

PI Brief Update Law Journal, now with Free CPD!

Over 600 personal injury articles and 40 credit hire articles
 FREE: the new edition of Kevan & Ellis on Credit Hire
 FREE: up to 12 CPD hours per solicitor per year

All for just
 £175+vat for your
 whole office

HOME	FREE NEWSLETTER	PIBU LAW JOURNAL	CPD INFO	CONTRIBUTORS	BLOG	PI JOBS	CONTACT	ABOUT US	SEARCH	LOG IN	SUBSCRIBE
------	-----------------	------------------	----------	--------------	------	---------	---------	----------	--------	--------	-----------

Lord Justice Goldring Speech on Expert Witness Evidence - Mark Solon, Bond Solon



19/11/12. The expert witness role has been put under a microscope by the government and the judiciary over the past decade, with increasing intensity. Speaking at Bond Solon's annual expert witness conference in November, Senior Presiding Judge for England and Wales Lord Justice Goldring gave his judicial perspective and a valuable glimpse into the future direction of expert witness work.

Lord Justice Goldring highlighted three recent reports that are particularly relevant to the role of the expert: in crime, the Law Commissions Report of 2011 on expert witnesses; in family, David Norgrove's Family Justice Review, which was followed by Mr Justice Ryder's Judicial proposals for the modernisation of family justice; and in civil litigation, Lord Justice Jackson's extensive review of civil justice in his report of 2010.

The fact that the role of the expert has been under such scrutiny, he said, reflects several concerns. Firstly, the use of expert evidence where there is no need for it; secondly the substantial increase in the cost of litigation which expert evidence occasions; thirdly the use of too many experts in one case, and fourth the concern about the quality of some expert evidence.

The Principles

The principles underlining the role of the expert were set out by Mr Justice Cresswell in *National Justice Compania Naviera SA v Prudential Assurance Company Limited* (No.1) (Ikarian Reefer), in which he found that expert evidence needs to be entirely independent, objective and unbiased. Furthermore, an expert must never assume the role of an advocate, must give opinion only on matters within their expertise, state the facts on which the opinion is based and make it clear when a question falls outside of his or her expertise.

Mr Justice Cresswell also set out in these principles that if an expert's opinion is not properly researched because he or she considers that insufficient data is available, then this must be stated. In cases where the expert witness has prepared a report but cannot assert the report contained the whole truth and nothing but the truth, this qualification must be stated in the report. Finally, if after exchange of reports, an expert witness changes his view on material matters, such change of view should be communicated to the other side without delay and when appropriate, to the court.

The expert witness role was further underlined last year by the Supreme Court in *Jones v Kaney* [2011] UKSC 13, in which the Supreme Court found that experts can be liable in negligence. Lord Brown said the most likely consequence: "...will be a sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly lest these views come to expose and embarrass them at a later date." This would increase the expert's ability to assist the court in fairly determining the proceedings and finding the truth.

Costs in Publicly Funded Cases

In publicly funded cases, which include both criminal and family cases, the Ministry of Justice in 2011 spent £160m on expert witnesses. In family cases the amount spent was £71m to £97m, in other civil cases it was £24m and in crime it was around £60m.

In October 2011, the government introduced codified, capped rates for experts. It sets out hourly rates and the intention was to reduce the expert fee bill by around 10%. However, there is, Lord Justice Goldring said, some indication that the number of hours worked has increased since the Legal Services Commission (LSC) reduced its rates for experts, which, if correct, suggests that experts are padding their time. Lord Justice Goldring warned: "That would be wholly unacceptable. It would call into question the integrity of the expert. It would too inevitably lead to a more draconian approach by the LSC, and, as it seems to me, fixed fees."

Criminal Cases

While concerns over the number of experts used in one case is not particular to crime, Lord Justice Goldring referred to the criminal case *Harris & Ors* [2006] 1 Cr. App. R 55 to demonstrate that more is not always best.

The Court in that case looked at four different convictions, one for murder, two for manslaughter and one for grievous bodily harm (GBH). In three cases a child had died and in one had been seriously injured. At the heart of the appeal was a challenge to the accepted hypothesis on 'shaken baby syndrome', or non-accidental head injury.

Lord Goldring said: "There was a plethora of experts. They jostled with each other over the prominence and strength of their respective medical hypotheses. They disagreed about the cause of death in each case."

In total 10 medical experts were called by the Appellants. Some experts sought to expound controversial and untested hypothesis that did not withstand legal scrutiny. Eleven witnesses were called by the Crown – bringing the total to 21 experts. Lord Justice Goldring asked: "Can one really justify 21 experts in 4 similar cases?"

The complexities of multiple conflicting experts make the judge and jury's task extremely difficult and there is a risk of all parties, including lawyers, attaching too much weight to what may be seen as unequivocal scientific

Get our FREE PI Newsletter

Enter your email address to receive our free PI newsletter which is written by a team of specialist PI barristers and provides case summaries of the most important PI cases. We also provide a free monthly general law newsletter and a weekly news summary.

Join Now!

Subscribe to PIBULJ

PI Brief Update Law Journal (PIBULJ) features articles on specialist topics in the personal injury field, written by our [team of more than 100 specialist PI barristers](#) and other legal experts. It now also offers CPD for no extra charge. Just £175+vat per year for your whole solicitors' office! £125+vat for barristers*. Reduced rates for students, pupils, garden leave, etc. Contact us for details.

Subscribe Now / More Info

Write for PIBULJ

Get your name seen by over 13,000 readers of our website and newsletters. [Click here](#) for more information on writing for us.

PI Industry News

[Irwin Mitchell, RJW, Thompsons on standby for bre... 40% of whiplash victims 'do not claim compensation'...](#)
[Bar broadside on referral fees 'confused and self-serv...](#)
[No loophole for fee-ban dodgers, SRA warns...](#)
[Court of Appeal extends 10% damages uplift to cont...](#)
[QOCS likely to be extended...](#)
[Competition Commission to investigate motor insurers...](#)
[Supplementary Legal Aid Scheme is abandoned...](#)
[ACL predicts less work due to Jackson reforms...](#)
[Small claims limit consultation due out soon...](#)

Site Partners:

[Divorce Solicitor Exeter](#)

Credit Hire Articles

We have now published more than 50 specialist credit hire articles. The most recent ones are shown below, or see the [complete list here](#).

Most Popular

[Child Car Seats and Contributory Negligence - Tim Kevan](#)
[High Court relies on ex turpi causa to reject unusual RTA claim - Anna Macey, Pupil Barrister, 12 King's Bench Walk](#)
[Kevan and Ellis on Credit Hire, 4th Edition: Chapter Two - Impecuniosity](#)
[Kevan and Ellis on Credit Hire, 4th Edition: Chapter One - Rates](#)
[Costs in Infant Settlements - Tim Kevan](#)

evidence. In fact, experts' opinions may be entirely fallible.

Work is being done currently to improve the way judges and lawyers approach and understand evidence. Andrew Rennison, the Forensic Services Regulator and the Forensic Science Advisory Council are at the forefront of new measures to ensure quality is maintained and that unsubstantiated theories are kept away from the court room. Short, authoritative documents – in essence a Noddy's guide – are being prepared for judges on key scientific areas, such as DNA and fingerprints.

Furthermore the Law Commission in its 2011 report on expert witnesses also proposed a statutory admissibility test, under which expert opinion is only to be admitted if it is sufficiently reliable.

Family Matters

In public law family cases - where the State has sought involvement in the lives of children - the Family Justice Review's final report of November 2011 found in its executive summary that "the growth in the use of experts is now a major contributor to unacceptable delay. The child's timescales must exert a greater influence over the decision to commission reports and judges must order only those reports strictly needed for the determination of the case."

The report further recommended: "...that primary legislation should reinforce that in commissioning an expert's report, regard must be had to the impact of delay on the welfare of the child. It should assert that expert testimony should be commissioned only where necessary to resolve the case. The Family Procedure Rules would need to be amended to reflect the primary legislation."

The government has pressed ahead with these reforms in the Children and Families Bill and Lord Justice Goldring said: "Although the legislation is not in place (and will not be for some time), we, the judiciary are working on the basis that what is proposed sets out a sensible approach to managing family cases."

The national Family Justice Council has been asked to contribute to the modernisation programme by providing advice on areas including the more effective use of expert evidence in the family courts and best practice. There will be changes to the Practice Direction that make it clear that seeking expert reports should be the exception, not the norm.

Lord Goldring concluded: "I suspect the days of inadequate or under-qualified experts will come to an end."

Civil Proceedings

In his 1996 report *Access to Justice*, Lord Woolf referred to expert evidence as one of the major generators of unnecessary cost in civil work. Lord Justice Goldring said: "The reforms, among other things, sought to address the perception of the expert as a 'hired gun' by imposing a *primary*, or in the language of the Civil Procedure Rules, *overriding* duty to the court, as a means of eliminating the problem of partiality."

Scroll forward to 2010, and Lord Justice Jackson's Interim and Final Reports stressed the crucial role of judicial case management. It is for the judge to make sure that the cost of the experts is proportionate and that their evidence goes to the heart of the case.

Lord Justice Jackson's Final Report acknowledged that, while a single solution would not fit all, alternative techniques for dealing with expert evidence could be tried for particular types of cases. He recommended that a pilot scheme should be set up to assess the extent to which the Australian court technique of using *concurrent evidence* (colloquially referred to as "hot tubbing"), could be implemented in English courts.

The Future

Lord Justice Goldring observed that, as advocates have to abide by a high ethical code, so do experts.

He concluded: "It is not only a question of integrity. It is also, a question of cost and time. As we look to the future, wasted time and excessive expense must become features of an outdated legal system. We can no longer tolerate them. We all have our part to play in achieving the necessary change and operating effectively within this new world."

Mark Solon

Managing Director of Bond Solon and Solicitor

www.bondsolon.com

marks@bondsolon.com

Image ©iStockphoto.com/J-Elgaard

[Go back to previous page](#)

[Pedestrian Road Traffic Accident: Is Eye Contact Vital? - Oliver Rudd, 12 King's Bench Walk](#)

[Maynard v Wigan Metropolitan Borough Council \[2011\] EWCA Civ 1694 - Daniel Tobin, 12 King's Bench Walk](#)

[Contributory Negligence: Extending the "Car as a Weapon" Principle? - Tom Gibson, Pupil Barrister, Outer Temple Chambers](#)

[When is an Offer Not an Offer? - Sarah Prager, 1 Chancery Lane](#)

[The Increasing Rights of Policy Holders Under BTE Legal Expense Insurance Contracts - Anna Macey, 12 King's Bench Walk](#)

BabyBarista



[BabyBarista in association with PI Brief Update](#)

Queen's Counsel



[Queen's Counsel in association with PI Brief Update](#)