A Brief History of the Expert Witness

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ABSTRACT

Expert witnesses are now an accepted part of criminal and civil trials. The use of expert witnesses and the admissibility of their science has developed over the last 250 years, when the concept of allowing an expert witness to give opinion evidence on the facts of other witnesses was allowed by Lord Mansfield in the case of *Folkes v. Chadd* in 1782. This paper briefly describes how court procedures have changed over the centuries before opinion evidence was admitted and then traces the history of the expert witness in England, USA, and Canada, examining issues of admissibility and duties of the expert from the 18th century to the 21st century. The paper further describes the change in admissibility with US decisions in *Frye* and *Daubert* and how they have affected courts in the UK and Canada. Also described are recent decisions in the UK on duties of experts and immunity from suit. *Acad Forensic Pathol. 2017 7(4): 516-526*

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INTRODUCTION

Trials determine the guilt or innocence of a defendant beyond reasonable doubt or whether a plaintiff (now complainant in English law) has proven their case on the balance of probability. In criminal trials, guilt is determined by evidence of the crime or a confession by the accused. We are now familiar with the concept of a common law court consisting of a judge and jury, assisted by counsel hearing witnesses, both lay and expert. However, the current structure developed over a long period of history, and while juries have been hearing witnesses since medieval times, the use of expert witnesses has a shorter history.

DISCUSSION

The Development of Juries

The determination of proof was fundamentally changed when, following the fourth Lateran Council of 1215 CE, priests were forbidden to supervise trial by ordeal (1). England and continental European legal systems subsequently diverged on how to investigate crimes. Continental Europe went to a judge-led investigation that used torture and although England did not entirely abolish torture, the determination of proof was made by juries, with their role extending from an accusatory role to determination of guilt (1). As the judgments were now made by man and not God, the concept of proof beyond reasonable doubt also developed (2).

In England, the right to a jury trial had existed in the time of ordeals, but after the abolition of ordeals, jury trials became the regular procedure (3). Because it came out of a right to elect jury trial, there was a right to refuse trial. Under these circumstances, if a defendant refused to plead, they were subject to *peine forte et dure*. This practice involved weights being placed on the defendant until he either agreed to a jury trial or died. The reason the practice continued was that someone dying under *peine forte et dure* was not formally convicted and their property was not subject to forfeiture. So, defendants with property might prefer to die under torture than be found guilty and executed. *Peine forte et dure* was not abolished until an act of Parliament in 1772. Further legislation was passed in 1827, from which time defendants who refused to plead were deemed to be entering a plea of not guilty (4).

Juries in medieval England were not selected for their independence, as they are now, but because of their local knowledge. Coroner's juries were summoned because they were expected to have knowledge of the person and their death and were both witnesses and the determiners of fact (5). However, over time in criminal trials, the self-informing jury became obsolete. Its accusatory role was replaced by the use of magistrates, known as Justices of the Peace, and this was formalized in 1554-1555 with the Marian statutes (6). The Marian statutes also changed the way a coroner and his jury dealt with indictments for murder, moving towards a full preliminary hearing that would be heard by the magistrates (6).

Special Juries

Another reason why juries were selected was because they could have expertise on the matter at trial as directly knowledgeable people on the issues themselves. These special juries were well established in England in the 14th century (7). They were particularly used in cases involving disputes between tradesmen and craftsmen. In a case in 1724, *Rex v. Burridge*, the Kings Bench court ruled that a special jury could be used without the consent of the parties (8). In 1730, by Statute either party could ask for a special jury (9). They were extensively used when Lord Mansfield was Lord Chief Justice (1756-1788). Mansfield was a dominant figure in the Common Law in the 18th century and was to have a significant effect upon the judgements of the US Supreme Court, as well as in England (10). For example, in the case of *Lewis v. Rucker*, Mansfield approved the use of a special jury of merchants (11). Another example of a special jury was for female jurors to be summoned to determine whether a woman was pregnant. In the 19th century, the use of special juries declined, though they were not formally abolished in England until 1971 (12). Another process used by the courts in cases requiring expertise was for judges to use a specialist court advisor. Lord Mansfield used such advisors as well as approving special juries.

Who Could Be a Witness

English trials in the early part of the 18th century would be unfamiliar to the modern viewer. Many witnesses were excluded from giving testimony. These included the defendant in a criminal trial being deemed not competent to give evidence. Counsel was not allowed to represent defendants until 1696, and then only in treason trials (13). Defendants could not call sworn witnesses until 1702 (14). Plaintiffs could not give evidence until 1851 in England, the defendant could not give evidence on one's own behalf until 1898, and there were no appeals against criminal convictions in England until 1907 (14). Defendants could cross-examine witnesses and, until the use of counsel in court, the judge played a much more active role in the trial, questioning prosecution witnesses and giving instructions on the verdict to juries.

In trials, cross-examination replaced oath as the method of testing quality of evidence. Rules of evidence were developed by judges as instructions were given to the jury, who no longer had the monopoly on the knowledge of the facts. Exclusionary rules were developed, notably the hearsay rules, to prevent juries from making verdicts based on error. Hearsay is the rule that excludes any statement, either written or oral, made out of court, but presented in court to prove the truth of that statement. Another rule developed was that witnesses could not give opinion evidence. There are exceptions to these rules, including to the hearsay rule and right of experts to give opinion evidence. In Bushell's case in 1670, it was said:

> *A witness swears to what he has seen and heard…to what hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony by the act and force of the understanding* (15).

It is the case of *Folkes v. Chadd* that is considered to have laid down the first rules on the admissibility of opinion evidence in common law (16). This English case is also known as the Wells Harbour Case. Again, it was a judgement of Lord Mansfield. The case was first heard in 1782, though a written report of the proceedings was not produced until 1831, well after Mansfield's death (17). Different experts had been heard about whether the position of an artificial embankment had caused the silting up of the harbor at Wells by the Sea, a town in Norfolk, England, and thus constituted a nuisance. Most of the experts had seen the harbor, but not the famous scientist Smeaton. His evidence was thus initially deemed inadmissible. On appeal with respect to the evidence of Smeaton, Mansfield stated:

> *It is objected that Mr. Smeaton is going to speak not to facts, but to opinion. That opinion, however is deduced from facts which are not disputed – the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all the facts is, that mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbours, the causes of their destruction and how remedied. In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskillfully navigating ships. The question depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House. I cannot believe that where the question is whether a defect arises from natural or an artificial cause, the opinions of men of science are not to be received. Handwriting is proved every day by opinion, and for false evidence on such questions a man by be indicted for perjury. Many nice questions may arise as to forgery and as to the impression of seal, whether the impression was made from the seal itself or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not taken. I have myself received the opinion of Mr. Smeaton respecting wills, as a matter of science. The cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, men such as Mr. Smeaton alone can judge. Therefore we are of the opinion that his judgment, formed on facts was very proper evidence* (17).

Thus, Mansfield laid down the rules for opinion evidence that have influenced common law jurisdictions since. Opinions based on the facts of other people were considered several times in the 19th century and were deemed admissible. In *Beckwith v. Sydebotham*, a case involving the seaworthiness of a ship – "Earl of Wycombe," Lord Ellenborough stated:

> *Where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits. As the truth of the facts stated to them was not certainly known, their opinions might not go for much; but it was admissible evidence* (18).

In M'Naghten's case (1843), the leading case on insanity that created the M'Naghten rules, it was determined by Chief Justice Tindall that where facts were in dispute, courts required detailed hypothetical questions in the examination of an expert (19). This remains the law. In the 1975 English case of *R. v. Turner*, Lawton LJ stated:

> *Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgement, counsel calling an expert should in examination-in-chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination* (20).

Folkes v. Chadd was also held as the leading case in the US. In *Lincoln v. The Saratoga and Schenectady Railroad Company* (21), the Chief Justice of the New York Supreme Court stated that *Folkes v. Chadd* was the leading case on the law of expert witnesses, and this case has been quoted in many US courts, including most recently in the Supreme Court in the case of *Federal Power Commission v. Florida Power & Light Co* in 1972 (22).

Expert Medical Witnesses

The use of medical witnesses has a long history in common law. In the oft quoted case from 1554 of *Buckley v. Rice*, Justice Thomas stated:

> *If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an honorable and commendable thing in our law, for thereby it appears that we do not despise all other sciences but our own, but we approve of them, and encourage them as things worthy of commendation…In an appeal of mayhem the Judges of our law used to be informed by surgeons whether it be mayhem or not, because their knowledge and skill can best discern it* (23).

Medicine developed and became more acceptable as expert scientific evidence. However, it's use in homicide trials in London remained limited. Forbes has studied homicide trials in the 18th and 19th century at London's famous criminal court, the Old Bailey (24). In the period 1729-1738, of 110 homicide trials, 44 had no medical witness, 21 no autopsy report, and only 45 had autopsy reports (24). Between 1759-1768, there were 84 trials with 47 having no medical witness, 22 no autopsy report, and only 15 trials occurred with an autopsy report (17.9%) (24). During the 19th century, the proportion of cases without medical evidence or autopsy reports decreased. For example, between 1809-1818 40.8% of trials had an autopsy report, and by 1869-1878 the percentage had risen to 61.7 %, with only 10 of 251 trials having no medical evidence (24).

Expert medical opinion in the US was deemed admissible in 19th century cases where the issue was determining whether wounds on the deceased were caused by sharp or blunt instruments (25). In the earlier American case of *Wilson v. People* in 1859, the court rejected the evidence of a physician with respect to determining what caused the injuries (26). However, this case was effectively overruled by the 1866 case of *Gardner v. People*, when a surgeon was allowed to give evidence on whether fractures of the skull could

have been caused by blows with a gun and his opinions were deemed admissible (27). Further medical opinions held admissible in American cases in the 19th century included opinion on the cause of death in a woman who had an abortion, whether a blow was sufficient to cause death, and whether a blow had endangered life (25). Other cases included whether a wound and fracture on the head could have occurred accidently, whether a gunshot wound was the cause of death, and what position the deceased was in when shot were also held admissible (28)

In the 19th century Canadian case of *R. v. Preeper*, a physician was permitted to give evidence on the range from which a person was shot (29). The physician gave testimony that the muzzle of the gun was between 20 inches and 3 feet. His opinion was based upon textbooks as he had no direct knowledge of firearms. The Supreme Court of Canada ruled by three votes to two that the opinion was admissible. The majority considered the opinion a matter of medical science as the questions had been framed that way. They also noted the failure of the defense to challenge the competency of the witness. The dissenting judges felt that the evidence was not a matter of medical science but should have been given by a gun maker or instructor of musketry who were accustomed to test and use such weapons and would be more competent than a medical person.

Use of Textbooks

In the English case of *Collier v. Simpson* (1831), the courts ruled a defendant physician was not allowed to read authoritative textbooks, but medical witnesses could provide their opinion and explain their reasoning, which could be based upon texts as part of their general knowledge (30). This rule was followed in the Indiana case of *Carter v. State* (1851) (31), where a witness referred to a textbook as an authority for an opinion and the book could be used to test his knowledge and contradict him.

19th Century Criticism of Expert Witnesses

In *Lord Abinger v. Ashton*, the Master of the Rolls, Sir George Jessel, stated his distrust of expert witnesses and complained that expert witnesses were biased to the side that called them and saw themselves as paid agents of the person who employed them as witnesses (32). In *Thorn v. Worthing Skating Rink* (1876), he further commented that, with respect to courts appointing their own experts, the courts first had to find an unbiased witness, which was very difficult (33).

Criticisms of expert witnesses in US courts echoed those in English courts. In *Winans v. New York and Erie Railroad*, Supreme Court Judge Griere stated that:

> *… experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount* (34).

In the Minnesota Supreme court decision of *Keegan v. Minneapolis & St Louis Railroad*, the court stated:

> *… the unsatisfactory, as well as dangerous, character of this kind of evidence is well known; Experts are nowadays often the mere paid advocates or partisans who employ and pay them, as much as the attorneys who conduct suit* (35).

By the end of the 19th century, it was stated in the leading US textbook on evidence that there was no specific rule admitting opinions or inference when made by one class of persons – experts – and excluding them from when made by another class – layman; but there is a rule excluding them whenever they are superfluous and admitting them whenever they are not (36).

Developments In the 20th Century

In 1923, the important decision of *Frye v. United States* was delivered (37). This is the starting point concerning the admissibility of evidence. It comes from the Court of Appeals of the District of Columbia. It involved the admissibility of polygraph testing,

which was ruled inadmissible as it had not gained general acceptance. It remained the leading test of admissibility for 70 years.

In 1975, the Federal Rules of Evidence were enacted (38). These were modified following the Supreme Court decision in *Daubert* (39) and later by the decision in *Kumho tire*, which clarified that all expert evidence, not just scientific evidence, is subject to the rules laid down in *Daubert* (40). *Daubert* was a civil case involving an allegation that the drug Bendectin, manufactured by Merrell Dow Pharmaceuticals Inc, caused birth defects.

Rule 702 governs admission of expert evidence, and following *Daubert* currently states:

> *A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:*
>
> *(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;*
>
> *(b) the testimony is based on sufficient facts or data;*
>
> *(c) the testimony is the product of reliable principles and methods; and*
>
> *(d) the expert has reliably applied the principles and methods to the facts of the case* (38).

The decision of the Supreme Court in *Daubert* was apparently heavily influenced by the Philosopher of Science Karl Popper's theory of falsification. For a critique of this from a Philosopher of Science, see – Susan Haack – *Evidence matters* (41).

Daubert remains the leading case on expert evidence in the US and has significant impact on common law jurisdictions outside the US.

Developments in Canada

In the Canadian case of *R. v. Béland*, the Canadian Supreme court referred to *Frye*. This was also a polygraph testing case (42). *Frye* and the Federal rules were examined in the 1993 case of in *R. v. RAD* in the British Columbia Court of Appeal (43).

The leading Canadian decision on expert evidence by the Supreme Court is *R. v. Mohan* (44). Mohan states that expert evidence is admissible when four criteria are established: 1) relevance of the evidence; 2) the necessity of the evidence in assisting the trier of fact; 3) the absence of any exclusionary rule to the reception of evidence; and 4) the proposed expert being properly qualified (44).

In *R. v. J (J-L)*, the Supreme Court of Canada endorsed *Daubert* (45). In giving their opinion, the court stated that *Mohan* was in step with the developments in Canadian jurisprudence. Further, the Court said the judge needs to take his or her gatekeeping role seriously. Subsequent judgments have affirmed *Mohan* and echoed US admissibility tests in *R. v. Trochym* and *R. v. Sekhon* (46, 47). In *R. v. Abbey*, the Ontario Court of Appeal has proposed a two-step process using the four *Mohan* admissibility criteria and then a cost-benefit analysis (probative versus prejudicial effect) (48).

UK Developments

Admissibility

In England, the courts have approved Lord Mansfield's opinion in *Folkes v. Chadd* on several occasions. In *R. v. Turner* 1975, it was stated:

> *The foundation of the rules was laid by Lord Mansfield CJ in Folkes v. Chadd (1782): 'The opinion of scientific men upon proven facts may be given by men of science within their own science'. An expert opinion is admissible to provide the court with scientific information which is likely to be outside of the experience of a judge or jury. If, on the proven facts, a judge or jury*

can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case, if it is dressed up in scientific jargon it may make the judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion any more helpful than that of the jurors themselves; but there is a danger that they may think it does (20).

What constituted novel science was analyzed by the Court of Appeal in *R. v. Robb* in 1991 by Bingham LJ as follows:

The old academically established sciences such as medicine, geology or metallurgy and established professions…present no problem. The field will be regarded as one in which expertise may exist and any qualified member will be accepted without question as an expert. Expert opinions may be given of the quality of commodities, or the literary, artistic, scientific or other merit of works alleged to be obscene. Yet while receiving this evidence the courts would not accept the evidence of an astrologer, soothsayer, a witch-doctor or an amateur psychologist and might hesitate to receive evidence of attributed authorship on stylometric analysis (49).

Both *Frye* and *Daubert* have been quoted in cases in English courts. In *R. v. Gilfolye* (2001), a case involving admissibility of expert evidence on the psychological autopsy, the Court of Appeal approved the general acceptibility rule and stated this accords with English practice (50). *Daubert* was not cited. *Daubert* was, however, quoted in the 2002 case of *R. v. Dallagher*, which involved the admissibility of earprint evidence, but quoted an earlier version of the Federal rules and not the 2000 amendment (51). In *R. v. Luttrell*, a case involving analysis of lip reading by video evidence, the appellant argued that reliability was part of admissibility, but the Court of Appeal declined to agree and stated that in some cases reliability might be relevant to whether the conditions of admissibility had been met (52).

In 2009, the Court of Appeal in *R. v. Reed*, Reed and Garmson summarized admissibility of expert evidence as:

It is important to distinguish the issue of the admissibility of expert evidence from the assessment of that evidence by the jury. In the present appeal, the issue related to admissibility. First, expert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable for it to be put before the jury. There is, however, no enhanced test of admissibility for such evidence. If the reliability of the scientific basis for the evidence is challenged, the court will consider whether there is a sufficiently reliable scientific basis for that evidence to be admitted, but, if satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted, then it will leave the opposing views to be tested in the trial.

Second, even if the scientific basis is sufficiently reliable, the evidence is not admissible unless it is within the scope of evidence an expert can properly give.

Third, unless the admissibility is challenged, the judge will admit that evidence. That is the only pragmatic way in which it is possible to conduct trials, as sufficient safeguards are provided by Part 3 and Part 33 of the Criminal Procedure Rules. However, if objection to the admissibility is made, then it is for the party proffering the evidence to prove its admissibility (53).

Duties of Experts

In the case of the *Ikarian Reefer* (54), a shipping case with use of expert witnesses, Cresswell J laid out rules for expert conduct and these were repeated in the Court of Appeal in *Harris* (55) and other appeals related to pediatric head injury, where the court stated:

It may be helpful for judges, practitioners and experts to be reminded of the obligations of an expert witness summarised by Cresswell J in

National Justice Cia Naviera SA v. Prudential Assurance Co Ltd, The Ikarian Reefer (1993) 2 Lloyd's Rep 68 at 81. Cresswell J pointed out amongst other factors the following, which we summarise as follows:

(1) Expert evidence presented to the court should be and 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 advocate.

(3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.

(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.

(6) If after exchange of reports, an expert witness changes his view on material matters, such change of view should be communicated to the other side without delay and when appropriate to the court.

Wall J, as he then was, sitting in the Family Division also gave helpful guidance for experts giving evidence involving children (see Re AB (child abuse: expert witnesses) (1995) 1 FCR 280). Wall J pointed out that there will be cases in which there is a genuine disagreement on a scientific or medical issue, or where it is necessary for a party to advance a particular hypothesis to explain a given set of facts. He added:

'Where that occurs, the jury will have to resolve the issue which is raised. Two points must be made. In my view, the expert who advances such a hypothesis owes a very heavy duty to explain to the court that what he is advancing is a hypothesis, that it is controversial (if it is) and placed before the court all material which contradicts the hypothesis. Secondly, he must make all his material available to the other experts in the case. It is the common experience of the courts that the better the experts the more limited their areas of disagreement, and in the forensic context of a contested case relating to children, the objective of the lawyers and the experts should always be to limit the ambit of disagreement on medical issues to the minimum.'

We have substituted the word jury for judge in the above passage.

In our judgment the guidance given by both Cresswell J and Wall J are very relevant to criminal proceedings and should be kept well in mind by both prosecution and defence. The new Criminal Procedure Rules provide wide powers of case management to the court. Rule 24 and para 15 of the plea and case management form make provision for experts to consult together and, if possible, agree points of agreement or disagreement with a summary of reasons. In cases involving allegations of child abuse the judge should be prepared to give directions in respect of expert evidence taking into account the guidance to which we have just referred. If this guidance is borne in mind and the directions made are clear and adhered to, it ought to be possible to narrow the areas of dispute before trial and limit the volume of expert evidence which the jury will have to consider.

We see nothing new in the above observations (54).

In the Court of Appeal case of *R. v. Bowman*, the Court, which included Cresswell J, added the following points that need to be in an expert's report:

1. *Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise.*

2. *A statement setting out the substance of all the instructions received (with written or oral), questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which those opinions are based.*

3. *Information relating to who has carried out measurements, examinations, tests etc and the methodology used, and whether or not such measurements etc were carried out under the expert's supervision.*

4. *Where there is a range of opinion in the matters dealt with in the report a summary of the range of opinion and the reasons for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made against any opinions expressed should be set out.*

5. *Relevant extracts of literature or any other material which might assist the court.*

6. *A statement to the effect that the expert has complied with his/her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an acknowledgment that the expert will inform all parties and where appropriate the court in the event that his/her opinion changes on any material issues.*

7. *Where on an exchange of experts' reports matters arise which require a further or supplemental report the above guidelines should, of course, be complied with* (56).

In Canada, a judgment of the Ontario Court of Appeal approved the guidelines for expert witnesses contained in the *Ikarian Reefer* in *Moore v. Getahun* (57).

Civil Procedure Rules

Following a report by Lord Wolf in 1996, Civil Procedure rules were enacted that came into effect in 1999 (58). These rules cover expert witness duties and procedures in noncriminal cases. Among the rules, contained in part 35 are:

1. *Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.*

2. *It is the duty of an expert to help the court on the matters within his expertise. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.*

3. *No party may call an expert or put in evidence an expert's report without the court's permission.*

4. *Expert evidence is to be given in a written report unless the court directs otherwise.*

5. *Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to given by one expert only.*

6. *A party may put to an expert written questions about his report whether an expert is instructed by another party or is a single joint expert appointed by the court.*

7. *The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to identify the issues in the proceedings; and where possible, reach agreement on an issue.*

8. *An expert may file a written request to the court for directions to assist him in carrying out his function as an expert* (58).

Immunity of Witnesses in the UK

In 2005, Sir Roy Meadow lost his medical licence having acted as an expert witness in a series of trials involving the death of young children that were accused to have been killed by a parent. He appealed the decision and in the High Court he was granted immunity from prosecution, which the Court stated applied to regulatory or diciplinary proceedings as well as civil suits. This decision was challenged in the Court of Appeal, which upheld the High Court decision in a split verdict (59). The dissenting opinion was from the Master of the Rolls, who said that immunity should not extend to regulatory or diciplinary proceedings. He repeated the duties set out in the *Ikarian Reefer* and stated that Meadow had failed to adopt them and this amounted to serious professional misconduct.

However, in a 2011 case, the UK Supreme court ruled five to two that experts should not be immune from suit where they have been negligent (60).

CONCLUSION

This paper has endeavored to trace the development of how proof and evidence has been used by the courts in its accusatory and fact finding roles from medieval England to modern common law jurisdictions. The expert witness giving opinion evidence based upon other witnesses facts started in the late 18th century with the judgement in *Folkes v. Chadd* in 1782. Use of medical evidence remained haphazard in the 19th century and concerns of use of experts also developed in that century. The *Frye* decision in 1923 was the first major decision concerned with admissibility of novel science.

In the late 20th century and into the 21st century, common law legal systems have promolgated duties of experts and changed how courts may use expert witnesses. A detailed analysis of *Daubert* hearings and forenic pathology is beyond the scope of this paper. *Daubert* decisions have mostly involved civil cases and appear to have had little impact on the general practice of forensic pathology, though there have, for example, been occasional *Daubert* hearings regarding pediatric head injury (60, 61).

In view of the interest of courts, those who act as expert witnesses can still expect changes made either by courts or legislation on how expert witnesses will be received by the courts, how they will be used in trials, and whether they continue to enjoy immunity as witnesses.

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