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SIGHTED JUSTICE: the Ethical and Practical Role of the Expert  
and its Implication for the Structure of Jurisprudence.

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*Synopsis:* The paper discusses the ethical duties which special knowledge confers upon the holder, in particular the duty to use that knowledge in the service of justice when required. It goes on to review the roles of experts in the broad system of justice. The expert retained by a party is considered - as party witness, as investigator and as aide to the legal team, but also as negotiator and, perhaps more controversially, as advocate. The expert as neutral is considered, as witness or investigator for the tribunal, as member of a tribunal or as the sole determiner of issues, as well as in the context of mediation and other ADR procedures. The paper discusses the difficulties which face conventional tribunals in determining how evidence of an esoteric nature best may be analysed and assessed, to close by asking, in the context of expertise, the question: "Is an exclusive legal community justified in a modern world?"



*Peace through Justice - A. O'Connor.*  
Reproduced by courtesy of the Secretary-General of  
the Permanent Court of Arbitration

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<sup>1</sup> *Profile:* Geoffrey Hartwell is an engineer who has made a lifelong study of the responsibilities which specialist knowledge confers on a practitioner. He combines a busy mechanical, electrical and electronic practice with an international practice in arbitration and mediation, and with teaching an LLM in Commercial Dispute Resolution, which includes the role of experts in its curriculum.

Geoffrey is a former Chairman of the Chartered Institute of Arbitrators and President of the Society of Construction Arbitrators and is at present Vice-Chairman of the Society of Expert Witnesses. He is a chartered arbitrator, an accredited mediator and accredited adjudicator and has been appointed as a special referee in the High Court of the Isle of Man.

## SIGHTED JUSTICE

There is a statue of *Justice* on the dome of the Central Criminal Court in London, the Old Bailey. She is blindfolded, with the scales of justice in one hand and the sword of state in the other.

An error - she is not blindfolded, although that is what is widely thought!

There is another statue of *Justice*, or rather *Peace through Justice* in the Peace Palace in the Hague, the home of the International Court of Justice and of the Permanent Court of Arbitration. She is not blindfolded and she has no sword. In the Cathedral at Pisa, not an hours drive from where this conference takes place in Prato, there is a pulpit under which a figure of *Justice* is seen supporting the church. She also has no sword and no blindfold. Sighted Justice is no strange concept.

Please keep those images in mind. I will return to the implications of sighted justice, but first I need to call attention to an aspect of the role of the lawyer, and particularly, but not exclusively, the trial lawyer, which separates the lawyer from almost every other kind of professional, especially the scientific professional.

It is an ethical aspect of the role of the lawyer. I argue that it is a relic of the days before popular education, when only the clergy and the lawyers could be called educated and when only the clergy and the lawyers had the knowledge and skill to be truly articulate<sup>2</sup>.

It is, perhaps, the one aspect of the lawyer's role which is at once the most important, the most contentious, and the most difficult rationally to explain to the laity. It has been, at the same time, a source of admiration and a source of fear, since the days of Cicero<sup>3</sup>, still perhaps its greatest and most cynical exponent.

I imagine you will have anticipated the subject of these opening remarks. Advocacy in the practice of law, and the exercise of rhetorical techniques in that advocacy, are different, and necessarily different,

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<sup>2</sup> And, of course, great lawyers and great churchmen were, as they are today, at the heart of government, where presentation and appearances were, and are, all-important.

<sup>3</sup> Marcus Tullius Cicero is thought to have been born on January 3, 106 BC and murdered on December 7, 43 BC. His life coincided with the decline and fall of the Roman Republic, and he was an important actor in many of the significant political events of his time (and his writings are now a valuable source of information to us about those events). He was, among other things, an orator, lawyer, politician, and philosopher. Making sense of his writings and understanding his philosophy requires us to keep that in mind. He placed politics above philosophical study; the latter was valuable in its own right but was even more valuable as the means to more effective political action. The only periods of his life in which he wrote philosophical works were the times he was forcibly prevented from taking part in politics. (*The Internet Encyclopaedia of Philosophy* at <http://www.utm.edu/research/iep/c/cicero.htm>.)

What connection there may be, between the climate of the age that enabled Cicero's success as a rhetorical lawyer, and the decline and fall of the Empire, and whether lessons may be drawn for the present day, I leave to others.

from the techniques of any other profession. I will explain shortly why even a lawyer's advocacy is subject, to a limited degree, to the moral imperatives which govern, or should govern, other professions in debate, but first I will touch briefly on the reasons for what I would call, by analogy with poetic licence, the advocate's licence. Reasons which, I suggest, are compelling and sufficient, but which should never be taken for granted.

This is not a dissertation on the practice of law, nor on the morality of the lawyer's task. That requires another conference to itself. I discuss legal advocacy only as a starting point, as a benchmark with which to compare the corresponding ethical duties of the expert in court and elsewhere.

The key to the nature of legal advocacy is to be found in the duty of the advocate to say, for his client, what that client would have said for himself, if blessed with the skill and knowledge of the advocate. That means, and has always meant, that the advocate is not confined to what he knows to be the truth, but may argue, and indeed has a duty to argue, whatever legitimately may be argued. It is sometimes said to be a service to the court to invite it to consider arguments in which the advocate himself does not believe, and the point is often extended to arguing for what are, in effect, false inferences to be drawn. Be that as it may, there is a foundation for the advocate's licence and it is accepted, by and large, by the legal systems of most states.

No such licence exists for others, whether medics, accountants, engineers, ecologists, artists or musicians. Nor could it. Specialised knowledge and experience brings with it a duty to the truth. An absolute duty. An ethical or moral duty. Nothing less is the burden of this paper.

As it happens, the author also believes that, when expressing opinion or argument as to the law, lawyers also share this duty, which is a necessary concomitant of the possession of esoteric knowledge, but that must be for another time.

In titling this paper "Sighted Justice" I wished to suggest that the role of the expert is to provide the Tribunal, whatever tribunal it may be, with eyes, to see what otherwise it might not see. I hope to argue that to be the function of the expert as seen by a number of systems of law. I hope also to demonstrate that it is a necessary function with roots in natural law. Natural Law is important to me, as it is for other experts, because although I teach as an external lecturer in a Law School, I am by formation and training an engineer, and therefore a servant of Natural Law.

Let me start by discussing what we mean by the word "expert". Essentially, in the forensic context, we use the word to describe someone who has skills or knowledge which are not directly accessible to the tribunal, but which are necessary for the proper understanding of issues and for the tribunal to make a correct decision.

Arguably, the use of experts in the Court and in other tribunals is necessary to take account of a serious flaw in legal thinking. Quite regularly, under almost every system of Law, we allow matters of huge

importance, even matters of life and death, to be decided by tribunals who have no first hand understanding of the issues.

Logically, that seems extraordinary. Whether it is right, in a modern age, for the people to be ruled by inexpert courts and tribunals is, again, something to which I will return. For now, I deal with the world as it is, flawed though it may be. The use of experts, either brought by the parties to give evidence or engaged to advise the tribunal itself, is one way, perhaps the only way, in which this flaw can be corrected, albeit to a limited extent.

Let me dwell on the point a little longer. The party to a case in Court may have vitally important decisions about his life, liberty or livelihood made by a tribunal which, however skilled and experienced in law, may know nothing of crucial issues upon which the final decision may depend. Moreover, it is not only the tribunal which suffers this fundamental handicap. As a general rule, the advocates who represent a party, together with those they oppose, work from the same level of ignorance.

As it happens, the Courts manage this extraordinary situation very well, and miscarriages are not all that common<sup>4</sup>. Nevertheless, in a complex modern world, it is probably wrong that such a state of affairs continues to exist. I will return to the point later.

Court, and legal systems have tried to make provision for expertise in various ways, but as good a summary as any may perhaps be found in the USA *Federal Rules of Evidence* (at Rule 702), “*If scientific, technical, or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.*”<sup>5</sup>

I have set out this problem, inherent in the nature of the legal system as it is, to emphasise the heavy responsibility of the expert. Not only is the expert, by definition, the only person in the Court who knows the truth about the relevant issues, he or she may be the only truly independent person involved,

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<sup>4</sup> But miscarriages are built into the system and accepted - even encouraged. A recent report (The Times, 26 January 2002) quotes a distinguished retired Judge of the English High Court, Sir Michael Davies, as saying this about the late George Carman QC, a famous advocate: “Carman made more contribution to miscarriage of justice by his skill than any barrister in the last 20 years. That’s not a criticism, that’s praise. He tended to win cases that he should have lost — I couldn’t name any of them of course because the living ones would sue me.”

<sup>5</sup> In the United States of America, the jury is retained, even for complex *inter partes* trials, where the public or state interest is not engaged. The traditional rule in the USA is that expert evidence is admissible where the subject matter is so complex or esoteric as to be beyond the ken of the ordinary citizen, but not when it is so complex, novel or speculative that it is outwith the scope of general acceptance in its recognised scientific or professional field. That begs the question, “How does a jury or judge decide what is or is not within the scope of general acceptance” - the answer to which must be, “by more expert evidence”.

particularly in a criminal trial. The judge and the prosecutor have a role to play in law enforcement, the defender has a duty to his client or to the Court. Only the expert has a clearly objective role. Even then, in my country and, I imagine, in others, there are experts in some fields who hold themselves out as engaged in “law enforcement”, so that even the expert’s objectivity may be open to question.

Why does the expert have a special ethical and moral responsibility? There is an old saying, “In the kingdom of the blind, the one-eyed man is king.”<sup>6</sup> In the Court room, before the Judges, the assembled attorneys and perhaps a Jury, when it comes to the subject of his expertise, be it Science, Medicine, Accounting or even some foreign law or mercantile practice, it is only the expert who can see.

It is that which confers upon him a duty, a duty which arguably has two sources. The first is the social contract which exists between any professional and society, namely that professional skills and knowledge are granted recognition and respect (and often that includes monetary recognition), on the understanding that those skills and knowledge will be used for the benefit of society. The second is the ordinary duty of every man to speak the truth. For an expert, that necessarily means the whole truth, for the good and sufficient reason that, if an expert is selective in what he or she says, that alone may mislead those who listen, as they have no means of knowing what has been omitted.<sup>7</sup>

These are not popular issues in the modern age. They are uncomfortable issues: Issues of morality and justice, not law; Issues of duty, not rights; Issues of truth and even altruism, rather than of partisan advocacy. To an external observer, those issues at once put the expert, the sighted man or woman, at odds with the legal environment. To maintain objectivity in the face of the pressures of the legal system requires, at the very least, the Aristotelian virtues<sup>8</sup> of Justice, Courage and Self-Respect. Truth or Truthfulness I hope we may take for granted.

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<sup>6</sup> Desiderius Erasmus: Probably from “The Praise of Folly” (*Moriae Encomium*), 1509

<sup>7</sup> *Sed quaere* if the same should be true of part-time philosophers. It may well be so.

<sup>8</sup> The virtues identified in Aristotle’s *Nicomachean Ethics* (350 BC), as translated by W. D. Ross, were: 1/ *Courage*; 2/ *Temperance*, alternatively *self-control*; *balance*; 3/ *Liberality*, alternatively *generosity*; perhaps *generosity of spirit*; 4/ *Magnificence*; 5/ *Pride*, alternatively *sense of self-worth*, *high-mindedness*, *magnanimity*, thus *self-respect*; 6/ *Proper Ambition*, Ross called this “*Ambition and Unambitiousness as the extremes of a nameless virtue*”; 7 *Good temper*; 8 *Friendliness*; 9 *Truthfulness*; 10 *Ready wit*, alternatively *wittiness*; *sense of humour*; 11 *Justice*.

There must be some questions in one’s mind as to why Aristotle selected eleven virtues, particularly since some of the distinctions may seem somewhat forced. In *The Thinker as Artist*, (Athens, Ohio: Ohio University Press, 1997) Chapter XII, George Anastaplo asks, in parentheses, “was the number of the moral virtues intended to recall ‘The Eleven’, the administrators, chosen in Athens by lot, who were in charge of the prison and executions? The Eleven were, in effect, the official executors of the moral judgements of the city. (See, for example, Plato, *Apology* 37 BC) It is a flight of fancy, but is it possible that Aristotle had in mind an individual to personify each of the virtues he listed?”  
<http://www.cygneis/ethics/gathinker.htm>, 3 March 1999.

Few would argue that it is easy to maintain the standard of integrity that this proposition entails. Perhaps the best advice that can be offered to an expert is the famous advice given by Polonius, the coda to his exhortations about borrowing and lending and about fashion and friendship:

This above all, — to thine own self be true;  
And it must follow, as the night the day,  
Thou canst not then be false to any man.<sup>9</sup>

I would argue that to be the principle that should inform every expert who is engaged to assist a court or tribunal, or to act as a court or tribunal, a special task to which I will turn later.

In the recent amendments to the civil practice in England and Wales, the Civil Procedure Rules, the experts duties in court are set out in some detail. I would argue that there is nothing new in them. The principles have long been well known. However, the Rules themselves illustrate, I suggest, the view I have been expressing in this paper so far.

The Rules provide that an expert owes a duty to the Court and not to the party who calls him.<sup>10</sup> I have argued already that the expert owes such a duty, although I argue that it is to his or her conscience and to his or her profession, rather than the Court, which is an emanation of the State and so may have its own agenda. Lord Wilberforce made the point clear when he said, of expert evidence, that it “*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*”<sup>11</sup> The Rules also set out the requirements of an expert report<sup>12</sup>. In

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<sup>9</sup> *Hamlet, or the Prince of Denmark*, William Shakespeare (1564-1616). Note that Polonius, a respected courtier of the King, Claudius, was speaking to his own son, Laertes, and not to Hamlet himself, as is sometimes supposed.

<sup>10</sup> **Part 35.3 CPR** ..... **Experts - overriding duty to the court**  
35.3 (1) It is the duty of an expert to help the court on the matters within his expertise.  
(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

<sup>11</sup> *Whitehouse v Jordan* [1981] 1 WLR 246,256. In a chapter in *The Expert in Litigation and Arbitration*, D. Mark Cato (ed.), LLP Professional Publishing 1999, Andrew Bartlett QC argues that the dictum is wrong. He says, “*Such entirely independent evidence exists only in never-never land.*” That is, however, the necessarily cynical view of an adversarial lawyer. The better, and more ethical view, is surely that of Lord Wilberforce himself, one of the great legal minds of the twentieth century.

<sup>12</sup> **35.10 CPR** ..... **Contents of report**  
35.10 (1) An expert’s report must comply with the requirements set out in the relevant practice direction.  
(2) At the end of an expert’s report there must be a statement that -  
(a) the expert understands his duty to the court; and  
(b) he has complied with that duty.

(continued...)



addition, the Rules are supplemented by practice directions <sup>13</sup>, giving yet more details of the contents of an expert's report and emphasising the need for truth. It is possible to find, in the structure of the

<sup>12</sup>(...continued)

- (3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.
- (4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions -
  - (a) order disclosure of any specific document; or
  - (b) permit any questioning in court, other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.

<sup>13</sup>

Practice Direction 35

2 ..... FORM AND CONTENT OF EXPERT'S REPORTS

- 2.1 An expert's report should be addressed to the court and not to the party from whom the expert has received his instructions.
- 2.2 An expert's report must:
  - (1) give details of the expert's qualifications;
  - (2) give details of any literature or other material which the expert has relied on in making the report;
  - (3) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
  - (4) make clear which of the facts stated in the report are within the expert's own knowledge;
  - (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
  - (6) where there is a range of opinion on the matters dealt with in the report-
    - (a) summarise the range of opinion, and
    - (b) give reasons for his own opinion;
  - (7) contain a summary of the conclusions reached;
  - (8) if the expert is not able to give his opinion without qualification, state the qualification; and
  - (9) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty.
- 2.3 An expert's report must be verified by a statement of truth as well as containing the statements required in paragraph 2.2(8) and (9) above.
- 2.4 The form of the statement of truth is as follows:  
"I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion."
- 2.5 Attention is drawn to rule 32.14 which sets out the consequences of verifying a document containing a false statement without an honest belief in its truth. (For information about statements of truth see Part 22 and the practice direction which supplements it.)
- 2.6 In addition, an expert's report should comply with the requirements of any approved expert's protocol.

new English Civil Procedure Rules, evidence of the mistrust that exists between lawyers and others, and a trend towards a more formulaic treatment.

There is a recorded case in which an expert's evidence was refused because he had not made a formal statement in the words prescribed in the Practice Direction<sup>14</sup>. That is serious enough, but the precise wording of this Direction has been changed since the Rules first were promulgated. The principles are sound enough, but the practice has perhaps gone too far.

The principles of independence and honesty, which I say are necessary ethical obligations arising from an expert's special knowledge and experience, are widely recognised. In France, for example, formally listed experts have to take an oath, to support the law, to accept the assignments given to them, to fulfil them within the prescribed deadlines, to produce the necessary reports, and to give their opinion honourably and honestly<sup>15</sup>. When unlisted experts are used, their reports should contain a similar undertaking.

The Italian penal code<sup>16</sup> provides a penalty for experts who give false opinions - imprisonment from two to six years, giving practical teeth to an ethical duty.

I think that I have said sufficient to demonstrate that the principles of independence and honesty, which I say are necessary concomitants of the nature of expertise itself, are recognised and required by legal systems. Unfortunately these principles are not universally accepted by some lawyers and some experts, but it is to be hoped that the importance of these standards will come to the fore through events, such as this conference of the International Institute of Forensic Studies.

So far, I have discussed the ethical responsibility of the expert as witness, whether appointed by a party or appointed by the court or tribunal<sup>17</sup>.

It may be appropriate now to summarise the tasks which an expert may perform, and to examine the logical extension to the range of those tasks.

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<sup>14</sup> *Edwin Stevens -v- RJ Gullis & David Pile* (1999) CA

<sup>15</sup> "d'apporter leur concours à la Justice, d'accomplir leur mission, de faire leur rapport et de donner leur avis en leur honneur et en leur conscience." translated by Bernard Peckels, "*The Expert in France*" *The Expert*, September 1997

<sup>16</sup> Art 373

<sup>17</sup> There is an intermediate role, where the expert is not appointed by the court, but is a so-called single joint expert, instructed jointly by the opposing parties. This role is new in England and Wales and the jurisprudence surrounding it has yet to develop.



- 1 **Party Expert:** An expert witness may be called by a party in litigation or arbitration<sup>18</sup>. Although he or she will be a part of the legal team which calls him, his responsibility is to present the truth, as to facts, as to any research he may have done, and his opinion, without any concession to those who have instructed or engaged him. An expert witness must be neutral, for the reasons we have discussed. This style of appointment is usual in Common Law countries and in International Arbitration, less so, perhaps, in Civil Law litigation.
- 2 **Tribunal Expert:** An expert may be appointed by a tribunal or court<sup>19,20</sup>. In English litigation, a neutral expert may be appointed jointly by the parties. He or she has the right to make enquiries and to report to the tribunal, but the tribunal generally will provide an opportunity for the expert to be examined by the parties. A neutral expert in a role of this kind will have to be seen to observe the practices of the relevant jurisdiction in respect of Natural Justice, and in some jurisdictions that may limit the extent to which he or she may deal with one party in the absence of another. Provision for an arbitral tribunal to appoint experts is to be found in modern arbitration statutes<sup>21,22</sup> and in many standard institutional arbitration rules.

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<sup>18</sup> See, for example, *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (1999) Article 5, which sets out the necessary contents of an expert report, including an affirmation of truth.

<sup>19</sup> See, for example, *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (1999) Article 6; an affirmation of truth is not required.

<sup>20</sup> Also, the Isle of Man, *Rules of the High Court of Justice of the Isle of Man Order 29 - Court Expert*

<sup>21</sup> See, for example the English *Arbitration Act 1996*:  
*Power to appoint experts, legal advisers or assessors.*  
**37. -** (1) *Unless otherwise agreed by the parties-*  
 (a) *the tribunal may-*  
 (i) *appoint experts or legal advisers to report to it and the parties,*  
*or*  
 (ii) *appoint assessors to assist it on technical matters,*  
*and may allow any such expert, legal adviser or assessor to attend the*  
*proceedings; and*  
 (b) *the parties shall be given a reasonable opportunity to comment on any*  
*information, opinion or advice offered by any such person.*  
 (2) *The fees and expenses of an expert, legal adviser or assessor appointed by the*  
*tribunal for which the arbitrators are liable are expenses of the arbitrators for the*  
*purposes of this Part.*

<sup>22</sup> Also *UNCITRAL Model Law on International Commercial Arbitration 1985*  
**Article 26. Expert appointed by arbitral tribunal**  
 (1) *Unless otherwise agreed by the parties, the arbitral tribunal*  
 (a) *may appoint one or more experts to report to it on specific issues to be*  
*determined by the arbitral tribunal;*  
 (b) *may require a party to give the expert any relevant information or to*  
*produce, or to provide access to, any relevant documents, goods or other*  
*property for his inspection.*

(2) *Unless otherwise agreed by the parties, if a party so requests or if the arbitral*  
*tribunal considers it necessary, the expert shall, after delivery of his written or oral*

(continued...)

- 3 **Expert Determination:** An expert may be appointed by one or both parties, in the absence of any arbitration or litigation, to advise or to assist with resolving any difference. In the extreme, two parties may agree to abide by the decision of such an expert. That is expert determination. It has a legal status. In most jurisdictions, an agreement to abide by the decision of an expert is binding as a contract and enforceable through the courts, subject to satisfactory proof. Although expertise of this kind does not attract the direct enforcement of arbitration, or the international force derived from the New York Convention of 1958<sup>23</sup>, it is almost unassailable, as there is little or no basis upon which a court would intervene with a purely contractual arrangement. Although there is no clear legal requirement, for example, to avoid seeing one in the absence of the other, the fundamental requisite of fairness remains a moral obligation of the expert.
- 4 **Expert Arbitration:** The origins of commercial arbitration lie in the practice of merchants to appoint one of their own number to deal with differences and disputes. In the modern day, there are experts, in a variety of disciplines, trained to act as sole arbitrators or members of an arbitral tribunal. That usually means that they are sufficiently trained in the relevant areas of law and, indeed, may have a wider knowledge of the law of other nations than a specialist lawyer. A comparatively small proportion of international cases are dealt with by expert arbitrators, because the availability of the service is not widely known, and because arbitral institutions are often unaware of appropriate experts. The expert has a special duty, in arbitration, to make sure that the parties are aware of his or her personal knowledge and experience, and where that knowledge and experience are leading<sup>24</sup>.
- 5 **Expert Assessor:** An Assessor is one who assists the court in trying a scientific or technical question but who has no voice in the decision<sup>25</sup>. Under the English Arbitration Act 1996, assessors are treated much as other experts (s. 37).

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<sup>22</sup>(...continued)

*report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue*

<sup>23</sup> UN Convention on the Recognition of Foreign Arbitral Awards, New York, 1958.

<sup>24</sup> See the English authority: *Fox (A) and ors -v- P. G. Wellfair Ltd.; P. Fisher -v- P. G. Wellfair Ltd* [1981] 2 Lloyd's Rep 514

<sup>25</sup> For example, in England and Wales, Brethren of Trinity House (who are generally ship masters) may sit as assessors in the Admiralty Court and the Court of Appeal, bishops in the Judicial Committee of the Privy Council in ecclesiastical appeals (Judicature Act 1925, ss 33(3) & 98)

- 6     **Special Referee:** In some jurisdictions<sup>26</sup>, there is a provision for an expert to be appointed to act, and to conduct a trial in the court in almost every way as a Judge. In the example with which I am familiar, in the Isle of Man, the referee has all the powers of a Judge in the High Court, save for the power to commit a person to prison or to enforce an order; those powers are exercised, if needed, by the regular Judge, the Deemster.
  
- 7     **Expert Juries:** From time to time, it has been suggested that Juries be selected on the basis of their knowledge of a topic which is thought likely to play an important part in a trial. Examples would be Juries of accountants for trials of accounting fraud. There are superficial attractions to such a practice, but the writer is not sufficiently familiar with the arguments to take the topic further.
  
- 8     **Other Expertise:**  
Experts can be found who are trained in mediation and conciliation, in the conduct of negotiations and in all the less formal fields of dispute resolution. The confidentiality that some of these processes require, however, may pose ethical problems when set against the public duty of the professional.

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<sup>26</sup> For example, the Isle of Man, *Rules of the High Court of Justice of the Isle of Man* Order 29A - Referees and Arbitrators.

So-called adjudication is required by certain forms of contract<sup>27</sup>. Adjudication, usually, but not necessarily, by a knowledgeable expert, is a rough-and-ready swift form of arbitration which provides a temporary and provisional decision, usually in a contract which continues over time, and may be corrected or amended later in the court or by arbitration proceedings.

Important, for the parties whose lives or livelihoods are to be affected by a decision, is that the involvement of an expert, whatever his or her precise role, makes sure that Justice is done in full daylight and that Justice is not blinded to the realities of the particular case.

In these examples, the expert's duty is to make sure that Justice is done in full daylight and that Justice is not blinded, by lack of true understanding, to the realities of the particular case. In all of them, the responsibility of the expert, to use his or her knowledge and experience wisely, but above all openly and honestly, remains paramount, even when, as a special referee, he is acting as a Judge.

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<sup>27</sup> And, in UK, for construction Contracts, by the Housing Grants Housing Grants, Construction and Regeneration Act 1996:

**Right to refer disputes to adjudication.**

108. - (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.  
For this purpose "dispute" includes any difference.
- (2) The contract shall-
- (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
  - (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
  - (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
  - (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
  - (e) impose a duty on the adjudicator to act impartially; and
  - (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.
- (3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.  
The parties may agree to accept the decision of the adjudicator as finally determining the dispute.
- (4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.
- (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.
- (6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.  
For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

**Conclusions:**

To summarise, and to simplify my argument, I argue that it is of the nature of expert evidence that only an expert is able to judge it. From that, I draw two conclusions.

First, if the views of experts are to be accepted and understood, whether by the general public or by parties affected by expert evidence, experts, those who have esoteric knowledge and experience, must accept and adopt ethical principles which oblige them to be open, frank and truthful, without regard to the circumstances in which their knowledge and opinion are to be expressed.

To implement that conclusion requires that the Institutions governing the various expert professions should enact, and enforce, ethical rules designed to ensure that their members conduct themselves properly, not only in court, but in all their dealings with those of inferior knowledge. Some Institutions already have such rules, but others should, perhaps, take steps to ensure special recognition of the personal and professional duty that their members owe to the court and, indeed, to those affected by their special knowledge.

Secondly, if the methods of state legal systems are to continue to have the respect they deserve, more must be done to establish mutual respect between experts and lawyers and more must be done to extend those legal systems to encompass and make proper use of expert knowledge and experience.

The recognition of arbitration and other voluntary means of dispute resolution is a part of the implementation of that principle, but that is not far enough. In the public court system, perhaps the example of the Isle of Man should be followed and Courts created in which appropriate experts may be appointed on an *ad hoc* basis, to determine issues at first instance, having the powers of the the Court, but with the regular Judge available if need be.

Personally, I do not find the idea of an expert jury attractive, but I mention it as a possibility that should not be ignored. A later version of this paper may look further into the topic.

I posed the question, in the synopsis, “Is an exclusive legal community justified in a modern world?”. I dare to suggest that perhaps, by the twenty-second century, the practice of law as an esoteric profession may have been superseded by a wider use of logic and principle, but that may be for another day, and another debate.

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