

## Casenotes

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### What should expert witnesses be told?

*Re S (a child) (expert evidence) [2008] All ER (D) 51*

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The Court of Appeal has considered the scope of the information to be sent to expert witnesses with their instructions. *Re S* concerned a care order for a baby whose father had been accused of sexual abuse. Information that could assist the expert in assessing the risk posed by S's father lay both in the public and private domains.

The father had been cautioned for bigamy and twice prosecuted for and acquitted of sexual offences. Beyond matters of public record, however, the local authority files and the police records contained complaints of sexual interference and grooming, and commentary thereon; these allegations had not proceeded to prosecution. At the case management conference, the judge had directed that both the criminal record and the untested allegations should be disclosed to the expert. The father appealed against the direction, on the grounds that releasing such information would bias the single joint expert against him.

The Court of Appeal referred to the principle that in instructing experts, nothing relevant could be omitted but, equally, material that was unnecessary because it was irrelevant had to be rigorously excluded. Experts must be spared files of documents which are peripheral to their essential task, as this would both create an unreasonable burden upon the expert and increase the costs involved. The Court was also concerned to prevent any risk of bias arising and to encourage co-operation between the parents

and the professionals; it was therefore important to emphasise that local authorities should not introduce into proceedings and send to an expert material that would be perceived by the person being assessed as prejudicial and unfair.

The Court of Appeal ruled that the father's prosecutions and acquittals, together with the caution, could be included in the materials sent to the expert. However, the Court excluded the material from the police and local authority's files, which had not been the subject of the criminal or family proceedings. This decision may be surprising, given that experts are frequently asked to assess risk based on information that is not in the public domain. Nonetheless, their lordships held that the unproven allegations of sexual misconduct by the father did not amount to a risk that needed to be assessed by the expert.

### **Expert witnesses must not opine beyond their expertise**

*Alitalia-Linee Aeree Italiane SPA v Rotunno and others [2008] EWHC 185 (Ch)*

The High Court has outlined the limits to the expert witness' contribution, emphasising that an expert witness should opine solely on areas within his area of expertise. The case concerned the meaning and significance to be attached to the unusual wording of the rules of the Alitalia pension scheme. The experts in question were actuaries with experience of pension fund contributions.

Henderson J was grateful to the expert witnesses for their discussions of the relevant commercial background, standard actuarial approaches and market conditions in the context of which the clause was to be construed. The judge also valued their exposition of the various ways in which pension schemes may be funded and the role played by the scheme actuary in the funding process: how they value pension schemes, the calculations they perform and the assumptions they make.

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The expert had also explained that the wording of the rule on the scheme's funding objectives was too unusual for there to be either any accepted actuarial practice or consensus on its meaning. He proceeded to propose how he would interpret the clause. The judge observed that the expert's mandate was to explain technical points of actuarial practice; in the absence of any standard practice, the interpretation of the words was a matter of law, and thus beyond the scope of the expert's retainer:

"The general practice of actuaries, if it exists, in relation to a clause of a particular type, at the date when it was adopted, would certainly be a relevant factor for the court to take into account when construing the clause. However, the individual views of actuaries on the meaning of particular wording are at best of only peripheral relevance."

It is for the expert to advise on the technical aspects upon which he has been invited to comment, but it is for the judge to decide on how that evidence is to bear upon the judgment. The judge also stressed that he could not accept expert evidence directed to irrelevant matters such as the history of the dispute or criticisms of the actuarial materials relied on by either party in a wider context.

The case illustrates the value of the expert witness in assisting the court in technical matters, but emphasises that at the same time he must confine his comments to areas within his expertise.

### **Conscientious and professional experts can expect the support of the court**

*R (on the application of Doughty) v Ely Magistrates' Court [2008] EWHC 522 (Admin); and*  
*Re P (a child) (care and placement order proceedings: mental capacity of parent) [2008] EWCA Civ 462*

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Expert witnesses have been strongly defended in two separate cases in which an expert's credibility was impugned. Both cases demonstrate support at the highest levels for the work performed by expert witnesses assisting the court.

Doughty considered the controversial issue of the necessary qualifications for an expert. Mr Doughty sought the judicial review of a magistrates' ruling that he was ineligible to appear as an expert witness in an earlier case, which had turned upon the use of a police speed detection device, the LTI 20:20. Mr Doughty had over ten years of experience in the traffic department of the Metropolitan Police, during which time he received training and qualifications in speed measuring devices in general and the LTI 20:20 in particular, both their functionality and the analysis of their readings. However, the magistrates concluded that Mr Doughty "had not acquired sufficient knowledge of the subject", on the grounds that his experience of the LTI 20:20 had ceased upon his retirement in 1999; they felt that his wider experiences were inadequate to compensate his perceived lack of specialist knowledge. As a managing director of a company specialising in providing expert opinions and evidence in road traffic matters, the magistrates' ruling that Mr Doughty's evidence was insufficiently expert caused "serious damage" to his professional reputation. Richards LJ found for Mr Doughty and held that the magistrates were "unreasonable to conclude that the claimant's opinion relating to the LTI 20:20 could be of no value in resolving the issues before the court."

Richards LJ emphasised that the expert's competence is to be determined not on a generalised basis but as a focussed question by the court in the context of a particular case, by reference to the specific issues to which the evidence relates and on the basis of the specific information available to the court as to the witness' knowledge and expertise. His lordship did not, however, choose to contribute more generally to the

ongoing debate on the extent to which official accreditation and / or regulation of experts is desirable or necessary.

Importantly, Richards LJ drew a distinction between the competence of the expert, and the credence granted to his evidence, noting that few factors should affect whether the court would admit the evidence at all, but that a range of considerations would nuance the extent to which the court could rely upon it. One such factor is inadmissible evidence, upon which his lordship commented that while its presence in an expert report should raise questions about the weight to be given to the expert evidence, it was “not a good reason for precluding the giving of any evidence by the witness concerned”. Instead, mechanisms exist to allow for objection to be made to inadmissible material, and where that objection is properly made, the inadmissible material will be excised and not relied upon by the court.

#The court further observed that, while unusual, judicial review was nonetheless appropriate in the instant case. However, despite vindicating Mr Doughty’s position, the court did not allow him to recover his costs either from the magistrates or from the public purse. Expert witnesses should be aware that Doughty’s case concerned very specific circumstances, and that judicial review is unlikely to be a suitable procedure for every aggrieved expert, particularly in view of the precedent against recovering costs.#

Where Doughty considered the factors bearing upon the quality and admissibility of expert evidence, Re P addressed the issues of competence and bias. The expert was a clinical psychiatrist who had been instructed to assess whether P’s mother had the mental capacity necessary to instruct her solicitor; following thorough testing, the expert found that she did not. The mother’s Member of Parliament intervened on her behalf to make two allegations concerning the expert: firstly, that she had incorrectly

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assessed the mother, and secondly, that she was the paid expert for the Local Authority and exhibited bias in her report.

The Court of Appeal took the opportunity to comment upon the role of the expert witness, with particular respect to impartiality and qualification. The Court firstly stressed the expert's supreme duty to the court, which requires the expert to act independently of either party, irrespective of the source of her instructions, in providing objective advice based on her expertise. The expert is to follow the applicable court rules and practice directions, in conjunction with the specific instructions of the court; should the expert have any doubts about her mandate, she is to seek guidance from the instructing solicitor or the court.

Secondly, their lordships addressed the question of an expert's competence, observing that it was for the judge to ensure that any expert selected had the requisite qualifications to provide the advice sought. Wall LJ also observed that a court cannot accept an expert's opinion uncritically: it will want to know how she reached her opinion and what factors she considered in doing so.

Having made these general observations, Wall LJ found that the expert in *Re P* was "admirably qualified". Furthermore, he considered the allegation of bias to be "outrageous", and rebuked the MP in the strongest terms.

Both *Doughty* and *Re P* illustrate that offering expert advice can be a challenging undertaking which exposes professional credibility to risk. However, the strident vindications of the experts in these two cases demonstrate that a conscientious and professional expert can expect to receive the full support of the court.