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New expert witness guidance? Kennedy v Cordia 2016

Expert evidence forms the basis of almost every claim that comes before the courts in personal injury and clinical negligence litigation. The experts instructed will be of fundamental importance to the success or failure of the case. The legal profession are increasingly aware of the responsibility when instructing an expert to ensure that the expert is aware of their duty to the court. Following the case of *Jones v Kaney* (2011),¹ it is important that experts know that their evidence no longer carries immunity from an action in contract or negligence if it is found to be wanting.

In light of this, it is worth reading the judgement in the *Kennedy v Cordia* case.² Who would have thought that a bruised wrist from a fall on an icy footpath in 2010³ would lead to the Supreme Court giving useful guidance on when expert evidence would be allowed in a civil court? The claimant (Ms Kennedy) was employed as a home carer by the defendant. Her work involved visiting clients in their homes and providing personal care. One wintry December evening, she was required to visit an elderly lady. She slipped and fell, injuring her wrist. She sued the company, and called Lenford Greasley as part of her case, a consulting engineer and former factory inspector. Mr Greasley opined that as part of the risk assessment for her role Ms Kennedy should have been provided with some form of anti-slip overshoe which, if worn, would probably have prevented her injury.

The defendant objected to his evidence on the basis that he did not have any special skill, learning or experience. This objection was rejected initially by the court. At first appeal (motivated partly by concerns about the unnecessary proliferation of experts in civil cases

which is seen to be driving up the costs of litigation) the inner house decided that Mr Greasley should not have been allowed to give his expert evidence and that he had overstepped the mark by taking a view that certain regulations had been breached when this was the role of the judge.

Ms Kennedy subsequently appealed to the Supreme Court against this decision.² The appeal concerned the admissibility of Mr Greasley's evidence, and whether the defendants had in fact been in breach of their statutory duties (or negligent) by failing to provide the said overshoes.

Because the case began in Scotland, the judges refer to 'skilled witnesses' - the equivalent of the expert witness in England. The principles of the judgement in this case apply throughout the UK.

In essence, in the *Kennedy v Cordia* case, the Supreme Court judges recognised the need to regulate expert evidence, which can be highly influential and difficult for the other side to test unless assisted by their own expert. They set out guidance regarding the admissibility of expert evidence, the responsibilities of the legal teams and the court in relation to such evidence and the importance of economy in litigation. They outlined how experts may give both opinion evidence and expert evidence of fact, drawing on their own knowledge and experience of the subject matter including the work and literature of others.

The Supreme Court set out four considerations at paragraph 44 of the judgment governing the admissibility of expert evidence. It is, ultimately, for the court to decide, but an expert should be able to answer yes to all four of these questions:

1. Will your expert evidence assist the court in its task?
2. Do you have the necessary knowledge and experience?
3. Are you impartial in your presentation and assessment of the evidence?
4. Is there a reliable body of knowledge or experience to underpin your evidence?

The Supreme Court distinguished between opinion evidence and factual evidence given by experts, stating in paragraph 44 of the judgement, "All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent."⁵

Therefore, opinion evidence (on which most case law focusses) has a threshold of necessity when these four considerations are assessed. Where an expert gives an opinion, a mere assertion is "worthless...what carries weight is the reasoning not the conclusion" (paragraph 48).⁵ However they did not believe that the necessity test applied to factual evidence, particularly where an expert could summarise and present material not arising from their own experience. It might be that the court could receive the same evidence by calling a large number of factual witnesses, but that would be unnecessarily inefficient.

The Supreme Court identified a number of areas where the expert witness might be allowed to give factual evidence:

- Factual evidence based on the expert's own personal observation or experience;
- Information from official publications such as textbooks, peer-reviewed articles, guidelines;
- Evidence of the practices of named relevant parties;
- Evidence of what advice the expert would have given or what he/she would have done in a similar situation.

If the expert is unsure where he/she or his/her evidence stands in relation to this ruling, the matter should be discussed with the instructing solicitor.

In the *Kennedy v Cordia* case, the expert witness was found to have experience and qualifications in health and safety. His evidence on factual matters was relevant and admissible. He had the necessary experience and qualifications to explain how anti-slip attachments reduced the risk of slipping, and his evidence on health and safety practice was relevant.

The Supreme Court decision is likely to make it difficult to argue against the instruction of health and safety 'experts' in the future. However, the principles applied in this case, both in terms of the requirement for expert opinion and the nature and quality of the evidence, can equally be extrapolated to the role of experts in other disciplines in medicine in general, and orthopaedics in particular.

With regard to assisting the court, the judge stated: "It is for the court to decide whether expert evidence is needed, when the admissibility of that evidence is challenged." In Davidson's 2007 textbook on evidence, Lawton stated: "If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. The subject-matter under discussion must be necessary for the proper resolution of the dispute, and be such that a judge or jury without instruction or advice in the particular area of knowledge or experience would be unable to reach a sound conclusion without the help of a witness who had such specialised knowledge or experience."⁴

With regard to a witness' knowledge and expertise, the Supreme Court stated: "The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence. Where the skilled witness establishes such knowledge and

experience, he or she can draw on the general body of knowledge and understanding of the relevant expertise" (paragraph 50).⁵

The Supreme Court reaffirmed the guidance of Mr Justice Cresswell on an expert's duties in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68⁶ in both civil and criminal matters:

"The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports."

Interestingly, the Supreme Court also said that it falls in the first instance to counsel and solicitors who propose to adduce the evidence of a skilled witness to:

"[A]ssess whether the proposed witness has the necessary expertise and whether his or her evidence is otherwise admissible. It is also their role to make sure that the proposed witness is aware of the duties imposed on an expert witness. The legal team also should disclose to the expert all of the relevant factual material which they intend should contribute to the expert's evidence in addition to his or her own pre-existing knowledge. That should include not only material which supports their client's case but also material, of which they are aware, that points in the other direction, viz the court's concerns about one-sided information in *R v Gilfoyle*.⁷ The skilled witness should take into account and disclose in the written report the relevant factual evidence so provided."

This case is important for all experts (including orthopaedic surgeons) to read and consider, as there is useful guidance of which to be aware. However, there are no great surprises or major changes in the law. It is useful to see the Cresswell principles⁸ of expert evidence reaffirmed in this case as they bear close scrutiny and attention by anyone involved in the preparation of expert reports.

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