

'Beware the hired gun'

Are expert witnesses unbiased?

By Henry Lerm

More than a century and a half ago, judges started complaining about the lack of independence and objectivity when hearing expert evidence. That lament was aptly illustrated in the English case of *Lord Arbinger v Ashton* (1873) 17 LR Eq 358 at 374 when the judge stated:

'Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witness, rather consider themselves as the paid agents of the persons who employ them.'

(The dictum was repeated by Sperling in the article *Expert Evidence: The Problem of Bias and Other Things* (New South Wales: 1999 at 1)).

Those cautionary remarks have continued to resonate in different courts around the world. (See the seminal decisions by the Supreme Court of the United States in *Daubert v Merrel Dow Pharmaceuticals, Inc.* 113 S. Ct. 2786 (1993); the English decisions of *Whitehouse v Jordan* [1981] All ER 267; [1981] 1 WLR 246 and the influential judgment of Creswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* ('The Ikarian Reefer') [1993] 2 Lloyd's Rep 68 at 81-82). Those remarks have also not escaped South African courts and the warning by Davis J in the case of *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC) loom large and should be heeded.

This article has a brief look at the nature and scope of the work of expert witnesses and their duties and responsibilities towards the court. The article also deals with the approach of our courts towards expert evidence including, the drawing of inferences and remedies available to the courts, where it is found that an expert has displayed some bias and, with the influence of his or her attorney, acted dishonestly during the process of litigation.

The nature and scope of the work of an expert

Modern day has seen the advance of science in most disciplines in life. This has resulted in complex concepts and principles being explained with greater clarity and certainty. The presentation of forensic evidence such as DNA, ballistics and other types of forensic evidence in criminal law litigation, have caused the courts to decide on complex issues (see *S v Mdlongwa* 2010 (2) SACR 419 (SCA) at para 18). Similarly, on a civil law terrain, the opinion of an expert for example, involving the reconstruction of motor vehicle accidents (see *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (ECD)) or complex assessment of medical risks and causation, cannot be executed without a clinical judgment involving expert evidence. (See *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at para 39; *Wright v Medi-Clinic Ltd* [2007] 2 All SA 515 (C); and *Buthulezi v Ndaba* 2013 (5) SA 437 (SCA) at paras 16 and 17.) The same can be said about many other disciplines, including engineering, aviation and the like.

Where those matters are brought before a court, presiding judges lacking in knowledge and experience would find themselves in uncharted waters, and not be able to adequately decide those matters without expert guidance. (See Meintjies-Van der Walt 'Expert odyssey: Thoughts on the presentation and evaluation of scientific evidence' (2003) 120 SALJ 352 at 353; for case law see also *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (ECD); *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) 616H; and *Holtzhausen v Roodt* 1997 (4) SA 766 (WLD) 779D.) But then for experts to make worthwhile contributions, they must have scientific knowledge and experience in their respective disciplines and be able to give their opinion in a logical and defensible manner.

Duties and responsibilities of expert witnesses

Judges are sometimes mercifully dependent on the special knowledge and skills of experts. Without their evidence, judges will be unable to draw appropriate inferences or reach fair conclusions. That weighs heavily on the duties and responsibilities of experts. (See Price "Dealing with differences": Admitting expert evidence to stretch judicial thinking beyond personal experience, intuition and common sense' (2006) 19 SACJ 141 at 142; see also Meintjies-Van der Walt 'Decision-makers' dilemma: Evaluating expert evidence' 2000 13 SACJ 319 at 326.)

Because of the so-called 'knowledge and/or experience gap', there is a danger that some experts may try to manipulate the situation so as to give an opinion aimed at advancing the case of those who instruct him or her, instead of placing an independent and unbiased defensible theory before the court. To counter that, rules have been designed over time to ensure that experts and those who instruct them, provide the courts with unbiased opinions. Of all the guidelines, perhaps the code of conduct devised by Creswell J in the *National Justice Compania Naviera SA case (op cit)* at 81 on the duties of an expert is the most instructive. They read:

- '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 should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert 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.'

What it all means is this, of an expert is required originality, objectivity and an unbiased assistance to the court. The expert's opinion should be based on all the facts or assumptions. No expert should be unwilling to make concessions about something either not falling within his or her expertise or not known when first expressing that opinion.

The code has since been accepted by the South Africa writers Zeffertt, Paizes & Skeen *The South African Law of Evidence* 5ed (Durban: LexisNexis/Butterworths 2003) at 330 and quoted with approval in the *Schneider* case at 211.

The Schneider case

This case investigated the home-schooling of two minor children. The CEO of an organisation promoting home education, was called as an expert witness by the mother of the children. The said organisation had also funded the litigation. Another expert witness had apparently been brought in as a 'hired gun' to discredit the evidence of a third expert witness. None of this was revealed to the court by the second respondent's legal team.

Besides emphasising that ‘the best interests of children are very serious’, the court found that the second respondent’s legal representatives owed the court a fiduciary responsibility. But, because of their lack of openness, they failed in this duty (at 218H – 219A).

The court stated the primary duty of an expert witness as: ‘An expert comes to court to give the court the benefit of his or her expertise’. Turning to the responsibilities of an expert witness, the court found that he or she must provide ‘the court with as objective and unbiased an opinion, based on his or her expertise An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case’ nor does he or she ‘assume the role of an advocate’ (at 211J – 212B).

As a mark of the court’s displeasure, both counsel and the attorney were reported to their respective provincial law society and Bar Council. The attorney was ordered to pay costs *de bonis propriis* on the scale as between attorney and own client (at 220H and 223F).

Other duties and responsibilities of an expert witness and lawyers

The law also expects of experts and lawyers the following duties and responsibilities:

- Expert witnesses are expected to advance a theory with a theoretical or factual foundation (see the *Wright* case at para 166).
- For their evidence to be effective, experts ought to give evidence that address the issue(s) directly (see the *Wright* case at para 167).
- The reluctance of an expert to make concessions when indicated, may result in him or her being discredited (see the *Schneider* case at para 213C).
- Because lawyers are regarded as officers of the court, they owe the court certain duties including, to act honestly and fairly and to conduct themselves with honour and integrity. They should avoid any conduct which, if known, could damage their reputation. (See Lewis’s ‘golden rule to ethics’ in *Lewis Legal ethics: A guide to professional conduct for South African Attorneys* (Cape Town: Juta & Co 1982) at 7 – 17; see also JR Midgley ‘Ethical and Legal Duties’ 1990 (Aug) *DR* 525.)
- The so-called contingency fee arrangement, alternatively known as the ‘no win-no fee’ arrangement between expert and attorney, where the result of the case determines whether they will be paid, has the potential that some practitioners may be tempted to influence the expert witnesses to give evidence in favour of their client.

Handy hints for attorneys

When instructing an expert witness, the following may well serve as some dos and don’ts:

- Ensure that the expert possess the necessary qualifications, experience and knowledge appropriate to the issue(s) for which he or she is called. Consider the expert’s qualifications; publications in recognised journals; papers delivered at conferences; evidence given before, how he or she fared under cross-examination. Has the expert ever been discredited?
- Where there has been a close social connection between lawyer and expert, care should be taken not to compromise the independence of the expert. The lawyer may well be advised to engage another expert, instead.
- Determine the nature of the relationship between the expert and your client namely, any prior psycho-therapy or any other medical treatment given by the expert to the client. It may also not be wise to call that expert for fear of potential bias. Similarly, identify any close relationship between your opponent and their client, alternatively, between their expert and client. That may come in handy to show up bias in cross-examination.
- That the expert compiles a comprehensive report in language that is educational and understood by you, your opponent and court alike. The contents of the report must also be relevant to the issue(s) before the court.

- Avoid influencing an expert in whatever form as to the opinion he or she ought to give and the evidence he or she should provide to the court. That may very well come to haunt you.

Conclusion

Expert evidence has certainly made a significant contribution to courts' understanding of certain kinds of evidence. It has especially made a difference where it is so complex that judges and magistrates are not always in a position to grasp the evidence with certainty. What has, however, for centuries caused challenges is the lack of objectivity in expert evidence. Instead of experts coming to court to help the court, they sometimes come under the influence of their lawyers just to support the views of the party calling them. Cases involving contingency fee arrangements, may well present temptations to lawyers to call an expert witness as a hired gun. Here, an ethical duty is at war with a craving for gain. But, before a lawyer is tempted, he or she should remind themselves that legal services should never become a common trade commodity. Traditional legal services belong to a noble profession, governed by ethics and not to the cut-throat business milieu, where ethics hardly feature.

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