

Expert witnesses: lessons learnt from miscarriages of justice

Sailesh Mehta, a barrister at Red Lion Chambers, reports on lessons learned from miscarriages of justice having prosecuted and defended in fire cases for 25 years, many of those cases involving fatalities and expert evidence

Expert witnesses are now an accepted part of criminal and civil trials. Their evidence can be of great assistance to the Court to better comprehend a factual scenario which is outside the knowledge or experience of most people.

The use of expert witnesses and the admissibility of their evidence has developed over the last 250 years, when the concept of allowing an expert to give opinion evidence on the facts was recognised by Lord Mansfield in the case of *Folkes v. Chadd* in 1782. Experts now regularly give evidence in criminal trials, in areas including DNA analysis, fingerprints, blood marks, photographic identification, cause of death, nature of firearms, drugs language etc.

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Experts are also frequently used in civil trials, as well as in disciplinary tribunals involving doctors, nurses and dentists.

In cases that I have been instructed, I have frequently used experts in fire safety who have dealt with a wide range of topics, including cause of fire, likely spread of fire, whether an alleged breach caused a risk of death or serious injury, whether a defendant “took all reasonable precautions and exercised all due diligence” to avoid the commission of the offence.

As a result of a series of high-profile miscarriage of justice cases here and abroad, the Court of Appeal and the Law Commission have voiced mounting concern about the use of expert evidence in criminal trials. Research has confirmed that juries can give undue weight to expert evidence, particularly if it is in a complex area that is difficult for the jury to follow. As a result, there is an added burden on the Court and all parties involved in litigation to ensure the evidence is necessary, admissible and thoroughly tested before trial and in Court.

In *Dallagher* [2002] the defendant was charged and convicted of murder. An ear-print on a window at the murder scene where the deceased was asleep proved the defendant’s presence at the scene. West Yorkshire police sent the ear-print to Mr Van Der Lugt, a Dutch policeman. For more than a decade, he had taken a close interest in ear-print identification and come to believe that each person’s ear-prints were unique. He had no formal forensic science qualifications. He opined that he was “absolutely convinced” that the defendant had left the ear-print, and a second prosecution expert thought it a “remote possibility” that the print had been left by someone else. DNA evidence taken from the ear-print subsequently established that it had not been left by Mr *Dallagher* at all and Mr *Dallagher* was released after eight years in prison.

Lessons Learned

Fire experts can learn the following lessons from *Dallagher*: (i) ensure you have genuine expertise in the area you are giving evidence about; (ii) ask fundamental questions about the state of science in your area of expertise – is it a developing area?



Is there a body of evidence to support your conclusion? To what extent is your conclusion based on verifiable research and how good is the research? Is there a reliable and strong database of core material? Is there room for a broad range of opinion and what are the fair parameters of that range? To what extent is your opinion based on experience and to what extent is it based on fact? Had the Court and lawyers asked these questions, it is likely that the “expert” evidence would not have been admissible, or would have been the subject of serious challenge.

Statistical Dangers

Sally Clark [2003], a British solicitor, was found guilty of smothering her 11-week-old child in 1996 and shaking her eight-week-old child to death two years later. There were no injuries ordinarily found in such cases. A paediatrician with expertise on sudden infant death syndrome said there was a one in 73 million chance of two such deaths in the same family occurring naturally. He had no expertise in statistics and had simply squared the chance of one sudden death – one in 73,000 without taking genetic factors into account. The Court of Appeal on acquitting her said this figure grossly misrepresented the true position. It transpired that the Prosecution had failed to disclose medical details which may have led to a very different conclusion on cause of death. The Royal Statistical Society wrote to the Lord Chancellor saying there was ‘no statistical basis’ for the figure. Experts now believe the risk could be anywhere between one in 100 and one in 8,500. She was released but never recovered and died three years later.

Subsequent research carried out as a result of another similar miscarriage of justice case (*Canning* [2004]) found that ‘the occurrence of a second unexpected infant death within a family is... usually from natural causes’.

Fire experts can learn the following lessons from the *Clark* case: (i) be careful not to stray into statistics or any area you do not have expertise; (ii) have your work peer-reviewed; (iii) test any potential defence hypothesis fairly; (iv) even though your conclusions

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are based on a particular set of facts, give an opinion on what the conclusion would be if the facts the defence put forward were (or might be) believed by the Jury; (v) remind yourself that in a relatively new scientific area such as fire safety, today's orthodoxy may be discarded tomorrow.

Untested Hypotheses

Until the judgment of the Court of Appeal in *Harris and others* [2005] the prosecution had been allowed to rely on a hypothesis that a non-accidental head injury to a young child could confidently be inferred from nothing more than the presence of a particular triad of intra-cranial injuries. This untested hypothesis was used in numerous cases, including murder. The Court criticised the use of such untested hypothesis to secure convictions.

Fire experts can learn the following lessons from the Harris case: any hypotheses should be clearly flagged, and should be critically scrutinised, and must be underpinned by empirical research to justify the opinion evidence founded on it.

Non-Disclosure of Information

Judith Ward was wrongly convicted of the 1972 M62 coach bombing of which 12 soldiers and members of their families died. At the time it was the worst IRA outrage on the British mainland. She served 17 years for crimes she did not commit and lawyers at her appeal said there had been "significant and substantial" non-disclosure of information to the defence by three government scientific experts, whose reports were heavily biased against the defendant.

Fire experts can learn the following lessons from the Ward case: (i) remind yourself constantly that you are giving evidence for the benefit of the Court and not for any party; (ii) do not be shy about seeking disclosure of any material that might be relevant to your report – many experts simply rely upon what they are given even when there is far more relevant material available; (iii) ask for further investigations to be carried out in any area where there is doubt, or where this may assist in making your conclusion more reliable.

The common themes in the above cases are:
(i) there was little judicial scrutiny of the expert

evidence in advance of the trial and the parties were left to "get on with it" in the expectation that the adversarial process will cure any defect; (ii) the advocates for one or both parties did not fully understand the evidence; they chose the "softer option" of attacking the expert rather than attacking the fundamental premises, or researching the wide range of opposing expert opinions; (iii) the experts confused hypothesis as fact, strayed outside their area of expertise or were partisan.

These three factors, or any combination of them will result in future miscarriage of justice cases. It is estimated that in the USA, one in 50 who have been convicted largely on the basis of expert evidence, may well be innocent.

Cross-examining Experts

I have cross-examined many so-called experts of doubtful expertise: the 'love-bite' expert who had never examined a child before in a case involving a child; the 'nautical' expert who had made fundamental mathematical errors in his report; the telephone expert who had failed to disclose vital evidence that undermined his propositions; the "drugs language" expert who accepted that much of the language he referred to was in fact now used in common parlance.

My own experience of fire experts is rather different. They have all been reflective of their duty to the Court, are painfully aware of the limits of their expertise and are meticulous in alerting the Court to the range and rationale for the opposing view. Long may it continue. 🔥

About the Author:

Sailesh Mehta is a barrister at Red Lion Chambers, a leading set of Criminal and Regulatory Chambers. He has prosecuted and defended in fire cases for 25 years. Many of his cases involve fatalities and expert evidence.

