

## Call yourself an expert?

...The British Justice System is crying out for more expert witnesses, but is it really a case of expert advisor or expert on trial? Kay Hudson examines the credentials necessary for security professionals to become an expert witness.

### Having spent several years in the security industry,

perhaps acquiring relevant qualifications along the way, it would be a natural assumption for any practising professional to think about registering themselves as an expert witness and offering their expertise in the fight for justice. How, though, can you go about becoming an expert witness, and what factors do you need to be aware of before making your decision?

We've all read about specific cases in the newspapers or watched and listened intently to experts on the television and felt that the information being presented as fact was either unsubstantiated or incorrect. Indeed, such occurrences have actually led to some appalling miscarriages of justice down the years. You need only cast your mind back to the dreadful case involving solicitor Sally Clark – who was accused of killing her babies – to realise the powerful influence testimony given by an expert can have not only on the case at hand but on peoples' lives in general.

If you're thinking of becoming an expert witness, you must feel confident enough to give evidence in spite of the possible outcomes for any of the parties involved, but also be certain that you've presented the facts to the Court (by way of your knowledge, experience and skills) from which the only conclusions drawn must be the right ones. To be able to do this, the first question you must ask yourself is what qualifies you to be an expert.

### The necessary credentials

In recent years, some important cases have revealed the Judges' view on what makes a good expert. It's worth taking note of what has been said. The role of the expert is clearly set out under Section 3 of the Criminal Evidence Act 1972, which stipulates that an expert is "only qualified to give evidence that's relevant if his or her knowledge is beyond that of a layman, and such evidence has to relate to a factual issue in the case". Ignore this description at your peril, as it appears to have a variety of implications.

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The first point to make is that the evidence given must offer some insight into a particular issue and not just state the obvious. In the case of Liddell versus Middleton, for example, it was successfully argued (on appeal) that the evidence of the appointed expert should be excluded on the grounds that it contained no more information than that which the Court could decide for itself.

The second point taken from the description is that you must be qualified in the eyes of the Court to give evidence in the first place. In the case of R versus Silverlock, much was made of the lack of formal qualifications held by the case's expert witness, although it was eventually accepted that the expert in question had several years' experience.

***Whether you rely upon experience or qualifications or experience, keeping yourself up to speed is essential if you don't your evidence to be called into question.***

Beware of presenting yourself as an expert of a particular area or field if the expertise required varies from your own and/or requires some amount of research before you can comment. Solicitors, barristers and even Judges have been known to expose a weakness or a lack of comprehensive knowledge on a particular matter upon which you may be required to give evidence.

The expert in the case of Hawkes versus Southwark was criticised by the Judge over such matters. Although he possessed a degree in mechanical engineering and had given evidence on manual handling accidents on numerous occasions in the previous three-and-a-half years, the Judge felt this didn't qualify the witness to give evidence on a case in which a carpenter who, while definitely carrying a door, was knocked off balance and fell down a flight of stairs.

Although Lord Justice Aldous accepted the argument that the employer was in breach of the Manual Handling Regulations 1992, and acknowledged the expert's qualifications and his experience of giving evidence in other cases, the Judge stated that the expert hadn't attempted to carry a door up the stairs nor given evidence that he'd taken part in any such manual handling operations of this type. The Judge went on to say: "The fact that a person possesses expertise in aspects of manual handling cannot qualify him or her as an expert in all forms of manual handling".

In these situations it may be advisable to do the necessary research beforehand so as not to get caught out, or simply to state the parameters of your expertise rather than wait for the Court to point them out to you. As occurred in the case involving Noviera versus Prudential, where the Court stated that as well as giving independent unbiased evidence, an expert should tell the Court if they didn't have experience of a certain aspect of the case upon which they were being questioned, or if they had insufficient information on which to base a properly researched conclusion.

Not having specific experience in a certain element upon which you're required to provide evidence isn't the only issue determining what qualifies you to be a good expert in the eyes of the Courts. The case of Hawkes versus Southwark brought up the issue of what the Judge felt qualified a person as having experience, and it amounted to a sizeable period of time and a number of cases. In practice, this will vary from Judge to Judge, and depend upon the seriousness of the case. It couldn't be a hard and fast rule, otherwise we'd be unable to have any new experts to provide evidence!

A similar warning must go to those who rely on qualifications as a basis for expertise as Courts have been known to only authorise evidence by an expert that was in relation to specific topics covered by their course and/or training programme. Whether you rely upon experience, qualifications or a mixture of the two, keeping yourself up-to-speed is essential if you don't want your evidence to be called into question.

It also helps to support your findings if you're still practising in those areas from which you're drawing your expertise.

## Opinions, bias and independence

When appearing as a single or joint expert, it's important to stick to the evidence and be careful when appearing to offer opinions or advice on what should or shouldn't happen as neatly highlighted by the aforementioned Liddell versus Middleton case.

The Lord Justice Stuart-Smith said: "The expert witness was not entitled to draw conclusions from the statements of witnesses to the accident. "He also went on to comment that an expert is also not entitled to conclude what actions the defendant could or should have taken based on eyewitness testimonies.

In the case of R versus Theodosi, the evidence given by constable Strong was found inadmissible on appeal due to three factors. The Judge agreed that (i) the comments made by the constable were outside his expertise and highly speculative (ii) based on what he had heard in court (hearsay) and not evidence and (iii) was usurping the Court by answering questions only the Jury should decide upon. This isn't to say that experts cannot have (or, for that matter, voice) their opinion on matters. Expert witnesses may be called on to state their opinion on issues covered by their specialist knowledge or skill in cases where the Court itself cannot form an opinion (as in the case of R versus Oakley).

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Remember, however, that opinions given should be completely unbiased and that, in all cases, the expert's duty is to advise the Court and not make a good case for the instructing solicitor. Major reviews of guidelines have been undertaken to ensure that important evidence isn't omitted because it weakens a particular side's case, or that the experts present biased evidence to the Courts because they're effectively acting as a 'hired gun' (as the expert admitted to the Court in the case of Whitehouse versus Jordan).

Courts take a very dim view of biased reporting, as seen in the case of Spencer & Spencer versus Adlers & Anor. In this case, the report of the expert forensic accountant called by one party was dismissed by the Judge, who suggested that: "The report was not addressed to the Court, but rather to the defendant's solicitors" (and said that it even contained recommendations on how to damage the claimant's case while furthering their own).

There are always pressures brought by the client and the instructing solicitor to produce reports and evidence that fully support their case, but don't be tempted to let this unduly influence the comments you make. Although the contract you'll possess will be with the solicitor and not the Court, if you're adjudged to have failed your duty to the Court then you could well be liable.

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## Rules, regulations and punishments

Courts hold the guidelines governing the judicial process in very high regard, and it's worth making sure you're up to speed on these before you accept any instructions from a solicitor. In the case of Stevens versus Guillis & Pile in 1999, an expert was debarred from giving evidence because he wasn't up-to-speed with the theory and practice behind the Civil Procedure Rules (CPR).

**Expert Witnesses need to ensure they have a clear understanding of the theory and practice behind the Civil Procedure Rules (CPR).**

Besides the CPR guidelines, it must be remembered that specialist jurisdictions have their own requirements. For their part, experts are expected to act in compliance with approved expert protocols – so it's well worth reading up on particular Court guides or practices that may be in effect if your case goes to Court.

Many solicitors have commented that the amendments to the CPR rules translate into less experts, less money for experts and less time available for those experts to respond, so if you're busy with other work – or if this is to be your only source of income – you may wish to think again. Courts can now limit the amount paid out to experts on any one case, while solicitors are notorious for making their experts wait months for even the smallest amount of money. Figures show that less than one-in-four bills for expert witness services are actually paid on time.

Of late, the situation has become so bad that some individual experts have found it impossible to continue to work alone, and are now looking to bigger expert witness practices to sub-contract work their way rather than wait months on end for payment. There is even a company specialising in obtaining payments from instructing solicitors for waiting expert witness clients (thus clearly showing there's a need for this type of intervention...for a fee).

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The difficulty when chasing payments from solicitors is that they're often of the opinion that experts always wait until the end of the case or settlement of fees – which can be years later – and if you apply too much pressure when chasing them you might jeopardise any future work that may have been received.

Problems with fees usually arise from disagreements (post case judgement or resolution) over what rates were agreed, payment terms, hours / costs incurred and whether the client or the instructing solicitor is to pay the bill.

Recent surveys into the issues have discovered that the solicitors and law firms aren't necessarily all to blame. Many experts admitted to not having a form of contract when accepting instructions, not stating by which date fees are required to be paid and not giving solicitors an estimated hourly fee (or estimates on the time needed to conduct the work).

## Obtain a written agreement

The best way to avoid these issues is to ensure you obtain a written agreement from the firm instructing you of acceptance of your fees, supplier terms and conditions and an initial 'project' fee (i.e. the estimated costs for the project) prior to the commencement of work. It's also advisable to keep a breakdown of all time and costs incurred in support of your fees in case there's any subsequent dispute.

You may also wish to include a small amount to cover legal fees should there be a disagreement (most solicitors and law practices do, after all). However, consider your fees carefully as the Courts may limit the amount paid to experts and you might well lose work if your costs are unreasonable

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Time is also important and while it's not always necessary for the expert's report to be presented by the expert in Court, you may find that your evidence will not be accepted if you can't attend in person. Failure to comply with the rules or any excessive delays may also result in the instructing party being penalised in costs and, in extreme cases, stopped from placing evidence before the Court.

In the case of Rawlinson versus Kimberley Clarke, the case was thrown out as the expert was unavailable on the dates the Court proposed for the hearing. In such instances it wouldn't be uncommon for the instructing solicitor to sue the expert on the grounds of negligence, failure to carry out their duty to the Court or failure to abide by the contractual terms agreed when initially instructed. Even if you have no desire to go to Court, you could well end up there if there's any failure to comply with the CPR.

The rising cost of insurance premiums is well documented, but this is something you'll have to look into. As an expert witness, you'll enjoy a certain amount of immunity from recourse because of your position, but poor advice or failure to comply could cost you. Professional indemnity insurance and public liability would be a useful back-up should something go wrong.

There's also the cost to one's reputation to be considered – as demonstrated by the case of the expert used in the Sally Clark trial. The eminent paediatrician Professor Roy Meadows' evidence is now being called into question on a number of other cases, and he's had to face much personal and professional criticism over his role in the case. Although this particular situation is both rare and unfortunate, it shows just what sort of impact poor advice could have on your business and reputation. With this in mind, it's always advisable to protect yourself with the right level of insurance.

***The cost to one's reputation should always be evaluated when considering taking on a particular case (especially where media interest is high)***

## Carrying out other work

If you undertake other work in-between providing expert witness services, you need to be aware that this might be affected by the demands of the solicitors or, indeed, the Court.

Due to the nature of the legal system, and the workloads of the average solicitor, they often only have a few weeks or days to instruct an expert and for a report to be published.

In most cases there might be amendments to be made or responses to questions or clarification of comments within the original draft to be added. All with short notice and tight deadlines. If the case is likely to go to Court, dates are usually planned way in advance – but be prepared for a late settlement and cancellation of your Court appearance.

The caseload also varies greatly, and will depend upon how many experts there are offering such services, and how many cases there are to work on. That said, this changes from month to month and year to year. You can do a lot of marketing, offer the most favourable rates and ensure that you're the most experienced and learned expert in your field, but there's still no guarantee you'll have a regular influx of cases to work on.

In short, the diary of the expert witness must be flexible. It's generally best not to rely on providing expert witness services as your only source of income! That said, there is little doubt that providing expert witness services can be extremely rewarding. Indeed, it's pretty fascinating playing the detective, piecing together bits of evidence to see the various different factors contributing to a certain solution.

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***If you would like further advice on this subject or would like to speak to an advisor, call our consultants on 01252 782664 or alternatively email: [info@ija.co.uk](mailto:info@ija.co.uk)***

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