
(ii) that the party may not recover the fees and expenses of that expert from any other party.'

'*It can be useful to put questions to an expert in contentious probate cases. The nature of the questions put can often be fact specific but the following generic question may be considered. CPR PD 3.3(6) requires an expert to state in his/her report where there is a range of opinion on the matters dealt with in the report; the expert must summarise the range of opinions and give reasons for their own opinion. Sometimes an expert may not deal with that requirement in a report. A useful question may be to ask the expert if there is a range of opinion in relation to spe*cific *conclusions reached – particularly if the expert has not complied with the requirements of the Practice Direction. This can be a useful tactic to 'set up' the expert. If the expert states that there is no such range of opinion but is subsequently met by a different*

opinion from the expert on the opposing side, this may show the expert's view to be too narrow – or that the expert has not been willing to consider the merits of other opinions. If the expert concedes that there is indeed a range of opinion with regard to the conclusions reached then this may be seen to dilute the certainty of the expert's own opinion.' [TC, paragraph 11.58].

In paragraphs 6.28 to 6.34 of the *'Chancery Modernisation Review'* final report published in December 2013, Lord Justice Briggs observed that *'The present rules enable the court to control the number of expert witnesses, and the general areas of expertise within which expert evidence may be called. CPR 35.4(2)(a) does now require the parties to identify the expert issues, when seeking permission to call expert evidence. But it is not yet the practice of chancery case managers to specify the questions to be put to the experts, or even the specific issues upon which expert evidence is required. Nor is there any practice which requires experts to meet before preparing their main reports. This produces a number of expensive and time-consuming disadvantages, all of which may be alleviated by a greater focus at the case management stage upon the issues. The first is that experts in the same discipline often receive widely different instructions from their separate instructing parties, so that their reports, once exchanged, resemble ships passing in the night. The second is that, not infrequently, a large part of the content of exchanged experts reports is substantially identical, with only small parts dealing with issues about which, after they have met, the experts continue to be in disagreement. The result is that the court is faced with reading slightly differently worded treatises providing substantially the same guidance, at grossly excessive cost to the parties, quite apart from the waste of judicial time. Thirdly, once the experts have met, their combined summary report about areas of agreement and disagreement frequently provides most of what the court needs, augmented by much more focused supplementary reports upon the points of real disagreement.*

Other courts and tribunals have already addressed these problems. In particular, it is now standard practice in the TCC [Technology and Construction Court] *for experts to be directed first to meet, to prepare a statement of their agreement and non-agreement, and only then to prepare full reports on the points of disagreement. In the TCC it is generally unnecessary for the court to specify the issues for expert determination, since they will often be sufficiently apparent from the statements of case, and from Scott Schedules in particular. I am advised that it is an increasingly common practice in arbitration for similar directions to be given.*

I consider that it is now time for the Chancery Division as a whole to move decisively in the same direction. By contrast with the subject matter of a typical case in the TCC, chancery cases often give rise to issues requiring the assistance of experts without those issues necessarily being spelt out in the statements of case. For that reason, I consider that it will be necessary, much more frequently than in the TCC, for the court at the case management stage to embark upon a prescriptive analysis (with the assistance of the parties) of the precise issues to be put to the parties experts, so as to enable their first meeting to be fruitful in the way which I have described. This is consistent with, and likely to follow on from, a generally issue based approach to case management and, in my view, likely very substantially to reduce the cost of expert evidence and the time taken by the court both in pre-reading, and (although to a lesser extent) at trial.'

Evidence

In a testamentary capacity claim the expert medical evidence presented to the court will usually include:

(i) evidence provided by the deceased testator's GP and any other medical practitioner, including any nurse, who treated him in the period leading up to execution of the will; and

(ii) evidence from a specialist practitioner (i.e. an adult psychiatrist or a psychogeriatrician) who may not have met the deceased testator, who has been instructed to provide an opinion for the court based upon;
   (a) GP's and hospital medical records; and
   (b) any mental tests the deceased may have performed.

Where a will has been drafted by an experienced independent lawyer who formed the opinion from a meeting or meetings with the testator that the testator understood what he was doing, a court will only set the will aside on the clearest evidence of lack of mental capacity. The Court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testator, and particularly in circumstances when that expert accepts that the testator understood:

(i) that he was making a will; and

(ii) the extent of his property.

'Any retrospective assessment [by a GP] *will have to be based upon medical notes made at the time, as well as on other non-medical information which may help to suggest the nature of the person's mental functioning at the time… Clearly the doctor will have to indicate that the assessment was retrospective and may therefore be unreliable… Any medical opinion should take full account of relevant information from other disciplines. An assessment by a clinical psychologist may already be available, or could be sought, and this may assist in giving a detailed validated and systematic assessment of cognitive functioning. An occupational therapist has special skills in assessing disabilities which may interfere with activities in everyday tasks. A report from a nurse or social worker may be helpful where information about daily activities or social functioning is of importance. What is important is not the diagnosis per se, but the specific disabilities and how they may affect the person's ability to make particular decisions… It is important for the*

assessing doctor to have access to all relevant medical and psychiatric records. These give an historical picture of a known current disorder, as well as giving diagnostic clues to what might be a so far undiagnosed disorder.' [AMC, paragraphs 16.9, 17.2, and 17.4].

Instructing an expert

To evaluate the merits of a testamentary capacity claim, it is proper and sensible for each party to appoint their own expert before proceedings are issued. An expert medical opinion can then be appended to the claim form. An expert can only give evidence that is within his personal expertise. The judge is most likely to be influenced by the best qualified and experienced expert, especially if the expert has carried out relevant research and has written on the subject. It is therefore important to find an expert who has the right specific expertise, and not just a knowledge of the area. The choice of which type of specialist to instruct will depend upon the nature of the suspected incapacity. The prominence of the expert chosen is partly a matter of keeping the costs of the case at a reasonable level. A GP will not, in most cases, be suitably qualified to act as a medical expert in a contentious probate claim, although very often the deceased testator's GP will be a witness of fact, and as such will give evidence of the opinion (if any) he formed of the deceased's capacity around the time the disputed will was made.

'The court has a broad discretion to decide whether or not a person is capable of giving evidence on the issues before the court… it is the issue which determines the admissibility of the particular field. If the issue requires a sophisticated level of inferential reasoning in the expression of an opinion on a central question in the proceedings, a witness will not be heard, or if he is heard little weight will be attached to his evidence, if his field is one which does not itself require, in its regular study or practice, a similar level and type of inferential reasoning… It is a matter in the discretion of the court to decide, not only whether a witness is an expert, but also whether his expertise is appropriate to the needs of the case… the only clear guiding principle is that the witness must bring to the case a relevant expertise which the court requires and lacks. It is the issue or issues on which the expert is to give evidence which is relevant, not the general subject-matter of the case.' [Expert Evidence, paragraphs 1-028 and 2-008].

'In a disputed capacity case expert evidence will usually be obtained from a Psychiatrist. If the testator was elderly at the time instructions for the will were given then it is usual to obtain expert evidence from a Psychiatrist who specializes in later-life patients… The expert will need to have regard to the witness statements and documents but his role should be to pick out the relevant points and discuss and consider how they might fit in with a given medical diagnosis - in other words the expert should be concentrating on bringing medical insight to bear on matters which would not be apparent to the lay person. Further examples of this would be commenting on the effect of any medication known to have been taken by the deceased at the time of making of the will, commenting on the relevance of notes in hospital records, and translating any relevant medical terminology.' [TC, paragraphs 11.50 and 11.56].

A recent illustration is Cowderoy v Cranfield [2011], in which Mr Justice Morgan observed, '*Neither* [of the parties' expert witness] *psychiatrists ever saw* [the deceased testator ('T')]. *Each was provided with written material including medical records and each prepared a report for the court. Each was then provided with further material including each other's reports and each provided a second report for the court. The two psychiatrists met… and prepared a memorandum of their discussion. As neither psychiatrist had ever had the opportunity of seeing* [T], *neither was in a position to give me a direct psychiatric appraisal at any point in time, let alone on the day* [T] *executed the disputed will. In principle, psychiatric evidence could assist a court dealing with an issue as to testamentary capacity. For example the evidence could refer to such medical evidence as is available as to an individual's physical condition from time to time and could explain the likely impact on the mind of that physical condition. Similarly, the evidence could refer to medication being taken by an individual and comment on the likely effect on the mind of such medication being taken. Both psychiatrists did to some extent offer views on how likely it was that* [T] *had testamentary capacity at different points in time. Of course, the views expressed by the psychiatrists depend very much on what they understood the facts of this case to be. Each psychiatrist was given a version of the facts which was probably not complete. Further, understandably, neither psychiatrist sat through the whole trial and neither psychiatrist knew the findings of fact which I would make in this judgment… I will obviously bear in mind this psychiatric evidence when I come to my ultimate conclusions. This psychiatric evidence allows me to be better informed as to the possibility of there being an impact on [T's] mental functions of her medical condition and, similarly, the effect on her mind of the medication she was taking with or without the addition of alcohol.'*

New *'Guidance for the instruction of experts in civil claims'* came into effect on 1 December 2014, and replaced the former *'Protocol for the Instruction of Experts to give Evidence in Civil Claims'*, and is available to download on the website of the Academy of Experts at www.academyofexperts.org/guidance.

Paragraph 16 of the Guidance states,

'Before experts are instructed or the court's permission to appoint named experts is sought, it should be established whether the experts:

a. have the appropriate expertise and experience for the particular instruction;
b. are familiar with the general duties of an expert;
c. *can produce a report, deal with questions and have discussions with other experts within a reasonable time,*

and at a cost proportionate to the matters in issue;

d. *are available to attend the trial, if attendance is required; and*

e. *have no potential conflict of interest.'*

The legal test for testamentary capacity

In The Vegetarian Society & anr v Scott [2013], HHJ Simon Barker QC stated that a key factor in preferring the evidence of the claimant's expert was that he was *'familiar with the elements of capacity necessary for a testator to make a will'* whereas the other party's expert was not. Consequently the evidence of the preferred expert, *'was the more focussed and helpful of the two.'* As Professor Robin Jacoby and Peter Steer remark in their article, *'How to assess capacity to make a will'* [2007] British Medical Journal 335; 155-7, *'Much litigation could be avoided… if, doctors, when asked by solicitors, assessed testamentary capacity correctly.'*

'To make a valid will the law requires what is always referred to as testamentary capacity and, as a separate requirement, knowledge and approval. The latter requires proof of actual knowledge and approval of the contents of the will. The two requirements should not be conflated. The former requires proof of the capacity to understand certain important matters relating to the will.' Hoff v Atherton [2005].

To execute a valid will the testator must be over 18 and have testamentary capacity. Capacity is determined solely by the testator's state of mind. The criterion of testamentary capacity is that the testator understands, *'the nature of the act and its effects;* [and] *understands the extent of the property of which he is disposing;* [and can] *comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or pervert the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.'* Banks v Goodfellow [1870]. *The testator must have, 'a memory to recall the several persons who may be fitting objects of* [his] *bounty, and an understanding to comprehend their relationship to himself and their claims upon him.'* Broughton v Knight [1873].

An eccentric disposition of property is not in itself evidence of incapacity, and it is the whole picture that needs to be looked at. Capacity may be lacking because of mental illness or because the testator is under the influence of drugs or alcohol. *'More recent cases have modernized these formulations so as to be clear that a competent testator must be able to understand the effect of his wishes being carried out at his death, the extent of the property of which he is disposing, and the nature of the claims upon him.'* Jeffrey & anr v Jeffrey [2013]. Capacity depends on the potential to understand. It is not to be equated with a test of memory, Simon v Byford [2014].

s.2(1) of The Mental Capacity Act 2005 introduces a new statutory test of capacity, and provides,

'(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to:

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behavior, which might lead others to make unjustified assumptions about his capacity.'

Note that the definition does not replace the common law test expounded in Banks v Goodfellow (see also Key v Key [2010]). However, Judges may use it to develop new common law rules.

'In many cases [knowledge and approval are] *considered with the issue of capacity. Once a court is satisfied that the testator had the capacity to understand what he was doing, it is readily accepted that he did understand.'* Simon v Byford & ors [2013].

'In Fulton v Andrew (1875)… Lord Hatherley said that, "When you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed it… those circumstances afford a very grave and strong presumption that the will has been duly and properly executed by the testator."

This view was effectively repeated and followed by Hill J in Gregson v Taylor [1917]…, whose approach was referred to with approval by Latey J in In re Morris deceased [1971]… Hill J said that "when it is proved that a will has been read over to or by a capable testator, and he then executes it", the "grave and strong presumption" of knowledge and approval "can be rebutted by only the clearest evidence". This approach was adopted in this court in Fuller [2002]…and in Perrins v Holland [2010]… There is also a policy argument…, which reinforces the position that a court should be very cautious about accepting a contention that the will executed in such circumstances is open to challenge. Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.' Gill v Woodall [2011].

A testator need not have a full understanding of the legal terminology used by the will/trust draftsman to give effect to his wishes. *'In some cases where the testator employs an expert draftsman to provide the appropriate wording to give effect in law to the testator's intentions, the testator has to accept the phraseology selected by the draftsman without himself really understanding its esoteric meaning and in such a case he adopts it and knowledge and approval is imputed to him.'* Williams on Wills (9th ed), paragraph 5.1, cited in Re Stolkin: Greaves v Stalkin [2013].

The Banks v Goodfellow test comprises four limbs, each of which must be satisfied separately:

(i) did the testator understand the nature of the act and its effect?
(ii) did the testator understand the extent of the property of which he was disposing?
(iii) was the testator able to comprehend and appreciate the claims to which he ought to give effect?
(iv) was the testator's mind affected by any disorder or delusion which was active in bringing about a disposal which the testator would not otherwise have made?

Mental capacity is both time and task specific, and should not be assessed in relation to the deceased testator's ability to make decisions in general. For a mental capacity claim to succeed it must be shown that the deceased lacked capacity for each particular decision, or type of decision at the time it was made. The relevant time at which capacity will be required for the will to be valid, is the time of execution of the will.

'The test in Banks v Goodfellow is not a medical test. It is a formulation by judges, to be applied by judges, of the necessary level of a testator's understanding for his will to be valid. The question of testamentary capacity is a legal question that is to be resolved by the court: "… the issue as to testamentary capacity is from first to last for the decision of the court. It is not to be delegated to experts, however eminent, albeit that their knowledge, skill and experience may be an invaluable tool in the analysis, affording insights into the workings of the mind otherwise beyond the grasp of laymen, including, for that purpose, lawyers and in particular judges." Key v Key [2010]. *It is for this reason that the test was set out in layman's terms and not medical terms…it is helpful to remember that, as Banks v Goodfellow is a common law test, the original test is capable of being developed by the court as modern needs and circumstances require…*[The courts do not apply] *the test in a rigid way, but in a way that takes into account changes in Society and psychiatric knowledge… There is no reason why factors from ss.2 and 3 MCA 2005 cannot be applied to develop the application of Banks v Goodfellow, within the existing framework of the test, where to do so the development would fit more closely with modern circumstances and knowledge…Ultimately it is open to the court to add or subtract elements from the common law test, but it is unlikely that major, as opposed incremental, changes would be made without legislative provision.'* (TC, paragraphs 2.11, 2.81, and 2.84). The approach of the court will depend in part upon the complexity of the terms of the deceased testator's will.

'When we move on to knowledge and approval what we are looking for is actual knowledge and approval of the contents of the will. But it is important to bear in mind that it is knowledge and approval of the actual will that count: not knowledge and approval of other potential dispositions. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. That is why knowledge and approval can be found even in a case in which the testator lacks testamentary capacity at the date when the will is executed. The reason for this requirement is the need for evidence to rebut suspicious circumstances: Perrins v Holland [2010]... Normally proof of instructions and reading over the will will suffice ... The correct approach for the trial judge is clearly set out in Gill v Woodall [2010]… It is a holistic exercise based on the evaluation of all the evidence both factual and expert.' Lord Justice Lewinson in Simon v Byford [2014] (Court of Appeal).

The duty of the expert

It is the duty of an expert to help the court on the matters within their expertise, which is a duty owed by the expert to the court rather than to a party. CPR r.35.3 states,

'(1) It is the duty of experts to help the court on matters within their expertise.

(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.'

Paragraph 2.4 of PD 35 further provides,

'2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.

2.3 Experts should consider all material facts, including those which might detract from their opinions.

2.4 Experts should make it clear –
(a) when a question or issue falls outside their expertise; and
(b) when they are not able to reach a definite opinion, for example because they have insufficient information.

2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.'

The rule against bias

Expert evidence presented to the court should be,

and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation Whitehouse v. Jordan [1981]. *'An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. An expert witness should make it clear when a particular question or issue falls outside his expertise. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one ... In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.'* Mr Justice Cresswell in The Ikarian Reefer [1993]. *'What really matters in most cases is the reasons given for the opinion. As a practical matter a well-constructed expert's report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not.'* Technip France SA's Patent [2004].

Form and content of the expert's report

Paragraph 3 of PD 35 stipulates,

'3.1 An expert's report should be addressed to the court and not to the party from whom the expert has received instructions.

3.2 An expert's report must:

(1) give details of the expert's qualifications;

(2) give details of any literature or other material which has been relied on in making the report;

(3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based;

(4) make clear which of the facts stated in the report are within the expert's own knowledge;

(5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;

(6) where there is a range of opinion on the matters dealt with in the report –

(a) summarise the range of opinions; and

(b) give reasons for the expert's own opinion;

(7) contain a summary of the conclusions reached;

(8) if the expert is not able to give an opinion without qualification, state the qualification; and

(9) contain a statement that the expert –

(a) understands their duty to the court, and has complied with that duty; and

(b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014.

3.3 An expert's report must be verified by a statement of truth in the following form –

I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.'

Conference with the expert

Counsel can talk to the lay client's expert about the issues to be addressed, the form of the expert report, relevant rules of court, and to familiarise the expert with the trial process, offering guidance to the expert on giving comprehensive and comprehensible evidence in technical areas. The conference is also an opportunity to:

(i) check the expert's education and expertise;
(ii) assess whether the expert will make a good witness;
(iii) assess how the expert is likely to withstand cross-examination;
(iv) ask about anything counsel does not understand;
(v) ask the expert to put the case against the lay client and explain how it can be answered; and
(vi) identify and probe weaknesses in the opinion of the opposing expert, e.g. any objective limitations in his methodology and expertise.

Trial

Introduction

The aim of the advocate is to win within the rules of law, evidence, and professional ethics. *'The means of winning is by being persuasive… Rightly or wrongly, adversarial advocacy is not really an enquiry into the truth. Perhaps the adversarial system should be about finding out what really happened. But it isn't. Instead it creates a polite contest. The contest is this: while a judge will seek out the truth as best they can, the advocates use their skill to test the evidence, and to control the way the evidence emerges, and then comment in closing on whether a case has been proved to the necessary standard of proof.'* (Morley). *'A trial is not an exercise designed to discover the truth. The rules of evidence are mainly designed to exclude. They often operate to prevent the evidence actually presented from showing the truth of the matter at all … The Judge is not an investigator but more like an umpire … What we are doing as advocates is trying to get the fact finder to arrive at an opinion, an opinion in our favour … our objective at trial is not the ultimate truth but an opinion in our favour.'* [Evans].

'The task of the advocate is to be argumentative, inquisitive, indignant or apologetic – as the occasion demands – and always persuasive on behalf of the person who pays for his voice … when making submissions to a judge … or cross- examining hostile witnesses, the advocate is required to entice, to flatter, [and within the boundaries of what

is ethically permissible to ridicule and] *to insult, all in order to advance the cause for which he is instructed The professional function of the advocate is, essentially, one of supreme, even sublime indifference to much of what matters in life. He must advance one point of view irrespective of its inadequacies. He must belittle other interests, whatever their merits … It is not for counsel appearing in court to express equivocation, to recognise ambiguity or to doubt instructions. His client is right and his opponent is wrong. The wider consequences can be left to the judge. The fundamental role of the advocate is not to enlarge the intellectual horizon . His task is to seduce, to seize the mind for a predetermined end, not to explore paths to truth.'* [Advocates]. At trial, the strategic objectives of the advocate therefore include:

(i) persuading the judge to rule in favour of the lay client through the admission and convincing presentation of expert evidence (which includes anticipating attacks upon the credibility of the expert and the value of his evidence);

(ii) the exclusion of expert evidence relied upon by the other party; and

(iii) undermining the credibility of the opponent's expert, and the value of his evidence, to minimise the weight that the judge will attach to that expert's opinions and conclusions.

'But the Barrister knows that there are limits to acceptable advocacy, problems concerning the extent to which he can and should act as a mouthpiece of his client. He appreciates that there is a fine line between, on the one hand, brilliant advocacy which focuses on the strength of his case and, on the other hand, sharp practice and sham theatricals which mislead the court.' [Advocates].

'Although it is typically the position in an adversarial system that the parties decide what evidence to present to the court, the advocate cannot knowingly present false evidence nor withhold material evidence (at least it would have to be disclosed to the opponent before the hearing)… Rule rC3 makes it clear that the advocate must not mislead the court, knowingly or recklessly, or attempt to do so… Also, the advocate must not make submissions to the court or any other sort of statement which he knows are untrue or misleading. If his client instructs him to do this, he must refuse. This could cover both legal and factual points. More plainly fact-based is the requirement not to ask a witness questions which suggest facts that the advocate knows, or is instructed by his client, to be false or misleading (rC6.1). This is most obviously demonstrated in cross-examination, where the client is putting his client's case to an opposing witness … It is important not to confuse knowledge with belief. The guidance under these rules (gC6) makes it clear that the advocate does not need to turn detective or pretend to be omniscient; you do not have to believe that what your client tells you in his instructions is factually true …
[Furthermore] *the advocate must not abuse his role. This requirement is specifically stated in rC3.2 and expanded upon in rC7.1-4. It would be an abuse of one's role to make a statement or ask a question merely with the aim of insulting, humiliating, or annoying a witness (or any other person). If you have a different aim but your question or statement may have the incidental effect of insulting, etc, you will not be prohibited from asking it.*

[Barristers] *must maintain the standards of honesty, integrity, and independence which run throughout* [the provisions of the Bar Standards Board Code of Conduct for Barristers. Specifically] *'In order to act with honesty and integrity, the advocate must not*

- *knowingly or recklessly mislead anyone or attempt to do so*
- *draft a statement of case, witness statement, affidavit or any other document which contains;*
  - *any statement of fact which is unsupported by his client or by his instructions*
  - *any contention which he does not consider to be properly arguable*
  - *any allegation of fraud, unless the advocate has*
    (i) clear instructions from the client to make this allegation and
    (ii) reasonably credible material to establish an arguable case of fraud
  - *any statement of fact which is not what he reasonably believes the witness would say if giving evidence orally (when drafting witness statements and affidavits)*
- *encourage a witness to give evidence which is misleading or untruthful*
- *rehearse, practice, or coach a witness on the evidence that they will give*
- *communicate about the case with any witness (including the client) whilst they are giving their evidence, unless the opponent or court gives permission to do so*
- *make or offer any payment to any witness which is contingent on the evidence they will give or the outcome of the case*
- *propose or accept any fee arrangement which is illegal.'*

[Ethics].

The calling of expert witnesses

Paragraph 8.15 of the Chancery Guide states,
'The trial judge may disallow expert evidence which either is not relevant for any reason, or which the judge regards as excessive and disproportionate in all the circumstances, even though permission for the evidence has been given.
The evidence of experts (or of the experts on a particular topic) is commonly taken together at the same time and after the factual evidence has been given. If this is to be done it should be agreed by the parties before the trial and should be raised with the judge at the PTR, if there is one, or otherwise at the start of the trial. Expert evidence should as far as possible be given by reference to the reports exchanged.'

Since April 1, 2013 the court has had the power to order at any stage that experts of like discipline give

their evidence at trial concurrently, not sequentially, a procedure known as *'hot-tubbing'*. The experts will then be questioned together first by the judge and then by the parties' advocates.

Examination-in-chief

The purpose of examination-in-chief is to get into evidence the facts necessary to prove your case. To achieve this purpose it is necessary to elicit each witness's evidence in a clear and concise manner, and to anticipate, so far as is necessary and possible, any attack on that evidence likely to be made in cross-examination. When examining his own expert witness the advocate's aims include:

- ensuring that the Judge understand the expert's evidence;
- persuading the Judge of points essential to the case; and
- anticipating the other side's cross-examination and fortifying against that assault.

The expert is obliged to state his qualifications in his report (PD 35, paragraph 3.2(1)). The usual practice at trial is for the judge to be referred to the relevant page in the report and for the advocate to then move on to the substance of the expert's evidence. *'In almost every civil case the expert will have written a report before the trial which will have been disclosed to the other parties pursuant to a direction of the court. This report should have been pre-read by the judge and examination-in-chief is usually relatively brief consisting of the advocate highlighting the important sections of the report and asking the expert to amplify or clarify ambiguities in the report and, sometimes, to comment on issues raised by the other side's expert (albeit that this has usually been done in the expert's joint statement) and/or issues that have arisen since he wrote the report. The bulk of the expert's time in the witness box is usually taken up with cross-examination. In many civil cases (in particular those involving a single joint expert all of the expert evidence is given by report alone and, thus examination-in-chief does not arise.'* [Expert Evidence, paragraph 8-012].

The opinion of an expert, however correct, is of no use to the court unless it is clearly formed by inference from facts which have been or are to be proved in evidence. The expert must always, in expressing an opinion, indicate which facts he relies upon. Counsel calling an expert should therefore in examination-in-chief, ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination. *'Unless a witness states in his evidence in chief the grounds and reasoning that have led to the opinion, the opinion is valueless.'* Cadbury Schweppes v Durrell Lea [2007].

Cross-examination

Just as a party must in cross-examination challenge evidence of fact given in chief by a lay witness which is not accepted, so the opinions of an expert must be challenged if they are to be disputed. The purpose of cross-examination is to:

(i) elicit support for your own case, and to weaken your opponent's case; and
(ii) put your client's case (including as to the fact or content of documents) to the witness to afford the witness the opportunity to respond to it.

'In general, if wishing to contest the opinion of an expert being called by our opponent, we can either contest the factual basis of the opinion, or we can contest the opinion itself. If the factual basis of the opinion is disputed, then we should be able to get the witness to agree in cross-examination that if the facts were as we contend, then his or her opinion would be different. If it is the opinion which we are contesting, on the other hand, then we will probably need to call our own expert witness…
There are six critical questions we can ask about experts:

1. Expertise questions: How credible is E as an expert source?
2. Field question: Is E an expert in the field that A is in?
3. Opinion question: What did E assert that implies A?
4. Trustworthiness question: Is E personally reliable as a source?
5. Consistency question: Is A consistent with what other experts assert?
6. Backup evidence question: Is E's assertion based on evidence?

… The expert's possession of special expertise or knowledge is obviously the main foundational fact for expert opinion evidence; but it is not sufficient to prove some expertise at large. The expert witness must also be shown to be an expert in the field to which the issue about which they have been called to give evidence belongs.' [Palmer, page 148].

An expert may be:

(i) challenged as to credit in relation to his opinion as he may in respect of facts;
(ii) asked to justify or deny particular opinions expressed on other occasions (including evidence given in similar cases) to cast doubt upon the opinions he has expressed in the present case;
(iii) asked about his attitude to the parties, i.e. if it is suggested that he is biased; and
(iv) questioned about whether he is or was not in a physical or mental state to express a proper opinion.

When cross-examining an expert witness the advocate's aims specifically include:

'(a) limiting the witness's apparent expertise. Narrow the extent of his or her expertise/experience by showing that it is not directly applicable to the case in question or, perhaps, by contrasting it to the experience of your expert;
(b) showing that the witness has had less involvement/ contact with the case than your expert;

(c) *showing your knowledge of the expert's subject. Using your knowledge of the technical terms involved or the way in which any tests were carried out, the expert will be less inclined to avoid your questions. Contrast this approach with the way you may deal with an ordinary witness of fact by simplifying technical terms;*

(d) *inviting the witness to define technical terms and sometimes in highly complex matters it may be necessary to invite the expert to use common language;*

(e) *challenging his or her methods, for example showing that there were other tests that the expert could/should have carried out that might have produced a different result. Remember to check that the expert's facts, calculations and methods do actually produce the results set out in his or her report and, if they do not, challenge the expert as this may undermine the confidence and credibility of the expert's evidence;*

(f) *inviting the witness to agree with the propositions that form the basis of your expert's opinion – he or she is unlikely to disagree with everything your expert says, and you should know from your own expert those areas that are in dispute. Remember to 'put your case' to the expert by inviting him or her to deal with your expert's methods/opinions/conclusions;*

(g) *inviting the witness to agree that, in his or her field, legitimate differences of opinion frequently occur between qualified experts. This shows that the witness is not infallible and that his or her evidence is 'opinion' only; and*

(h) *using hypothetical facts to test the strength of the expert's opinion. Testing whether a different interpretation of the same facts or a slight change in those facts would affect the expert's opinion.'* [Advocacy, paragraph 22.7.1].

Paragraph 5 of PD 35 provides,
'Cross-examination of experts on the contents of their instructions will not be allowed unless the court permits it (or unless the party who gave the instructions consents). Before it gives permission the court must be satisfied that there are reasonable grounds to consider that the statement in the report of the substance of the instructions is inaccurate or incomplete. If the court is so satisfied, it will allow the cross-examination where it appears to be in the interests of justice.'

Cross-examination of an expert witness is a hazardous undertaking. *'A witness under cross-examination does not want to agree with you. He will fight tooth and nail to confound you. He will misunderstand your questions. He will provide evasive answers. He will try to use your questions as an excuse to repeat the deadly features in his testimony which destroy your case. Unlike TV, a witness has no script which must be followed. He will try everything to wriggle out from under your questions. Every question in cross-examination is an invitation to disaster. It is an opportunity for the witness to hammer you and your case. So your first thought is don't do it. Always start from the point of view: if I can avoid it, I will.'* [Morley].

Re-examination

The purpose of re-examination is to correct, clarify or expand matters arising out of cross-examination. No question may be asked in re-examination which does not arise out of cross-examination. The basic rule about re-examination is do not do it, i.e. *'break glass in the event of emergency'.*

Conclusions

Expert evidence will be required and accepted by a judge where:

(i) the subject matter of the point in issue calls for expertise that is outside the knowledge and experience of the tribunal of fact;

(ii) the evidence will be helpful to the court in reaching a conclusion;

(iii) there is a body of expertise in the area in question; and

(iv) the expert is a suitably qualified person in the relevant field of knowledge.

'Just as a lawyer cannot succeed without developing a comprehensive theory of the case, neither will an expert be effective without a viable, articulated theory. An expert's theory is an overview or summary of the expert's entire position. The theory must not only state a conclusion, but must also explain, in common sense terms, why the expert is correct. Why did she settle upon a certain methodology? Why did she review particular data? Why is her approach reliable? Why is the opposing expert wrong? In other words, the expert witness must present a coherent narrative that provides the trier of fact with reasons for accepting, and it is hoped, internalising, the expert's point of view… In cases involving duelling experts there will be competing theories. Properly prepared and presented, each expert will attempt to explain to the trier of fact why her theory ought to be accepted. It can be particularly effective, therefore, to ask your expert to comment on the opposing expert's work.' [Lubet].

An advocate who can state the opposing expert's case theory, opinions, assumptions, inferences, chain of reasoning, and conclusions better than the opponent's expert witness can, is standing on the mountain top and looking down, for the purposes of:

(i) distinguishing his own expert's case theory, opinions, assumptions, inferences, chain of reasoning, and conclusions; and

(ii) conducting a devastating 'top down' forensic critique of the opposing expert's evidence, in order to: cast doubt; demonstrate falsity; tarnish; ridicule; and comprehensively devalue the weight to be attached to that evidence.

'Research, as much as technique, lies at the heart of expert witness cross-examination. Counsel cannot conduct an adequate cross examination without first thoroughly investigating all of the technical aspects of the expected

testimony. It is often said that you cannot cross-examine an expert without first becoming an expert yourself. Moreover, your research should extend beyond the expert's subject matter area and into the witness's own professional background … There is nothing so effective as impeaching an expert with his own prior assertions.' [Lubet].

ADR – Recent developments

Technical preparation is of benefit and value whether the case proceeds to trial or is settled through ADR. The CPR Rules Committee are currently considering rule changes to implement Early Neutral Evaluation ('ENE') in a Chancery setting, as recommended in paragraphs 5.6 to 5.16 of the Chancery Modernisation Review. Recently in Seals & Ors v Wilson [2015] (an Inheritance Act claim brought in the Chancery Division of the High Court where an attempt at mediation had stalled), Mr Justice Norris stated,

'*… it is highly commendable that the legal representatives for the parties have proposed as a way forward, and the court has been invited to undertake, an Early Neutral Evaluation of the case. The advantage of such a process over mediation itself is that a judge will evaluate the respective parties' cases in a direct way and may well provide an authoritative (albeit provisional) view of the legal issues at the heart of the case and an experienced evaluation of the strength of the evidence available to deploy in addressing those legal issues. The process is particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself.'*

Another ADR method, recently innovated by the author, is *'Guided Settlement'*. This process has its roots in both ENE and mediation, but is neither because the settlement *'Guide'* (e.g. a neutral Barrister TEP jointly appointed by the parties in a contentious probate, trust, or Inheritance Act claim) neither:

(i) determines any issues; nor
(ii) acts as an evaluative mediator.

The role of the Guide (as a technically proficient specialist practitioner and creative commercial problem solver) is to:

(i) analyse the legal merits of the claim and inherent litigation risks;

(ii) design a commercial settlement methodology; and

(iii) help the parties to communicate, so that they can use the methodology (with crunched figures based upon independent asset valuations) as a framework to explore and construct overall terms of settlement.

Throughout the process the Guide thinks freely (including outside the box) and generates creative solutions, i.e. acts as a neutral creative problem solver who has no partisan loyalties or personal stake in the dispute.

In e.g. a probate dispute, the basic procedural steps are as follows:

(i) the parties (through their solicitors) obtain and jointly pay for an inventory and valuation of the estate assets, i.e. to determine the size of the estate pie ('Valuations');

(ii) the solicitors acting for each party take instructions from their respective clients about their own commercial needs preferences and priorities (a 'Commercial analysis');

(iii) instead of appointing a mediator the parties jointly appoint a Barrister TEP to act as a settlement 'Guide', who:
  (a) undertakes a fixed fee preliminary evaluation of the legal merits of the claim, litigation risks, and costs, and sets out his conclusions in the form of a grid/schedule, i.e. a legal risk analysis ('LRA'); and
  (b) develops a commercial / arithmetical (i.e. number crunched) methodology for settling the dispute based upon the:
    - Valuations;
    - Commercial Analysis provided by each party's solicitor; and
    - LRA,

    (the *'Settlement Framework'*), which is circulated by e-mail amongst the parties before they meet to settle the claim.

(iv) In a fixed-fee meeting (e.g. of up to one day), the parties' solicitors, with or without their clients in attendance, and with full authority to settle or access to instructions over the telephone, meet with the Guide to explore and construct overall terms of settlement. The meetings take place in separate rooms in a neutral venue, e.g. at the Barrister's Chambers.

(v) Using the Settlement Framework, the Guide works with each party to jointly generate settlement proposals to:
  (a) reduce the issues in dispute (i.e. remove them from the claim equation); and
  (b) create momentum, leading to an overall deal.

Like mediation this may require more than one meeting.

(vi) Unlike a mediator, the Guide uses his technical knowledge of the legal issues in dispute and problem-solving skills to create inventive settlement proposals for which neither side will lose face if rejected, i.e. because they are the Barrister's ideas, and if agreed, can be claimed and owned as the product of a joint commercial collaboration between the parties.

Where Guided Settlement is entered into following the instruction of experts, the steps would need to be modified to enable the Guide to receive experts' reports before developing a methodology. If experts

have not been appointed, the parties could agree upon the appointment of a single joint-expert to assist the Guide.

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