MEETING OF THE PARLIAMENTARY AND SCIENTIFIC COMMITTEE ON MONDAY 22ND MAY 2006

In 2003 three criminal cases involved prosecution of mothers for causing the death of their babies, in which the mothers had suffered the loss of more than one infant. Police investigations relied on medical expertise and raised serious concern about the role of expert witnesses in court. The overriding issue is to prevent miscarriage of justice while protecting the interests and safety of children.

How will the outcome of these events affect the role and responsibilities of expert witnesses today and what changes to current legal and/or scientific practice, if any, will be required in future?

Science in Court: Expert Witnesses in the Dock

Baroness Kennedy of The Shaws QC

In most cases expert testimony is but one facet in multiple layers of evidence, but there are occasions when cases turn on expertise, including work I was involved in on Sudden Infant Death, following miscarriages of justice concerning Sally Clark's and Angela Cannings' convictions for killing their babies. Furthermore the General Medical Council (GMC) was reported by the Attorney General after a ruling that Professor Sir Roy Meadow should not have been struck off for giving mistaken evidence in Sally Clark's trial, since it had been decided in an earlier case that one cannot function as a doctor when performing as an expert witness.

The miscarriages of justice raised concerns about members of the medical profession, and the Royal College of Pathologists and the Royal College of Paediatrics, to their credit, took the initiative and asked me to lead an enquiry into ways in which they could prevent such miscarriages of justice happening again. We need to feel a sense of outrage that persons can be wrongly convicted and those cases touched on a raw nerve, especially the idea that someone might firstly lose their baby, and then be accused of having killed that child. However there are carers and parents who cause children to suffer and do kill their offspring. So it is very important that we try to find ways of squaring that circle without putting liberty at risk. We also have to do justice to those who have no voice in our society and make sure children are well protected while making sure parents are not wrongly convicted.

I sat on this Commission with paediatricians, a coroner, and a director of social services, with expertise in this field. Evidence was taken from Judges, and the Director of Public Prosecutions and we prepared a protocol which we hope will prevent these things happening in future and examined the role of the expert witness to understand how things might have gone wrong. Unfortunately doctors sometimes base their testimony on medical belief rather than scientific evidence. Good diagnosticians do have that feeling of something in their bones, but it is not good enough in a criminal court.

There are other temptations in the adversarial arena, pushing people into certainties where there are none with barristers for the Crown hating the words "I don't know", because you have to prove your case beyond reasonable doubt. As soon as the witness you have called says "I don't know" or "it might be the proposition you are putting to me (this to the defence lawyer) is right," the defence can see the possibility of undermining the Crown case. There may be other evidence that comes before the Court that leads to a conviction on the case of beyond reasonable doubt, but very often witnesses are told that if you express any doubt at all you are presenting a gift to the other side.

But expert witnesses also find themselves in positions where a high level of certainty may be lacking and should be willing to make proper concessions. Expert witnesses are independent and they are not there to win the case for a side. Even if they are being called by the Crown or the defence, they don't belong to anybody. However, just as lawyers and judges can experience case-hardening, so can doctors and experts, particularly if they are always called by one side, and don't have that balancing experience of doing it for all sides. If you spend your life dealing with children who have been abused and see the horror of how this impacts, then maybe you start seeing it everywhere.

People say to me, "how can you defend somebody who you know is guilty?" It is for the Court, the judge and jury to decide whether they are guilty and my role is to give voice to my client's case and I'm not the person who is sitting in judgement. You also have to give some people a sense of how ridiculous their account might be, but as a lawyer it is not my duty to judge and in the same way the expert should say it is not their role to be the judge and jury. You have to be reliant on your expertise and to examine whether the evidence is compelling and whether it is supported scientifically, to express a view in criminal proceedings.

Doctors sometimes, through lack of training, fail to appreciate the difference between the roles of professional and expert witnesses when in the latter case they will be able to express an opinion, but basing their views on science. At other times doctors may appear in a professional capacity describing their treatment of a patient. The temptation is that people try to turn them into experts: for example, "While you're here reporting on the anatomical aspects of the post mortem you conducted, can I just ask you if somebody has a wound of that length do you think….?" The doctor is then being turned into an expert, having been called in a different capacity. It is very important for doctors to say, "I'm sorry but are you asking me in my role as the person who dealt with this particular case or are you asking me to turn myself into the expert in the case?" Judges should hold the reins on that and very often fail to do so.

The GP's evidence in family courts is subject to a different standard of proof. For example, in a child abuse case in the family court, the trial is a balance of probabilities and the court will make it clear that their first purpose, above all else, is the interest of the child. What is required of an expert there is different from that in a criminal court where the standard of proof is much higher and where liberty is an issue. Experts need to know those distinctions and the ways in which the courts have different sets of priorities and where a family court might say "on the balance of probabilities and with the help of experts we believe that a child may be at risk here and we will therefore take this child away from its family" but that evidence would have been insufficient in the criminal court to punish on a criminal basis and send someone to prison.

We found that where there was failure by parents of babies who died, it was usually not due to criminal failure that should be dealt with by the criminal courts. It's not usually about people being wicked, but about the suitability of people as parents, or their capacity for parenting, possibly affected by drink or by drugs.

Experts are frequently called by the defence where babies have broken bones that are attributed to natural causes unrelated to abusive parental behaviour. The question is whether this has any scientific basis – were there peer reviews? Are there any scientific publications on the topic? Did those in the scientific and medical community have an opportunity to debate this matter? There has to be some control in the court from quacks and people presenting them as people with expertise.

A separation is required between carers and experts. It is incorrect for GPs with families in their care, or for a hospital paediatrician who receives a dead baby in an ambulance and has to speak to the family and has the trust of the family, to become experts in court. It is far better that someone new provides expertise, but very good records will have to be kept by all those who are involved professionally.

In the Sally Clark case a vital piece of scientific information was withheld from the defence – the presence of a staphylococcal infection in the lungs. It was felt that it would be elevated into something much more important than it should be and allow somebody that had killed a baby to get away with it. But then you are doing exactly what you are not supposed to do as an expert, you don't try to replace those who are judging the case.

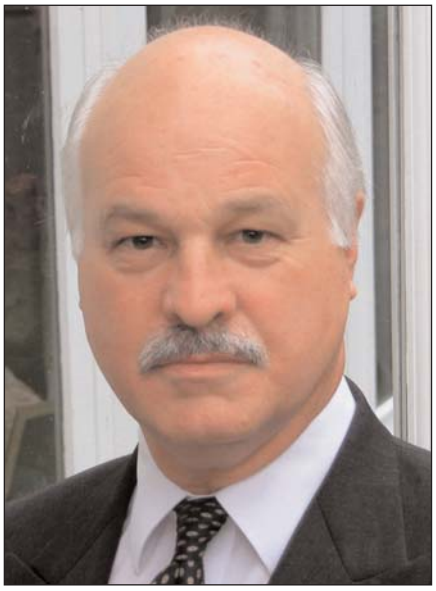
The judge should have prior indication of agreement and disagreement between experts in cases with complex expert testimony, and highlight the issues which exist between the parties. If it is evenly balanced, with a case turning virtually exclusively on that evidence, the case should not proceed, because it would be impossible to have a conviction, and it is wrong to expect a jury to make a judgement between two sets of expertise, when each is based on peer reviewed evidence, but perhaps one is based on newer information. Lord Steyn has said in the House of Lords, "It would be entirely wrong to deny to the law the advantages obtained from new techniques and advances in science."

It is important to ask the following: What is the expert doing in practice and is the expert still in practice? When did he or she last see a case in his or her own clinical practice? To what extent is the witness an expert in the subject to which he or she testifies? Roy Meadow fell into error when roaming into statistics which was not his field of expertise. Judges should help witnesses clarify where they have expertise and where they do not, are they in good standing with their own College and up to date with continuing professional development? Has training in the role of the expert witness been undertaken in the last 5 years? To what extent is his or her view widely held? If it is not widely held, is the view still based on science, rather than something that is to a large extent conjecture? Judges should also be alert to the cosiness that develops in the courtroom because the same witnesses reappear frequently.

Our recommendations indicate that expert witnesses from outside the jurisdiction should be tested with the same rigour as British experts. The court cannot be the playing field of the retired or of those who present a new theory which has not been subject to scientific peer review. The bar has been set very high because of the miscarriages of justice concerning paediatrics leading to a dearth of pathologists or paediatricians. I heard the Attorney General saying that we should have them struck off if they get it wrong in the courts. I am not sure it was a very timely moment when we are trying to encourage people to stay in this field. It is important to have their expertise while making sure that they operate appropriately and rather than debarring doctors we should be providing them with better training, otherwise we will have courts without the expertise they require. We also need to train judges to be much more skilled and proactive in exercising their duty to establish the expertise of witnesses.

SCIENCE IN COURT – EXPERT WITNESSES IN THE DOCK

James Badenoch QC
Chairman, Expert Witness Institute



The role of the expert witness is currently under the spotlight as never before. This is the result of a few high profile recent cases; of certain actions of the General Medical Council; and of critical but often ill-informed media comment.

Part of the problem has been a lack of balance in the publicity attending the recent cases, due to failure, wilful or otherwise, to understand or report them correctly. In the Sally Clark trial, Prof Sir Roy Meadow wrongly strayed beyond his expert field of paediatrics by giving evidence for the Crown of the statistical improbability of two cot deaths occurring in the same family by chance alone. He misinterpreted the statistics, but there had been no prior enquiry by the prosecution into their validity, and the defence did not challenge them in cross-examination despite discernible fallacy. The trial judge told the jury to disregard them, and successive Courts of Appeal and the GMC expressly found that the professor had given the evidence in good faith. In fact, the pathologist who reported the post mortem findings, but who gave no expert opinion evidence, had failed to disclose to the prosecution the presence of bacteria in bodily samples. This omission of factual material (notwithstanding much evidence capable of pointing to guilt) was the ground upon which Mrs Clark's conviction was overturned.

Professor Southall was disciplined by the GMC for having voiced to police (not in the witness box) his expert opinion that Mr Clark's televised account of a spontaneous nosebleed in his infant son could not be true, and signified deliberate suffocation. In the case of Trupti Patel the mother was acquitted of murdering her babies, which is not an indictment of expert evidence. In the Angela Cannings case no expert erred or misled the court, but her conviction was quashed on the ground that when reputable experts disagreed in court about the aetiology of fatal injuries (some of them allowing the possibility of natural causes) the jury could not, without other extraneous evidence proving guilt, safely be sure about it (though the jury had clearly thought otherwise).

The apparent effect of the Cannings decision, namely that opposing expert theories must necessarily neutralise the prosecution case, was swiftly modified in R. v. Kai-Whitewind, with the Court of Appeal holding that a dispute between experts about the interpretation of findings did not automatically extinguish those findings, which remained to be evaluated by the jury.

Yet these cases have quite unjustifiably engendered widespread vilification of expert witnesses generally, as a dangerous source of misleading evidence and a cause of avoidable injustice. This has produced a doubly malign effect:

Public perception of expert witnesses appears increasingly unfavourable, due in part to ignorance and/or misunderstanding, with consequent lessening of confidence in the justice system as a whole.

Experts are, by report, becoming increasingly reluctant to give evidence, for fear of unpleasant consequences, personal or professional (or both), particularly in child abuse and child protection cases, which adversely affects access to justice, and further endangers some of the most vulnerable in our society.

Ignorance of what exactly an expert witness is (I mean of what qualifies him to give opinion evidence) is depressingly apparent in the minds of the public, and of a few vociferous commentators. Expert witnesses are in the dock partly because of the notion quite widely peddled and believed that they are a breed of plausible rogues, probably qualified only by white hair and gold-rimmed glasses, who style themselves expert witnesses and are willing in return for large fees to provide ostensibly learned opinions on any subject, with conclusions to suit their paymasters.

It is crucial that this demonisation, and its malign effects, are countered and reversed. We need to get across that an expert witness is an expert first (in his specialised field), and a witness (selected for his learning) second, and that there are very exacting standards imposed on expert witnesses by the law. We need to explain how huge is the number and variety of cases in which justice depends on expert evidence. Finally we need to restore the confidence of the experts themselves, by educating them in the requisite legal standards, and demonstrating that conscientious adherence to those standards will rightly protect them from public opprobrium, and from the threat of judicial sanction, and from professional discipline.

Media coverage promotes a general awareness of the contribution to criminal cases of fingerprint and scenes of crime experts, pathologists etc. Too few, however, understand how many other issues before the courts in a complex society are incapable of fair resolution, with the right remedy or outcome, without expert witnesses to supply understanding (which litigants, judges, tribunals and juries lack) of

technical matters which are central to the case.

The following is a random list of subjects requiring expert evidence, some commonly. It covers only a fraction of these instances, but is instructive:

the allegedly faulty radar gun or speed camera;
the adequacy of the guard on a factory machine;
the state of the brakes on a runaway lorry;
the indications for urgent Caesarean Section;
the mechanisms of brain damage in a foetus;
mental capacity when a will was changed;
the cause of an aircraft crash, bridge collapse, or wall subsidence;
disputed paternity;
the cause, extent and effects of bodily or psychiatric injury;
the measurement of aircraft noise;
vehicle speeds before a collision;
the best interests of young children.

Every day across the land courts rely on expert evidence on topics like these to decide the just attribution of criminal or civil liability. "Expert witnesses are a crucial resource", said the eminent judge Dame Elizabeth Butler-Sloss, "without them we [the judges] could not do our job".

What the law in broad terms asks of the expert is:

that he has the relevant expertise, and does not stray outside it;

that he reaches his opinion on adequate grounds, after diligent enquiry;

that his opinion is honest, uninfluenced by the interests of the parties;

that he is prepared to change or modify his opinion if good reason is shown, and does not adhere stubbornly to a position for the fact alone that it favours the side which enlisted him.

These principles, amplified and extended, are enshrined in Part 35 of the Civil Procedure Rules 1998 and in the Practice Direction which supplements it. This Practice Direction repays study, and is printed on page 32. The new Criminal Procedure Rules, whose introduction is imminent, will largely echo the civil ones.

Do expert witnesses unfailingly meet these standards? The answer today is that they do in the vast majority of cases, but not always. In *Phillips v. Symes [2004] EWHC 2330 (Ch)*, a case founded on psychiatric evidence of mental capacity, Mr Justice Peter Smith ruled that an expert witness could be condemned personally in wasted litigation costs if, by his evidence, "he causes significant expense to be incurred, and does so in frequent divergence from his duties to the Court". In *Pearce v. Ove Arup Partnership Ltd* [2002] IPD 25011, Mr Justice Jacob (as he then was) referred an expert witness to his professional body for consideration of disciplinary proceedings, for having given "biased and irrational" evidence to the Court. [I understand the professional body took no action].

As for truly impartial detachment from the enlisting party's interests, things are more difficult. In my principal field of legal practice, clinical negligence, it is noticeable that experts of matching experience and distinction are very often found, on identical facts, to take diametrically opposite views for the Claimant and for the Defendant, and with apparently equal conviction and sincerity. At the 2005 annual conference of the Expert Witness Institute the Master of the Rolls, Sir Anthony Clarke said this:

"I have listened to many experts giving evidence, and there have been times when I have wondered what they would have said if they had been instructed by the other side instead.……It seems to me that there is at least a risk that a person who is asked to express an opinion by a party to litigation, however much they try to be entirely objective, will tend to [bend] their opinion in the interest of the client, at least in the grey areas – which appear in almost every case. It is inevitable – it is human nature".

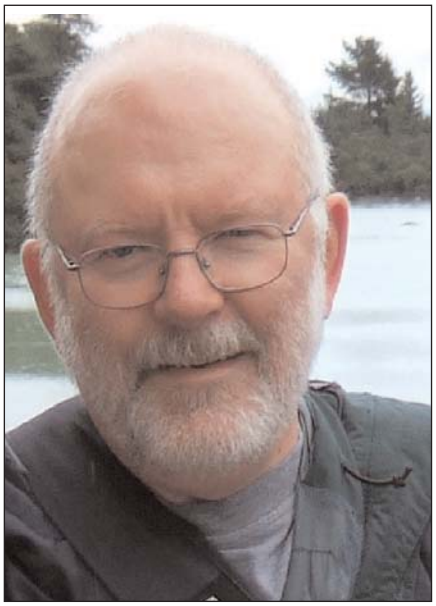
We cannot change human nature, but lawyers must be mindful of it. The Master of the Rolls pondered the solution of requiring experts to report without first being told from which side of the dispute their instructions came. Certainly the lawyers have a clear duty to ensure when preparing cases that expert evidence is soundly based, and that experts have considered the merits of contrary arguments and tested their own against them, before their reports are served and before they are called to the witness box. This discipline may not be universally followed, but it should be, and training in these principles for lawyers and experts alike is already a priority.

These concerns notwithstanding, it is the fact that in every contested case where expert evidence is in issue under our adversarial system, there will by definition be differing opinions expressed on either side. In the criminal court the jury may be left unsure of the correctness of one opinion or the other. In the civil court the judge must decide which of the two should prevail, always of course with the unscientific luxury of determining the issue "on the balance of probabilities". In either case the effect of the verdict or judgement is that one of them is probably wrong, or at least not provenly right. Yet at the end of these cases we do not expect a hue and cry, or allegations that the expert whose opinion has been rejected has acted dishonestly, improperly or culpably. For in all specialist disciplines there are difficult areas where expert views may differ markedly on grounds which are at least arguable, and are advanced with complete sincerity.

To restore the willingness of experts to offer their skills to the courts, and to protect this crucial resource of justice from further erosion is an essential goal. To do this we must make sure, and make clear, that provided the expert witness does his conscientious best to comply with the requirements of the Rules, it cannot and will not be a ground for legal, professional or lay complaint that his opinion is held to be wrong, or is for whatever reason rejected, disregarded or not preferred. Provided the opinion is honestly held, is not outwith his expertise, and is impartially presented after appropriate and diligent investigation, the expert witness has done his duty, and done it properly. That he should continue to be willing to do so, and that public understanding of the importance and value of expert evidence should be enhanced, is vital to justice, and to the confidence all need to feel in the justice system.

SCIENCE IN COURT – EXPERT WITNESSES IN THE DOCK

Professor Robert Forrest LLM, FRCP, FRCPath, CChem, FRSC, President, Forensic Science Society, Honorary Professor of Forensic Chemistry, University of Sheffield



Expert witnesses have long been subject to criticism both within and outwith courts. 150 years ago, on 22nd May 1856, the trial of William Palmer at the Central Criminal Court was reaching its conclusion as expert evidence for the defence was being adduced. Dr William Palmer was a member of the Royal College of Surgeons who practiced in Rugeley, in the Black Country. He enjoyed the life of the turf spending more time on his string of racehorses than on his practice. Suspicious deaths had clustered around him from the time he had been a student. The death that led to his trial for Murder at the Old Bailey was that of his friend John Parsons Cook who died in convulsions under his treatment. Strychnine poisoning was suspected and viscera collected at a post mortem examination organised by Cook's stepfather was submitted to Dr Alfred Swaine Taylor, at that time England's leading Toxicologist. When Dr Taylor received the samples there was evidence that they had been interfered with and Strychnine could not be detected.

The evidence presented at Dr Palmer's trial was largely circumstantial and with a broad leavening of opinion evidence. Expert evidence centered around the detectability, or lack of detectability, of Strychnine at post mortem examination of humans and animals who had died of Strychnine poisoning and alternate explanations for Cook's death such as Tetanus or Hysteria. Amongst the great and the good giving evidence for the Crown were Sir Robert Christianson, Sir Benjamin Brodie and Dr Alfred Swaine Taylor himself.

During the course of his trial, Palmer passed a note to his Counsel stating:

"I wish there was 2½ grains of Strychnine in old Campbell's (the Judge) acidulated draft solely because I think he acts unfairly."

The trial lasted for twelve days and the jury returned a Guilty verdict after retiring for 1 hour and 18 minutes. Dr Palmer was sentenced to death.

If he had been found "Not Guilty" he would have immediately been charged with the murder of his wife, Annie Palmer, whose body had been exhumed and had been found to contain large amounts of antimony.

There are many lessons for today in the trial of Dr Palmer.

Palmer exhibited a considerable amount of dysfunctional behaviour as a student, a factor which is not uncommon among doctors and nurses who systematically kill their patients today;

there were a large number of deaths before the penny dropped;

there was a mass of circumstantial evidence against Palmer;

the forensic evidence was sparse and controversial;

there appears to have been some difficulty in obtaining expert evidence for the Defence;

there was a clear conflict of expert evidence and a demarcation in those giving the evidence.

Experts from London and Edinburgh appeared for the Prosecution and from the provinces (including Dublin) for the Defence.

There was an extra-curial campaign orchestrated by friends of the Defendant; for example, a journalist obtained an interview with Dr Taylor and what Dr Taylor claimed were false pretences and comments made by Dr Taylor at the interview were used in his cross examination.

There were allegations of interference with the physical evidence.

Controversy continues 150 years after the trial and Palmer's execution.

150 years later, on 18th April 2006, an article appeared in *The Times* by Phil Willis MP under the somewhat provocative title "*There'll be no playing to the Court thank you Professor*". (I appreciate that this title may have been applied to the article by a sub-editor).

Willis raises a number of interesting points in his article; taking the title

first, it will be abundantly clear to this audience that the native ability of an individual to present complex concepts in Court and elsewhere varies. The ability to present complex information accurately so that the average man can understand it is, or ought to be, part of the stock in trade of a politician. The problem arises when this skill is used in a biased and unfair way. As far as presenting expert evidence, or indeed any evidence in court is concerned, training can help to level the playing field but will not totally flatten it. I would certainly favour mandatory training in court procedure and the presentation of evidence in court before a court accepts an individual as an expert, that is to say, someone giving opinion evidence. Obviously there have to be exceptions which I think could safely left to the discretion of the court.

This brings up the question of recognition as an expert by the court. Some argue that it is one step from registration as an expert by some formal body as a prerequisite for giving opinion evidence to the system of court registered experts used in the Civil (Roman) Law systems. This system does have some advantages, perhaps more for the prosecution than the defence. One obvious disadvantage is that the court will choose an expert for a "*counter analysis*" when the defence wishes to challenge scientific evidence. The Defendant may not have access to the physical evidence and, in many jurisdictions, cannot influence the choice of the expert.

In my experience, experts from Civil Law jurisdictions do not fare well when they come to the United Kingdom and give evidence in an adversarial setting in the Criminal Courts. It is certainly arguable that court appointed experts in the Criminal Courts could weaken the ability of a Defendant to call whoever he wishes to give pertinent expert evidence in his defence. Court appointed experts need to be clearly differentiated from experts recognised by the court.

There are advantages for the expert in systems where there is formal recognition (or appointment) as an expert by the court. Not least might be the issuing of an identity card recognised by Court Security Officers which allows one to carry the tools of one's trade, such as calculators, laptop computers, dictating machines etc into the court building. One of my most humiliating experiences when assisting the court as an expert (at the request of the Prosecution) was having every piece of electronic equipment in my possession, except my watch, removed from me on entry to the Victoria Magistrates Court in Birmingham, including a calculator lovingly programmed with a series of "what if" scenarios that I expected to be put to me when giving evidence. When I remonstrated I was rewarded with a pat down in public by a Security Officer of the opposite sex. Fortunately, as there is no taxi rank rule for expert witnesses such issues are easily addressed; one can decline to accept instructions to appear in courts which adopt such policies. One problem of court appointed experts is that one can become part of a cosy little club with the potential for opinion evidence not being subject to the vigorous scrutiny that it would be in an adversarial system. Finally, there is the possibility of the court appointed expert being able to hide behind instructions issued by the examining magistrate rather than carrying out a "full and fearless" examination of the evidence.

The question of the disciplining of experts arises. Personally, if present, I would far rather be judged by Judges than a General Medical Council or Council for the Registration of Forensic Practitioners Disciplinary Committee or, as Phil Willis suggests, by the Criminal Cases Review Commission in respect of any allegation of incompetence of malfeasance in the presentation of evidence. Many medical practitioners have lost faith in the ability of the General Medical Council to competently and fairly assess alleged incompetence or malfeasance by a medical pactitioner assisting the courts as an expert. I, for one, would be much happier to be judged in those circumstances by a High Court Judge, perhaps assisted by an appropriate assessor.

One comment made by Phil Willis in his article was:

"Judges are not well placed to determine the validity of new scientific techniques or theories. An agreed protocol for validation should be introduced, as in the US."

Whilst recognising that the United States is not a uniform jurisdiction, the Federal Rules of Evidence, in particular Rule 702, does provide a template which, interpreted in the light of cases such as *Daubert* for scientific evidence and *Kumho Tire* for technical evidence certainly provides a useful precedent that law makers could consider if a statutory protocol for the introduction of scientific or technical evidence in the Criminal Courts were to be introduced.

Nonetheless, such a protocol would still require Judges and Advocates to have a considerable degree of scientific insight if they were to assess appropriately the evidence which it was proposed to lay before the trier of fact. I would suggest that if such a protocol were to be introduced, then there would be need to increase the budget of the Judicial Studies Board for Judges and to consider introducing more training, with mandatory continuing professional development, in scientific evidence and opinion evidence based on scientific evidence for Advocates and pupils.

As a really long shot, I would suggest that it might be appropriate to make Law a post graduate subject, as in the United States, with

appropriate funding to encourage the entry of science graduates to the legal profession. For what it is worth, I would advocate the same for medical practitioners. I believe that 18 is too young to start training in either Law or Medicine. Further, a return to the rigorous study of basic science as the foundation for a medical education may, in the long run, improve the quality of opinion evidence from medical practitioners.

In discussion the following points were made:

Our system is adversarial resulting in polarisation of testimony. Expert testimony could be brought together to benefit all parties. In Singapore, witness conferencing results in evidence being presented together. A register of expert witnesses is not desirable since the variety in the criteria for experts in medical practice, for example, is so vast. Freedom of the individual is important. The following should be actioned: better training of judges and lawyers, very few of whom are scientists; no cosy group relations should be permitted between expert witnesses and judges due to frequent meetings in court; experts should be placed together to establish where they agree or disagree and the differences should be highlighted for the benefit of the court. Counsel from each side should co-operate in this activity. Expert witnesses should rely on sound science rather than authority as the basis for a professional opinion. The resources of the Royal Colleges should be deployed to assist in selection of expert witnesses, in preference to the development of a register. Postgraduate training for doctors and lawyers recommended, with up to four years' training after a first degree in science, though funds for this training do not exist. In general US students are better equipped than their UK counterparts. On the other hand, no special training is required for expert witnesses other than the simple requirement to tell the truth.

Appendix to talk by James Badenoch QC

PRACTICE DIRECTION ON EXPERT EVIDENCE

SUPPLEMENTAL TO PART 35 OF THE CIVIL PROCEDURE RULES

Expert Evidence – General Requirements

1.1 It is the duty of an expert to help the Court on matters within his own expertise: rule 35.3(1). This duty is paramount and overrides any obligations to the person from whom the expert has received instructions or by whom he is paid: rule 35.3(2).

1.2 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

1.3 An expert should assist the Court by providing objective, unbiased opinion on matters within his expertise, and should not assume the role of an advocate.

1.4 An expert should consider all material facts, including those which might detract from his opinion.

1.5 An expert should make it clear:

(a) when a question or issue falls outside his expertise; and

(b) when he is not able to reach a definite opinion, for example because he has insufficient information.

1.6 If, after producing a report, an expert changes his view on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the Court.

Form And Content Of Expert's Report

2.1 An expert's report should be addressed to the Court and not to the party from whom the expert has received his instructions.

2.2 An expert's report must:

(1) give details of the expert's qualifications;

(2) give details of any literature or other material on which the expert has relied in making the report;

(3) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;

(4) make clear which of the facts stated in the report are within the expert's own knowledge;

(5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;

(6) where there is a range of opinion on the matters dealt with in the report:

(a) summarise the range of opinion, and

(b) give reasons for his opinion;

(7) contain a summary of the conclusions reached;

(8) if the expert is not able to give his opinion without qualification, state the qualification; and

(9) contain a statement that the expert understands his duty to the Court, and has compiled and will continue to comply with that duty.

2.3 An expert's report must be verified by a statement of truth as well as containing the statements required in paragraphs 2.2(8) and (9) above.

2.4 The form of the statement of truth is as follows:

"I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."