

THE PRESENTATION AND CHALLENGING OF EXPERT EVIDENCE

PART 1 - PRESENTING EXPERT EVIDENCE

A. DECIDING TO PRESENT

When your case or your opponent's case may be assisted by a witness of special skill or knowledge then consideration should be given to calling an expert witness. This decision should be considered at an early stage of the preparation of the case. In Supreme Court civil cases, it should be considered before the Summons for Directions and in fact when the pleadings are being settled, and in other cases on receipt of the initial instructions.

The evidence of the expert is opinion evidence, in that it comprises inferences from perceived facts. In specialised fields only an expert can reliably draw inferences from the known facts. But in a Court such inferences or opinions are worthless unless based on proven facts. It is for this reason primarily that consideration should be given at an early stage as to the desirability of presenting expert evidence in support of one's own or in opposition to the other party's case. It will be necessary to decide what expert opinion is desirable and what factual material should be provided him and presented so as to form a proper basis for the desired opinion. It will also be necessary to decide whether expert evidence in related disciplines will be required. For example, if X-ray photographs will be necessary for the orthopaedic surgeon or technician's test of concrete strength for the structural engineer to have the basis on which to give their expert opinion.

Since scientific tests, experiments and investigations may require some minimal periods or may only be accurate if done at a time proximate to the event, consideration should be given to these matters at the earliest time. In Supreme Court Civil proceedings

It should also be borne in mind that it is quite proper to request copies of the reports of your opponent's expert witnesses and if it is refused to seek an Order of the Court to compel its disclosure. Although the Courts are reluctant to compel an expert originally instructed by one party to testify for the other or to break confidences, it is proper practice, after informing your opponent, to interview his expert witness or to request him to attend or conduct experiments or inspections in the presence of your expert. In special circumstances a party may be allowed to call an expert originally instructed by his opponent. Seyfang v G.D. Searle & Co. (1973) 1 ALL E. R. 290; Harmony S/S Co. S.A. v Saudi Europe Line Ltd (1979) N.L.J. 862.

In criminal cases, it is often a statutory requirement for the Prosecution to supply the Defence with copies of relevant medical or technical reports, but even where this is not the case such reports should be requested early. Of course, if the report may be favourable to the Defence it is the duty of Counsel for the prosecution to make it available to the Defence. In homicide and drug related cases, copies of medical and scientific reports should nearly always be requested. In the former type of case the post-mortem examination report should be obtained early as this will not only enable you to determine whether to obtain independent pathological opinion but will provide useful information on the probable time and the cause of death, the condition of the deceased and some of his antecedents and vital statistics.

All the available factual material and scientific reports, should be submitted to the expert you are consulting and a written opinion obtained from him. It is useful, in complicated cases or

B. WHOM TO PRESENT

The expert witness should be carefully selected especially where the case may depend on his evidence. The tendency in actual practice is to call the expert who is most readily available. In many cases he may not be a good witness-this can be due to his intellectual weakness, the shallowness of his theoretic training, his lack of relevant practical experience, or his inability to articulate clearly. It may also be due to personal traits, such as arrogance, loquaciousness, diffidence or irritability. In Jamaica, Counsel is often obliged to call an expert who suffers from one or other of these defects, because not only is there a shortage of scientists and specialists but many are reluctant to give evidence. Wherever possible however a conscious and deliberate choice should be made with a view to obtaining on your side the most effective available witness in the field.

The eclectic process should begin by identifying clearly not only the particular field for which expert opinion is needed but any relevant specialisation within the field. An attempt should then be made to get someone with specialist training in that field. Secondly, an attempt should be made to obtain a witness who has had extensive practical experience in the field. Thirdly, he should have the characteristics of a convincing witness: Clarity of thought; simplicity and preciseness in expression; a confident and commanding yet modest and respectful bearing.

Above all, only call an expert witness who will support your case and not your opponent's. In many cases where an expert is only called to assist in describing damage to property or injury

to quantify loss this presents little or no problem.

C. HOW TO PRESENT

Expert witnesses are called to give opinions on matters which require special skill or knowledge. In presenting the witness you should first endeavour to establish his competence to give such evidence. The weight of this evidence will depend on the established authoritativeness of his opinions. His qualifications, length of experience and practical knowledge should be carefully and fully given. Where a statutory registration system governs his profession, his statutory status should be stated. Thus a medical doctor should be described as a registered medical practitioner. In cases in which detailed specialisation is important, you should seek to establish his special training and experience in the field, mentioning any awards he has won, any articles he has published in professional journals and any academic posts he has held.

In your correspondence and the interview, the expert witnesses should be made fully aware of the specific matters on which his opinion is required. Some experts wish to show off their knowledge or are compulsive lecturers. Judges do not like to be lectured too. So advise him to keep to the issues. In your examination-in-chief quickly point him to the matter on which his specific opinion is required. Some Judges will be curious and ask questions of a general nature. His satisfactory answers to such questions often impress the Court more than the answers to your more pertinent questions. It is good strategy to let the Judge who is so inclined do some of the examination-in-chief. When a Judge is sitting with a jury, the Judge is often

In some cases it is good strategy to have the expert present while such evidence is being lead. In all cases where the opinion is being elicited from other witnesses, he should be led to state what are the facts on which he relies. In doing this you should avoid requesting the expert to express an opinion on the veracity of other witnesses or the soundness of inferences respecting facts in dispute. He may properly be asked in the form of hypothetical questions whether a certain conclusion or theory is probable or possible and the degree of probability. In some cases experts are allowed to use what is strictly hearsay evidence. Thus a doctor may give evidence of what the patient described in explaining the basis of his diagnosis. Similarly, a valuer may give evidence of value based on comparable prices, which he has obtained in the course of his business, from official records or private documents. Ramsay v Watson (1965) 108 C.L.R. 642; English Exporters (London) Ltd. v. Eldonwak, Ltd (1973) 1 ALL E.R. 726.

In some areas where there is no ready acceptance or explicit confidence in the scientific basis for an expert's opinion, the witnesses should be asked to state the scientific criteria for testing the accuracy of his conclusions, the theoretic basis for the basic postulates of his reasoning and the generality or universality of their support and verification. This is partially true, for example, in the case of handwriting identification.

There is a basic rule which must be constantly remembered though not necessarily observed. It is that the expert may not be asked the question the Court has to decide. Sometimes the

Court of Appeal held that in a prosecution under the U.K. Obscene Publication Act 1959, a child psychiatrist could properly give evidence as to whether battle cards sold with packets of bubble gum were likely to deprave and corrupt children of tender years although this was the very question the Court had to decide. Usually, even where the Court is unwilling to allow the direct approach to the ultimate issues it is possible to circumvent the rule by adopting a set of words which are synonymous with the legal phraseology.

#### PART 11 - CHALLENGING EXPERTS EVIDENCE

##### A DECIDING TO CHALLENGE

The purpose of cross-examining your opponent's expert is to solicit facts, theories and opinions relevant to the issue and favourable to your own case, and to obtain qualifications or explanations of the opinions given in chief which weakens his support of your opponent's case and refute conclusions which he has put forward by the use of facts and materials which you can bring to bear on his reasoning.

Most of what has been said about the preparatory work in presenting expert evidence also apply to deciding whether to challenge or not. Copies of reports should be obtained early, independent experts should be consulted. In criminal cases the prosecution has a special duty to facilitate the Accused in the preparation of his defence and to make exhibits and other materials available to defence experts and counsel for examination. R v Lord and Fraser (1983) Crim.L.R. 191. In civil proceedings where your opponent is non-cooperative, interlocutory orders may

B WHEN TO CHALLENGE

An effective cross-examination of an expert witness can be decisive not only because of the actual evidence elicited but moreso because of the impact which it has on the mind of the tribunal. E. Converso, a poor cross-examination of such a witness can shatter the case of the cross-examiner for the same reasons.' The number of successful cross-examinations of experts is considerable but in relative terms it is only a small percentage of the total number of attempts. The first rule therefore is that an expert witness must never be challenged without the most careful thought and preparation.

Never challenge an expert unless you are quite sure what you are about. An unfavourable answer will only further weaken your position. Be careful about asking questions for which you do not have a good idea as to what the answer will be. You may only be creating hurdles for your own witnesses. When in doubt remain quiet.

It is nevertheless true that expert witnesses generally provide for the properly prepared and quick-thinking advocate, a most fruitful field for successful cross-examination. Ordinary witnesses speak from recollection of events and once properly prepared will stick to their account. Experts deal with informed opinion, theories with qualifications, scales of probabilities and areas of inexact postulates which are not always scientific or precise. The more the opinion moves from mathematical precision, exact science and absolute rules, the greater the scope for challenge. Some potential areas for challenging should have been identified in the preparatory work and others may become apparent by the qualifications or modifications given or suggested

create prejudice against yourself especially with a jury of laymen. He may be eminent in his profession and yet have had limited exposure to the particular area of investigation. Careful attention should be paid to the evidence as to the witness's qualifications, the duration of the training in particular fields, the standing of the institution from which he has graduated and the opportunities he would have had for practical exposure to the specialisation in question. If he has a weakness in this area it may be useful to question his competence, positively if you are able to call another expert who has the desired qualification and who will be contradicting him. It is always best where you have no precise knowledge of the extent of the expert's exposure to the particular matter, to begin in a probing manner. For a striking example of this type of challenge, See Wellman, The Art Of Cross Examination pp-101-104.

An important rule in challenging an expert is to restrict the area of his manoeuverability. He should be confined to the issues involved and not be allowed to side-track the line of your questioning. Some Judges are over-indulgent with experts and allow them unjustified freedom to roam about. Experts are usually quite shrewd and you should keep your questions short and to the point or they will find some limb on which to hang qualifications to your thesis or disconcertingly unexpected theories. At the same time whenever possible you should try to exploit their enthusiasm for a particular cause, lead them imperceptibly to hard and fast positions which, in the face of learned texts or rival expert opinions, will be difficult to maintain. There is hardly any cross-examination of an expert which is effective as leading



through drink. He is shown the results of an analysis of urine was equivalent to 140 milligrams of alcohol to 100 millilitres of blood, and opines that this corroborates the view which he found on the examination.

Under the cross-examination it can often be demonstrated than nearly all the clinical symptoms on which he relies, taken individually, can be explained in terms other than those of insobriety. The slurred speech and unsteady gait may be normal speech and the way of walking of the accused, whom the doctor had not previously seen. The bounding pulse may be occasioned by a neurotic state accelerated by this being under arrest. Nystagmus- which means no more than an involuntary oscillatory movement of the eyeball-may have been caused by an ear disease of which the doctor was uninformed. Even the smell of drink on his breath may, the doctor has to agree, possibly have been occasioned by one large sherry, the smell of which is particularly potent. Thus the doctor is thrown back on the riposte-often made with some feeling- that taking each symptom individually is unsatisfactory; That his view was formed on the basis of the symptoms as a whole, now fortified by the urine content. Finally, he can be forced to concede that the British Medical Association is correct that one urine specimen, which alone was available, is unreliable; that the value of the analysis depends upon whether the urine had been in the bladder for less or more than two hours, a fact which was not known to him, and that 140 milligrams to 100 millilitres in the blood is a borderline case between sobriety and insobriety.

The doctor may be professionally convinced that the accused was unfit to drive, with such concessions in cross-examination,

You can therefore test each element of the hypothesis as well as undermine his conclusion by suggesting additional or alternative components which may alter his opinion. A brilliant display of this technique is the cross-examination of Dr. Lawson Coore by Mr. Martin Wright, Crown Counsel, (as he then was) in a Murder Case in July 1963. R. V Samuel Masters.

Another important method of challenging is to test the witness's evidence against authentic records. Firstly the authenticity and reliability of the records should be established. As in most cases of cross-examination, subtlety in concealing the ultimate objectives and patience in laying the foundation are of supreme importance. You must try to establish the system of maintaining the records, their usual accuracy, the opportunity of the recorders to observe the relevant facts, the absence of motive to mispresent and the general importance of such records. See S.C. Suit No. P.811/74 Ricketts & Allan v Ford (1957) See also Palmer, Lessons of a Cross Examination, Crim L.R. 774-8 .

Frequently an expert witness will be so sound and reliable, that it is inadvisable to challenge him even if he gives evidence against your client. If an expert does no damage to your case it is best to ask as few questions as possible, and certainly none unless there is good reason to believe that you will elicit further statements which would support your client's case. Sometimes it is necessary to find out beforehand from persons who know the expert about his abilities, whether he has given evidence in Court before hand if he is a good witness. When experienced persons regard him as a formidable witness be very wary about taking him on. It is sometimes best to remain quiet or ask some innocuous questions and then sit down with a show of confidence that

in which this occurs, the way of exposing him is to ask him technical questions on indirectly related areas of the subject which he did not come prepared to deal with and so reveal his shallowness of knowledge. Alternatively, you can lead him into absurdity by leading him to give ridiculously erroneous impromptu evidence and then confront him with the true position. See a striking example in Wellman, op. cit., pp 126-127.

On the other hand the cross-examiner should not attempt to disparage the character and professional standing of the competent expert whom he has failed to shake. This can have dangerous repercussions, See Wellman, op cit., pp 127-8; pp 128-0.

### PART 3 CONCLUSION

The proper presentation of an expert witness and his effective examination-in-chief will only be achieved by careful preparation. Similarly, successful cross-examination can only be achieved by meticulous study and constant practice. With respect to the challenging of an expert, the advocate finds one of the most gratifying aspects of his vocation. No one learns this only from lectures or books or even by observing the great exponents. But all these things and preparation will eventually pay off and the prize of turning a case around to your client's advantage by virtue of your successful cross-examination of your opponent's expert will be yours: