

## The Role of Expert Witness in the Adversarial English and Welsh Legal System

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**Abstract:** Historically, the civil procedures in England and Wales follow an adversarial approach. The criminal procedures started to develop an adversary system only in the 18th century. Since medieval times, the law system has grappled with issues as to when and how to use expert knowledge to assist it in the resolution of disputes. The earliest records of expert witness date back to the 14th century and involve cases in which surgeons were summoned to establish as whether a wound was fresh. The role of an expert witness is to assist the court on matters within their expertise. Courts rely on expert witness testimony in most civil and criminal cases to explain scientific matters that may not be understood by the judge or the jury. It is especially important for the dentist to demonstrate confidence in his testimony especially during the cross-examination. Above all the expert witness should keep in mind during the time of intensive interrogation that it is not him on trial even though it may seem to be at some times.

**Key words:** Forensic odontology, expert witness, legal system, adversarial system, Judge, Greece

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### INTRODUCTION

A departure from the dictates of a strong central authority in law was the development of English common law. This was simply a system of mores concerning interpersonal relationships. Although, the kings of England had established laws and dictates, a victory for common law occurred in 1215 when king John was forced to sign the Magna Carta.

The major departure of the Magna Carta from other legal codes was that it established a government which was limited by law. The spirit of the Magna Carta was carried even further when the Constitution of the United States was ratified in 1789, in very specific terms and limited the powers of government. Generally, there are two distinct law systems: the common and the civil law systems.

England and Wales follow the common law system where the principal hallmark is that it is an adversarial system which refers to how cases are adjudicated a characteristic of all common law based legal systems. The civil law system refers to the jurisdictions that have adopted the European continental legal system, derived essentially from ancient Roman law but owing much to the Germanic tradition (Cottone and Standish, 1982). Expert witnesses may be called in many fields and is supposed to be able to assist the decision makers (the

jury) in understanding and interpreting the evidence. But the expert is hired by one of the advocates (counsel) and not by the court itself. This is not the practice in many European countries where expert witnesses are brought into the case by the judge but it is the situation in common law countries such as England, Canada and the United States (Russ, 2001). The expert witness plays an essential role under the English and Welsh system of jurisprudence. Courts rely on expert witness testimony in most civil and criminal cases to explain scientific matters that may or may not be understood by the judge or the jury (Gillespie, 2007; Slapper and Kelly, 2009).

### THE ADVERSARIAL SYSTEM

Historically, the civil procedures in England and Wales follow an adversarial approach. The criminal procedures started to develop an adversary system only in the 18th century and to some extent this can be depicted as the absorption of a model already operating in the civil trials.

Thereafter, the adversarial pattern exists in all forms of litigation in civil or criminal cases (Gillespie, 2007; Slapper and Kelly, 2009; Langbein, 2003). In the English and Welsh legal system the law is not only passed by the Parliament (statutory law) but also can develop from previous courts decisions.

The judges are able to progress the law themselves and decisions made from previous court hearings form part of the law. For this reason the precedent is so important, designed in order to bring certainty to the law. The common law remains strong today and whilst is comparatively rare for the courts to create new legal principle there continues to be a significant amount of law that exists without statutory definitions. In conclusion, common law system tends to be case-centred, allowing scope for a discretionary approach to the problems that appear before the courts. On the other hand the civil law system is based on the primacy of written law, a codified body of general abstract principles that control the exercise of the judicial discretion and adopts an inquisitorial approach (Gillespie, 2007; Slapper and Kelly, 2009; Gabbay, 1990; McEwan, 1998). Within the adversarial approach, the procedure is seen as a contest between two sides presenting their evidence before a neutral judge or a jury that must decide the outcome. The participated parties argue before the court their opposing versions of the facts. The judge should not seek to become an investigator and rather concentrate on ensuring that both sides are following the procedural rules governing the case presentation; intervenes only if there is an objection from one party against the conduct of the other. The key elements of the adversarial model are firstly that each side decides whether to institute or defend proceedings what points are in issue and which arguments to rely upon and what evidence should be presented and secondly that an independent and impartial judge presides over the proceedings (Gillespie, 2007; Slapper and Kelly, 2009; Gabbay, 1990; McEwan, 1998).

In the adversarial process the competing parties call the witnesses and not the court. Both parties will gather their evidence, including statements by the witnesses and then decide which of them will appear in court. The opposing party can challenge the evidence presented through calling their own witness to provide alternative view on the issues or by cross-examination. It has been argued that one of the advantages of an inquisitorial model is that it ensures that all relevant witnesses are heard whereas in the adversarial system if a witness is not helpful to a side then may not be called. It is a key principle in the adversarial system the importance of providing oral evidence in courts as there is the assumption that this is the best way of presenting the facts. The criminal procedures within the adversarial system, allow the gathering of accusatorial evidence in a vigorously court controlled framework.

The control of the process by an open court hearing allows check and balance of the basic presumption of innocence of the accused. All preliminary proceedings in

a criminal charge are designed to ensure a fair hearing and protect the interests of the accused. On the other hand in inquisitorial proceedings an investigator has to discover as many relevant facts as possible within an official inquiry based on the belief that a crime had been committed. In contrast to the English and Welsh model, the judges are expected to seek out and arrive to the truth by asking questions to the witnesses rather than being a neutral umpire. McEwan (1998) concluded that the key characteristics of the criminal trial in common law system, make it the most adversarial of all judicial proceedings (Gillespie, 2007; Slapper and Kelly, 2009; Gabbay, 1990).

Langbein (2003) stated that the two striking defects of the adversarial criminal system are the combat and the wealth effect. The first one refers to that the job of each side is to win the court struggle that often entails tactics that distort or suppress the truth. The wealth effect refers to the fact that adversary procedure bestows upon persons who can afford to hire skilled trial counsel. This creates the risk that the most effective advocate rather than the truth will win the case.

Woolf and Great Britain (1996) found the legal system in England and Wales to be too expensive for litigants, slow in bringing cases to a conclusion, inequitable in favouring wealthy litigants and too complex and incomprehensible for many litigants. It was also commented that the system was too adversarial in approach, allowing the parties rather than the courts, effectively to run cases.

### **THE DUTIES OF EXPERT WITNESS**

Since medieval times, the common law system has grappled with issues as to when and how to use expert knowledge to assist it in the resolution of disputes. The earliest records of expert witness date back to the 14th century and involve cases in which surgeons were summoned to establish as whether a wound was fresh (Law Reform Commission, 2005). The role of an expert witness is to assist the court on matters within their expertise. The expert's duty to the court overrides any obligation to the person from whom they have received instructions or by whom they are paid meaning that the expert witness has a duty to act independently and not be influenced by any party. In theory, the expert witness is an educator for the court in understanding matters beyond the knowledge or experience of ordinary citizens by providing opinion evidence that is honest, scientifically based and unbiased.

The expert witnesses should consider all material facts and should make it clear when a question or issue falls outside their expertise or is not able to reach a

definite opinion (Gillespie, 2007; Slapper and Kelly, 2009; Law Reform Commission, 2005). It is the duty of the court to ensure that the expert evidence is restricted to that is reasonably required to resolve the proceedings. The expert evidence will only be allowed where the court gives permission either by way of written or orally. Expert witnesses give oral testimony in comparatively few cases. The general rule is that expert evidence is to be given in a written report that must include the expert's qualifications; details of literature relied on and reasons for the expert's opinion. It should also include a summary of all instructions and facts referred to therein. The written reports by the experts must also contain a statement that they understand and have complied with and will continue to comply with their duty to the court and a statement of truth is also required.

Thus, any document that contains a statement of truth may be used in evidence. If after producing a written report, the expert changes view on any material matter, this should be communicated to all the parties without delay and when appropriate to the court. Instructions given to the experts are no longer privileged and their substance must be set out in their report.

That means either party can insist through the court, on seeing how the oppose side phrased its requests to an expert (Gillespie, 2007; Slapper and Kelly, 2009; Law Reform Commission, 2005). Evidence in the form of testimony by an expert witness is accepted on the following grounds: First, the expert witness is in the unique position of being able to testify a scientific opinion which is presumed to be based on expert knowledge, skill and experience. Other witnesses can only testify as to facts not to express their opinions. The expert testimony is intended as noted above to assist the court in understanding the evidence in order to determine the facts at issue in the case. The basis for the testimony is expected to be an accepted and reliable methodology. It isn't the job of the jury to understand the expert opinion on the evidence but to decide whether or not to believe it.

That means that the job of the expert witness is to be clear and convincing, not to alienate the jury not to show any bias and to respond to the questions fully but not to volunteer information. It is truthful answers to specific questions, preferably explained in a way that will assist the side that hired the expert witness (Russ, 2001).

Woolf and Great Britain (1996) found expert evidence to be an area that presented major problems and needed reform. During the consultation process, a strong view emerged that the use of expert witnesses was a source of excessive expense, delay and increased complexity. Another major concern was the failure by experts to maintain independence from the party instructing them.

Lord's recommendations for the reforms on the role of the expert witness were generally adopted in the civil and criminal procedure rules.

The legal system of England and Wales currently encourages the appointment of single joint experts in cases where the claims involved are modest. In more complex cases where there is a major issue on liability or causation, courts do not ordinarily order a single joint expert. However, the use of single experts in substantial cases has been criticized (Law Reform Commission, 2005). The element of combat between two opposing sides, during the adversarial process as adopted in English and Welsh law is reflected in discussions and the expert witness fit uncomfortably into this context as they find it difficult to handle the ability of the counsel to control and interrupt their testimony. Experience gained by a number of court appearances does not make the situation significantly easier, since the subordinate position of the expert is constant. The lack of courtesy and the attacks on distinguished experts may make them reluctant to participate (Langbein, 2003; McEwan, 1998).

Ideally, expert witnesses should be unbiased conveyers of information, reliable, accurate and provide a truthful report. Regrettably not all experts testify within scientific standards and ethical guidelines. Strategies for regulating expert witness testimony generally fall under the principles of education, prevention, peer review and sanctioning.

However, the majority of the expert witnesses do their job with integrity and in an ethical fashion. The maintenance of public confidence in the service the expert witnesses are providing requires that the possibility exists for them to be called to account for any erroneous and harmful conduct just as they would be in any other aspect of their professional role. The knowledge that expert witnesses have received training in the duties required of them, evidenced by some form of accreditation could raise the confidence in their role.

Within this context, the General Medical Council (GMC) published guidelines which clarify the role and the duties of the doctor giving expert evidence in a court. The expert witness has the obligation to prepare a report that summarizes the facts and includes a declaration that his/her overriding duty is to assist the court in matters within the field of expert knowledge and that this duty overrides any obligation to those instructing the expert. The expert witness has to declare the understanding of the questions in respect of which his/her opinion as an expert is required and mention all matters which he/she regards as relevant to the opinions expressed. The report should draw attention to the court of all matters which might adversely affect the expert's opinion and indicate

the source of information in respect of matters referred to which are not within the expert witness personal knowledge. It should be stressed that nothing has been included in the report that has been suggested to the expert by anyone. The expert witness has to give a range of reasonable opinions relevant to the opinion expressed within the report and notify in case the report requires any alteration, correction or qualification. At the end of the expert witness report it should be attached a statement of truth to confirm that it has been clear which facts and matters referred to in this report are within the expert's knowledge and which are not (Skellern, 2008; Committee on Medical Liability and Risk Management, 2009; Beran, 2009; Devaney, 2007; General Medical Council (GMC), 2008). The Roberts (1993) stated that despite their difficult task, forensic experts make an important contribution to the criminal justice process and do so with skill and integrity in the light of the collaborative ideal adversarial system. However, it was stressed that the adversarial trial is not simply designed to facilitate the communication of scientific knowledge. Regarding the Forensic Odontology field the judge determines who is in position to act as an expert basing the opinion on information brought forth in court, In some cases a dental degree and a license to practice is sufficient objective evidence of competence.

Frequently, however the opposing side will challenge the dentist's qualifications as an expert, particularly if he/she has little or no previous experience with forensic cases. On the other hand if the dentist has impressive credentials, the opposing barrister may try to discredit the expert in a later testimony. The dentist called as an expert can be questioned in both direct and cross-examination on his educational background, professional dental and forensic experience and both general and specific knowledge of the field. The dentist who is called as an expert witness must insist for determination of what to expect during the trial and the general strategy expected. Before trial, the forensic dentist must also review the details of the case including dates, authority, procedures carried out and the available physical evidence.

Any notes which the dentist may refer to during the testimony should be assembled in good order, keeping in mind the opposing side has the right to see them and make them public. Forensic dentist should review his own credentials and the pertinent literature relating to the case (Mertz *et al.*, 1982). Bowers and Pretty (2009) reviewed bite mark cases that raise controversy due to the degree of expert disagreement. They concluded that forensic odontologists should carefully assess a suspected bite mark injury for its value as some injury types may present opportunities for error, disagreement and possible miscarriages of justice.

## CONCLUSION

The English and Welsh legal system is a complex system that seeks to uphold civil and criminal justice but undoubtedly tensions and unfairness exist within it. The updates and reforms are likely to continue in order to take the edge off some of the harshness of the adversarial system but are only minor modifications rather than a shift towards an inquisitorial system which would have a significant cultural impact.

The ideal outcome of any reform will be the development of a legal system that achieves justice and minimizes delay and private/public costs. It is especially important for the dentist to demonstrate confidence in his testimony especially during the cross-examination. Above all the expert witness should keep in mind during the time of intensive interrogation that it is not him on trial even though it may seem to be at some times.

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