Scientific experts: more attention needed

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A survey of members of the legal profession involved in cases requiring the use of scientific experts reveals strong support for court-appointed experts — but little evidence of direct experience to back up this feeling.

IN English law, the general rule covering the appearance of witnesses in court cases is that their testimony must be restricted to facts, and that tribunals should not be subject to their personal views and opinions.

There are, however, many occasions on which the tribunal lacks the ability to form an opinion on its own on the evidence presented to it. Judges are not polymaths, and where the issue under consideration is one of science (or art), assistance from an expert may be required. As a result, English courts have recognized the need for special witnesses who are able to provide evidence on both fact and opinion.

Yet expert witnesses and their reports have been the subject of criticism by the judiciary for more than 100 years[1], often because judges have to choose between the testimony of two opposing experts, and may feel that expert evidence is partisan. As a result, some judges began to resort to a referee to reach a decision.

Systems of court appointed experts subsequently developed, under which matters of opinion and fact are referred to a single expert appointed by the courts. This has removed the need for both parties to appoint their own expert, and can obviate the often wasteful system of adversarial examination and cross-examination.

Since 1932, Order 40 of the Rules of The Supreme Court [2] has allowed a judge to appoint a court expert when requested by the parties involved in litigation. In practice, however, this rarely happens. A review of civil litigation is currently being carried out by the government, and various aspects of the use of experts have been addressed in an interim report, prepared under the chairmanship of Lord Woolf [3].

The Woolf Report proposes, for example, that the calling of expert evidence should be subject to the complete control of the court, with the implication that in most cases, this will mean the court refusing to allow any oral evidence from experts appointed by the litigating parties.

The report also proposes that courts should have the power to appoint when appropriate a single expert to report or give evidence to the court — if necessary without the agreement of the parties — and to appoint assessors of the facts presented. Experts would also be given clear guidance that their first responsibility is to the court, and not to their client.

We have carried out research into the area of witness's opinions and the use of court experts. A questionnaire was sent out asking for opinions on the use of experts, and for data on the use of Order 40, among judges sitting as Official Referees — High Court judges specializing in technical disputes — as well as members of the professional associations covering the barristers and solicitors who practise in the courts over which such judges preside.

Replies to the questionnaire revealed that Order 40 is rarely considered, and even more rarely used. Among those respondents with experience of using Order 40, satisfaction with the use of court appointed experts was low and little more than satisfactory, mainly because they tended to be used in parallel to the existing system of parties appointed by the experts.

Furthermore, 85 per cent of respondents indicated that views of expert witnesses often differ, while members of the judiciary were unanimous that differences of opinion between parties' expert witnesses were a significant factor in extending the length of trials; 85 per cent of lawyers agreed.

The questionnaire also sought the opinion of respondents on changing the rules of the Supreme Court so as to increase the use of the court expert by leaving the appointments of such experts to judicial discretion. Almost two-thirds (65 per cent) of the judiciary were in favour of such a move, while three quarters of professionals who had experience of order 40 were also in favour.

The debate on the effectiveness of expert witnesses appointed by the opposing parties in a court case has raged periodically in the United States, most recently in the late 1980s (see ref. 4). A US procedure similar to Order 40 exists, namely Federal Rule of Evidence 706[5].

The rule was established because of concern over issues such as the practice of 'shopping' for experts — in other words seeking an expert opinion which strongly supports the case of the person paying for the expert — the venality of some of those selected, and the reluctance of many others, particularly those with high reputations, to involve themselves in litigation (see ref. 4).

Nevertheless, a study by the Federal Judicial Center in Washington, D.C., found that only 20 per cent of federal district court judges had ever used their power to appoint court expert under this rule, and half of those had only done so once[6].

One area identified by our research in Britain, and reinforced by the other studies published in the US literature, is concern over the qualifications and degree of expertise offered and exercised by experts Pamela Johnston (see ref. 4) , for example, of the University of California, Davis, puts forward powerful arguments for the use of experts as individuals who use their education, autonomy, experience and intuitive understanding, not as assistants to the fact-finder.

The wide degrees of competence found among experts degrades the whole legal system. What is needed is experts who are known to have the necessary expertise, and possess the type of intuition needed to solve problems.

Such intuition is impossible to define formally, although it may be demonstrated by an ability to understand new situations which go beyond current knowledge where, for example, state-of-the-art science or technology is being considered. Scientists may see an opportunity here to use their systematic and formulated knowledge in offering a quality of opinion which may allow justice to be done.

The Woolf Report was set up to review the current rules and procedures of the civil courts in England and Wales with the stated aims of improving access to justice and reducing costs.

Woolf's proposal for court appointed experts to address the problems associated with expert evidence deal with the system and not the experts. We found no evidence that a system of court appointed experts would work, either in this country or elsewhere. There has been very limited use of the current provisions for court-appointed experts. Many in our sample focused on the variety of standards amongst experts. This interface between science and the law requires more attention. □

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