Expert Witnesses

The Hon. Justice Winkelmann

A paper delivered to the Auckland Medico-Legal Society

8 April 2008

In January 1998 Harry Clark, the infant son of Stephen and Sally Clark died in Cheshire, England. He was eleven weeks old. He was their second son to die. Christopher had died aged 8 weeks in December of 1996. Sally Clark, the daughter of a Chief Constable, was a commercial solicitor. Her husband was a partner in a Manchester law firm. Initial inquiries suggested that they were loving parents. But after the death of her first child, Sally had developed a drinking problem for which she was receiving treatment at the time of the death of her second child. After an investigation Sally Clark was charged with the murder of her two sons and on 9 November 1999 and after a lengthy trial she was convicted. Four years later and after two appeals her conviction was quashed. There was to be no re-trial.

The grounds of appeal centred on the conduct of two expert witnesses, both doctors. The appeal was allowed on the basis of deficiencies in the conduct and evidence of one of those experts, and criticisms were made of both. The case had profound repercussions for the principal players. Sally Clark spent three years in prison. Although released in 2004, she never recovered from her experiences. Last year she died of alcoholic poisoning. There was no finding that she had taken her own life, but the inquest heard evidence that she suffered on-going psychiatric problems after her release and that she had returned to alcohol abuse.

The two doctors who gave expert evidence were charged with disciplinary offences, and lengthy disciplinary proceedings ensued. More fundamentally the case altered the way that expert witnesses interact with the justice system in the United Kingdom.

I have chosen to talk about this case in some detail. My interest in the case initially arose from my time as a barrister when representing doctors. In that role I frequently instructed medical professionals as experts to give evidence, and cross examined the

complainant's or plaintiff's expert witnesses. As a judge I now have the opportunity to watch expert witnesses for both the prosecution and defence. As counsel, and now as a Judge, I have seen good and not so good expert evidence.

These experiences have brought home to me how powerful expert evidence is in the criminal, civil or disciplinary context. Unfortunately they have also brought home to me how poorly prepared expert evidence has the potential to set proceedings off down a wrong path with a consequent risk of miscarriage of justice.

Expert witnesses occupy a unique position before our courts. In broad terms they are able to give evidence about their opinion of matters, whereas witnesses are in the ordinary course limited to evidence of what they saw heard or did. After recent amendments to our law they are now entitled to give opinion evidence on the very issue that the judge or jury has to decide, provided that the judge is satisfied that their evidence will be substantially helpful.

Expert witnesses give evidence before a jury on the basis that they have particular skill and knowledge that may assist the jury. They typically also give evidence to qualify themselves for this role, which in substance, lays out before the jury just how clever they are in the field in which they give evidence.

There are risks inherent in allowing such evidence. There is a risk that the expert will use the ability to express an opinion to cross the line into advocacy. The associated risk is that the jury will simply defer to the views of the expert witness in their deliberation process. To meet these inherent risks, rules of law have been developed as to how experts may give evidence before our courts.[1] Some of you will be very familiar with these, but in broad brush they include rules that experts must not give evidence beyond their expertise. They must be objective and unbiased, not straying into advocacy. They must acknowledge any fact or body of learning within their field that supports a view contrary to the view they are expressing. As an additional safeguard, Judges warn juries that the trial is a trial by jury, not by expert and that they must reach their own views, while giving the opinions of the experts appropriate weight.

Judges are often asked to speak about cases in which they have been involved. You may have noticed that it is uncommon for them to do so and indeed they are generally reluctant to discuss cases even in general conversation. They find it difficult to talk about cases in which they or their fellow judges have been involved because of the impact judicial comment can have on the on-going criminal justice process, and on the victims, the accused and their families. But the Sally Clark case raises issues that resonate equally in our country in relation to expert evidence.

By the time the Clark prosecution got to trial it relied heavily on the expert evidence, and in particular the evidence of several pathologists and that of an eminent paediatrician.

The opinion of Dr Williams, the Home Office pathologist who had performed the autopsy on the first child, Christopher, was initially that he had a lower respiratory tract infection and had died of natural causes. He did however note on autopsy some injury to the inside of Christopher's mouth, and small bruises. He thought those

[1] A good outline of the relevant rules is contained in Schedule 4 to the high Court Rules, Code of Conduct for Expert Witnesses; for more detailed discussion see: *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 L.L.R. 68 at 81-2. Doctors can gain easy access to the relevant rules at http://www.legislation.govt.nz/act/public/1908/0089/latest/DLM160968.html

associated with resuscitation attempts. That same pathologist later performed an autopsy on Harry, and expressed the opinion that Harry had been shaken to death. He recorded intra retinal haemorrhages, a subdural spinal haemorrhage and contusional tears to the brain. He also recorded an aged injury to a rib. He began to rethink his opinion in respect of Christopher.

The Cheshire Constabulary was concerned about what seemed troubling similarities in the circumstances surrounding the death of the two boys. Both babies were both found dead at almost exactly the same time in the evening. Mrs Clark had well and successfully fed them both shortly before their death. Their deaths occurred at a time when Mrs Clark admitted she had become tired in coping. On each occasion she was alone with the baby, although on one occasion her husband was in the next room. It has to be said that, at least with the benefit of hindsight these were not striking similarities.

The Constabulary approached Professor Meadows. He was one of the pre-eminent paediatric specialists in the United Kingdom, and was a former president of the British Paediatric Association and of the Royal College of Paediatrics. He regularly gave evidence in Family Court and less frequently before the criminal courts.

Professor Meadows reviewed the pathologist's reports and other material provided to him by the police. He provided a report expressing a view that it was improbable that the boys had died from natural causes and that their deaths had the characteristics of deaths caused by a parent.

The main thrust of the evidence that Professor Meadows prepared for the depositions and then for trial was clearly within his knowledge and expertise. It concerned the injuries observed on the two babies and possible causes of death. But he also gave evidence at trial during evidence in chief and under cross-examination in relation to statistics that he drew from a report, prepared by a multi disciplinary research team, the Confidential Enquiry into Sudden Death in Infancy (CESDI). This was a study of risk factors contributing to sudden and unexpected deaths in infants (SIDS).

The draft of that report identified three possible factors that increased the risk of SIDS; smokers in the household, a mother below the age of 26 and those households with no wage earners. None of those applied to Sally Clark. The draft report contained a table with accompanying explanatory text, showing that for infants in families with all three increased risk factors present the risk was substantially higher, than the risk for infants in families with none of these factors. The paper identified that for a family with none of the three risk factors present the risk of two infants dying of SIDS by chance alone would be 1 in 73 million. That figure was arrived at by using a simple squaring methodology. But the authors added an important qualification. They expressly stated that the figure did not take account of possible familial incidence of factors other than those included in the table. The authors observed that where additional factors were present, that would increase the risk of multiple SIDS within a family.

It was the use by Professor Meadows of those figures that was the principal focus of subsequent proceedings against him. He prepared a short supplementary witness statement, including the new figures from the CESDI report and in particular the 1 in 73 million chance statistic. He made no mention of the important qualification to that figure provided in the report.

When Professor Meadows gave his evidence he did not disclaim expertise in statistics or their interpretation. He went on in his evidence to link the 1 in 73 million as relevant to a consideration of how likely it was Christopher and Harry had died of natural causes.

Because of Professor Meadows intention to rely on the CESDI report the defence retained the services of Professors Fleming and Berry, two of the CESDI papers authors. Prior to hearing Professor Fleming wrote a letter to Mrs Clark's solicitors. He identified Professor Meadows' failure to include the qualifications contained in the report as to the use of the figures. He also said that the risk scoring system proposed in the report was designed as a tool to identify families at high risk of a second such death. The report should not be used to post fact analyse the likelihood of two SIDS deaths in one family

Although Professor Fleming primed the defence, no objection was taken to the admissibility of the evidence and the defence did not cross examine to expose the known flaws in Professor Meadows' approach. On the contrary, Defence Counsel's cross examination assumed the validity of the squaring exercise. Through cross-examination he also managed to elicit from Professor Meadows the colourful simile that the chance of two children dying naturally in these circumstances was like the chance of winning the Grand National race on an 80 to 1 outsider 4 years running.

Professor Berry was called to give evidence for the defence. When he gave evidence it became apparent that the defence case was not that the cause of death for Harry and Christopher was SIDS but rather that the deaths were or could have been natural. He did give evidence that the squaring exercise that Professor Meadows had undertaken was an illegitimate over simplification, and he drew attention to the accompanying warnings in the CESDI report. Overall his position was that statistics do not enable determination in any single case whether the cause of death was natural.

The Home Office pathologist Dr Williams also gave evidence at trial for the prosecution. He said that he had been totally wrong in his original opinion in respect of Christopher the first baby who died. His opinion was now that Christopher had been smothered, and there had been no significant features of respiratory infection. In respect of Harry his opinion was that the pattern of injuries was consistent with non-accidental injury, most likely caused by shaking.

What the prosecution or defence did not know was that Dr Williams had received microbiological results in respect of the second child Harry. These were not referred to in any of his reports or evidence, and were not part of the material he provided to the Crown. As with Christopher the microbiological results showed the presence of an infection in the respiratory tract; but in the case of Harry it was established as an unusually widespread Staphylococcus Aureus infection. The report that Dr Williams received with those results commented on the unusualness of the result but also commented that that organism was unlikely to have contributed to the child's death.

By the end of the trial the direct evidence of non-accidental injury had been undermined significantly. There were doubts about the existence and significance of injuries observed by Dr Williams. Those doubts were created by both prosecution and defence witnesses, and centred at least in part on challenges to the accuracy of his observations, procedures and documentation.

At the close of the evidence the prosecution case at trial was then largely circumstantial, supported by direct evidence to the extent the jury accepted it, of the injuries observed by Dr Williams. Otherwise, the prosecution case placed heavy emphasis on the absence of evidence to support a non-accidental explanation for the deaths.

In his closing address, Crown counsel combined the two aspects of the Crown case, and submitted to the jury that the existing injuries to the children went to still longer odds than 73 million to 1. This was fallacious. As the Court of Appeal later said, the existing injuries went to guilt, the odds went to rarity, and it was a mistake to put them together.[2]

However the trial judge did not expressly address this error in his summing up. Nor did he provide detailed directions to the jury as to how they should approach the statistical evidence.

Mrs Clark's second appeal was brought after the defence became aware of the additional microbiology results. The defence produced new evidence from a Professor Morris, a consultant pathologist, to the effect that Harry had probably died from natural causes; a widespread staphylococcal infection causing toxic shock, meningitis or toxin induced damage. He based his opinion on reports of testing of the previously undisclosed samples taken by Dr Williams. He also said that further tests should have been undertaken in light of these results but were not, and now could not be. There was no challenge by the Crown to that evidence. In particular there was no suggestion that Professor Morris' view was other than a respectable medical opinion

[2] *R v Clark* [2000] EWCA Crim 54 at [164]

which others might share. The appeal was allowed on this basis. No retrial was ordered

An alternative ground of appeal relied on was Professor Meadow' evidence. By this stage it was accepted that Professor Meadows' evidence had seriously overstated the odds against such a double fatality. The Court of Appeal did not need to determine that ground of appeal but expressed the view that the evidence should never have been put before the jury. The statistical material was irrelevant and if properly understood should not have been admitted at trial. It said that juries did not need expert evidence to tell them that two such deaths would be rare. Putting the statistics before the jury was tantamount to saying that without further consideration of the rest of the evidence the jury could just about be sure that this was a case of murder.[3]

What was the aftermath of the appeal? The outcome of the appeal led to the Attorney-General ordering a wide ranging review of the cases of other women convicted of similar offences. That review led ultimately to two further convictions being quashed.

In disciplinary proceedings, Professor Meadows was found guilty of serious professional misconduct and struck off the register of medical practitioners. On appeal the High Court found that he had made one mistake which was to misunderstand and misinterpret the statistics, and that this did not amount to a disciplinary offence. That result was confirmed in the Court of Appeal, but the Court of Appeal was nevertheless very critical of Professor Meadows' evidence. The appeal process also clarified that doctors are not immune from disciplinary proceedings arising from the manner in which they have given evidence in court.

Disciplinary charges were also brought against Dr Williams. They focused on inadequacies in Dr Williams' findings in the post mortem examinations, inadequacies in documentation and the failure to disclose the results of the microbiological test. Dr Williams was found guilty of serious professional misconduct but was expressly absolved of bad faith. Conditions were attached to his right to practice; that he should

not for a period of three years undertake any Home Office Pathology or Coroner's cases.[4]

The entire affair placed the family justice system into crisis with doctors refusing to give evidence in child protection cases. The case also ultimately resulted in two inquiries and the creation of guidelines for expert witnesses giving evidence in the criminal and family arenas.

To provide comfort for the courts and to potential expert witnesses, the English Crown Prosecution service developed a detailed guidance book for expert witnesses giving evidence for the prosecution, detailing their obligations and in particular their obligation to make disclosure

The cases have also produced an avalanche of comment in legal and medical journals. The view of many medical professionals in England was that the two doctors were in effect made scapegoats for the failings of many others and in particular for the failings of the system. It has been said that if the doctors made errors, then that has been shown only with the benefit of hindsight and by reference to the standards prevailing at the time of the hearing of the disciplinary charges, and not at the time of the trial.

It is possible to have some sympathy with these views. So far as Professor Meadows is concerned, he undoubtedly gave evidence beyond his expertise, and as a consequence he made serious errors in his evidence. But prosecution counsel also had the responsibility to ensure that his evidence was relevant and admissible, as did the judge. Although neither the Judge nor prosecuting counsel were likely to be competent in the interpretation of the statistics, defence counsel was armed with knowledge of the flaws in the evidence. For whatever reason defence counsel did not challenge the evidence during the Prosecution case.

In relation to Dr Williams, there were aspects of his observations and practices that were subsequently discredited and which the disciplinary panel considered fell below

---

[3] *R v Clark* [2003] EWCA Crim 1020 at [172] – [180].
[4] *Williams v General Medical Council* [2007] EWHC 2603 (Admin) at [7] and [156].

the required standard. Further, his non disclosure was serious, and so was the failure when he was giving evidence to refer to the results of those tests as a potential basis for a contrary opinion to his. But it was accepted that there was no bad faith involved.

It is not ultimately productive to strive to reach a conclusion on the cause of the deaths of the two babies or of the rights and wrongs of the disciplinary outcome. Several things can however be taken from the case. First, in England doctors do not have immunity for the evidence they give in court. Although I have been unable to find a case where the issue has squarely arisen in respect of doctors, there are good grounds to predict that the same situation will apply in New Zealand if the issue arises.[5]

Secondly, the case throws into stark relief the potential for justice to miscarry if experts do not strictly comply with their duties as expert witnesses. In a process as complex as a criminal trial or even a Family Court trial, it will not always be the case that other players in that process will pick up and correct those errors. Judges are astute to the risks associated with expert evidence, and to the particular difficulties associated with statistics. But if an expert fails to identify flaws in his or her own analysis, it is a lot to expect that counsel or the Judge will correctly identify those flaws.

I don't intend by this address to frighten off potential expert witnesses. Our courts are well served by medical professionals who make themselves available to give evidence and indeed aspects of the criminal justice system depend upon that participation. They do so on a daily basis, and to my knowledge, they have done so to date without disciplinary ramifications.

The failures of the two medical professionals in the Clark case were significant. They were moreover easily avoided if standard approaches to giving expert evidence had

[5] See for example *Dentice v Valuers Registration Board* [1992] 1 NZLR 720, where Eichelbaum CJ held that witness immunity did not preclude disciplinary proceedings against a valuer in respect of expert evidence he had given in Court. It was held (at 727) that any disciplinary action would be for providing evidence that fell below the minimum acceptable standards imposed by the profession and not for the fact of giving evidence itself.

been applied. My focus then is not on the risk of disciplinary procedure but on the reasons for, and importance, of the rules associated with expert evidence.

Medical professionals participate in our justice system for the best possible reasons. But those who do so as expert witnesses must accept the responsibility to apply scientific and professional rigour to the way in which they prepare and give their expert evidence. And counsel bear an even heavier burden to consider the relevance and admissibility of the evidence and to properly define its scope. Any counsel calling such evidence owes a moral duty to the doctor, an ethical duty to their client and a duty to the court, to ensure that they are familiar with the rules that regulate expert evidence. If these safeguards are not observed, then in the words of one judge commenting on the role of expert witnesses, an expert witness may be "angelic in his intention but devilish in his effect".[6]

[6] Hon Mrs Justice Heather Hallett DBE *Expert witnesses in the courts of England and Wales* (2005) 79 ALJ 288.