Expert Testimony Issues in the UK

Tony Ward

Courts in the UK do not apply stringent criteria to the qualifications or methodology of expert witnesses, but the expert must have skill or knowledge that relates to a matter outside the experience of the court. Evidence from security specialists will satisfy this test in some cases. In civil courts, the judges also have a wide discretionary power to exclude or restrict expert evidence in order to do justice without disproportionate expense. The appointment of single joint experts, and the requirements for experts to discuss their reports with one another, have significantly modified the adversarial culture of the civil courts. Some recent criminal cases suggest that judges may be moving toward somewhat more rigorous scrutiny of expert evidence, but the adversarial procedures applied to expert evidence in the criminal courts remain substantially unchanged.

Key words: Expert evidence; litigation; criminal justice; forensic science; United Kingdom

Introduction

The opportunities for security experts to testify in civil cases in the UK are more limited than they appear to be in some US jurisdictions, because British courts are generally reluctant to allow actions in negligence for the criminal acts of third parties. There are, nevertheless, important areas where security expertise may be relevant, particularly where property has been stolen or damaged while in the defendant’s custody.

The courts of England and Wales, Scotland and Northern Ireland have not developed standards for the admissibility of expert evidence comparable to those set out in Daubert and the other US cases discussed elsewhere in this issue. American judges have taken on a ‘gatekeeping’ role, largely in response to concern about the perceived gullibility of civil juries. British juries, by contrast, play little part in civil proceedings, and in those types of civil action where jury trial is still possible—notably libel—cases involving complex scientific evidence are tried by a judge alone. A more pressing concern for British judges has been to reduce the length and cost of civil litigation, and we shall see that this has led to some major reforms in the use of experts.

It is mainly in criminal cases that issues have arisen about the admissibility of methodologically questionable scientific testimony, such as the gravely flawed medical evidence that has led some mothers to be charged with murdering their babies, and, rather closer to the field of security, the enhancement and interpretation of images from CCTV cameras. This article will consider some important recent decisions in this area, but will show that a clearly-defined standard analogous to Daubert has yet to emerge. Although primarily concerned with England and Wales, the article also mentions a few important cases from Scotland and Northern Ireland, where the law is similar in most respects.
Expert evidence in civil proceedings

The admissibility of expert evidence is governed by the Civil Evidence Act 1972, s. 3:

where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

Whether a witness is ‘qualified to give expert evidence’ is not strictly defined, but the expert must have skill or knowledge that relates to a matter outside the experience of the court.9

The expert’s evidence must be ‘relevant’ to an issue before the court, which means it must be ‘helpful’ to the court in deciding that issue. 10 Evidence will not be considered ‘helpful’ if it simply tells the court what the expert would have done in the defendant’s place, or that the defendant has been negligent or broken some other legal duty, the latter being a question of law for the court to decide.11

Expert evidence can be ‘helpful’ in determining whether a defendant has breached a legal duty if it informs the court of standards that are laid down by some professional body or ‘sanctioned by common usage’.12 In such cases, the expert may not only tell the court what the accepted standards are, but may also express an opinion as to whether the defendant has complied with those standards.13 Whether such evidence is admissible does not depend on whether a field of expertise (such as security) is recognised as a ‘profession’,14 but on whether it raises matters that are beyond the knowledge of the court.15 To take an obvious example, expert evidence is not necessary to prove that ‘the ordinary reasonable man’ locks the front door when he leaves a house unoccupied.

One case where expert evidence on security was clearly necessary is Thomas Cook Group v. Air Malta.17 A consignment of banknotes was stolen from an airport by armed robbers. Two security consultants with extensive experience in aviation security (but, so far as is mentioned, no formal qualifications) gave evidence regarding accepted security practices at airports, and how the defendant’s arrangements differed from those practices. This evidence was undoubtedly helpful, indeed indispensable, to the judge in determining that the security provided was not so deficient as to amount to ‘wilful misconduct’ within the meaning of the Warsaw Convention.

The evidence of security experts carried less weight in Globe Master Management Ltd v Boulus-Gad Ltd.18 A tour operator cancelled its charter of a ship because of the deteriorating security situation in the Eastern Mediterranean. The charterer argued that this was not a breach of contract because the level of risk was ‘such no reasonable operator would continue to operate his vessel in any part of the area’. An academic expert on security, the head of a security firm and two former senior officials of the Israeli security services gave evidence to the effect that no public or private agency could provide adequate security at an economic price. The Court of Appeal considered that it was not ‘for an academic expert, however distinguished, to decide for the court what a reasonable ship-owner or charterer would or would not do’.19 There was no evidence that other reasonable operators considered the region excessively dangerous.

In Adams v. Rhymney Valley District Council,20 expert evidence was relevant because a reasonable landlord would have taken specialist advice on the fitting of locks, even though the defendants had not done so. They had installed window locks with removable keys, with the result that the children of one of their tenants were unable to escape a fire. Several expert witnesses expressed conflicting views on the suitability of such locks, as opposed to push-button locks which could be opened without a key. The Court of Appeal held, by a majority that even though the defendants had selected the locks with little thought and no specialist advice, they had not been negligent because a competent designer at the time the house was built could have chosen locks of that type. Lord Justice Morritt stated that:

42 Expert Testimony Issues in the UK