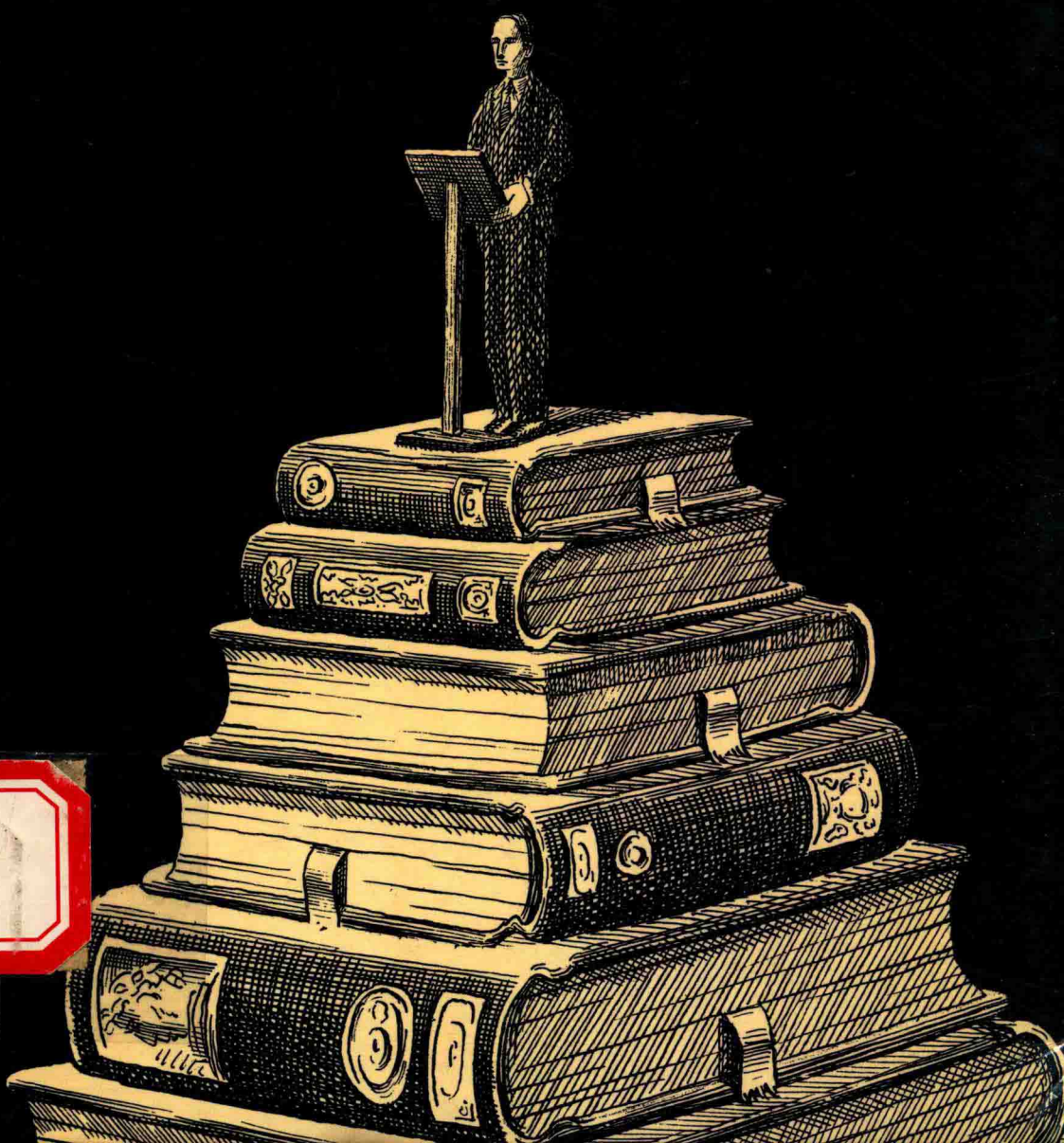
The expert witness

R H Mildred



The Expert Witness

R. H. Mildred
F.R.I.C.S., F.C.I.Arb., F.F.B

Past Chairman of the Chartered
Institute of Arbitrators

with a foreword by
The Right Honourable Lord Diplock

George Godwin
London and New York

George Godwin
Longman House
Burnt Mill, Harlow, Essex, UK

A division of Longman Group Ltd, London

Published in the United States of America
by Longman Inc., New York

First published 1982

British Library Cataloguing in Publication Data

Mildred, R H
The expert witness.
1. Evidence, Expert – Great Britain
I. Title
344.107'67 KD7521

ISBN 0-7114-56801-1

Typeset by Oxford Verbatim Limited.
Printed in Great Britain by William Clowes (Beccles) Ltd.
Beccles and London.

To my wife,
lovingly and in gratitude
for her patience

Foreword

R. H. Mildred was a distinguished Chairman of the Chartered Institute of Arbitrators as well as a distinguished expert in construction work. So he has great experience both at the giving end and the receiving end of expert evidence. This has enabled him to write a practical handbook which should be a great help to anyone who may find himself required to give evidence as an expert witness before a court or other tribunal or in an arbitration. My own experience of expert evidence has been limited to consulting with expert witnesses and examining and cross-examining them in my role as counsel and listening to and evaluating their evidence in my subsequent role as judge; but in both those roles I too would have benefited from having read this book if only Mr. Mildred had found time to write it three decades ago. Perhaps I ought also to confess to authorship of the Law Reform Committee's Report on Evidence of Opinion and Expert Evidence of October 1970 from which Mr. Mildred quotes and which led to the passing of the Civil Evidence Act, 1972. I do so for the purpose of stressing once again how much in a wide variety of cases the judiciary rely upon the candour and expertise of expert witnesses to enable justice to be done. In the very first chapter of this book, attention is drawn to the function of the expert witness as being to assist the tribunal to come to a true and proper decision. Honesty in expression of his opinion on matters within the field of his expertise is a characteristic of experts with professional qualifications that I have always, and happily with justification, been able to take for granted; but order and clarity of exposition and ability to explain technical matters in terms adapted to the kind of tribunal before whom the evidence is given, which may be entirely uninstructed in that particular subject or may share in whole or part the expert witness's own expertise, these are not gifts with

which experts are endowed by nature. Like the expertise itself, they need to be learnt. Here at last is a practical handbook admirably adapted for that purpose. I commend it warmly to all those who may be called upon to give expert evidence that will best assist the tribunal to come to a true and proper decision upon matters which involve the subject of their expertise.

DIPLOCK

Introduction

The purpose of this book is to give practical assistance to those who may be called upon to give evidence as experts. The term 'expert witness' can be a misnomer, conveying the idea that the witness is an expert at giving evidence rather than an expert in a particular field of knowledge. Nevertheless, one who is expert in his chosen profession may not, for lack of training or for other reasons, be able to prepare and present evidence competently when called upon to do so. My own experience of arbitration proceedings over a period of years has convinced me that this is so. Much so-called expert evidence that I have heard could only be described as bad.

This book then, while making no claim at all to being a legal textbook, does set out to explain the basic principles underlying the giving of expert evidence and to show how such evidence should properly be given.

While much of it has been written with the construction industry in mind it is hoped that it may be found helpful to those in other spheres of activity and that they can relate their own expertise to what is written here.

My thanks are due primarily to colleagues in the Chartered Institute of Arbitrators not only for the idea of this book but also for assistance in its preparation.

The late Mr William James, CBE, FRICS, a past President of the Institute, was for long in the forefront of those urging the necessity of training in the giving of expert evidence. In his inaugural address in 1970 he urged the taking of 'a greater interest in the training of expert witnesses who are a vital part of arbitration procedure – for example by lectures on the principles and practice of the preparation of proofs

of evidence . . . and perhaps in drafting a code of conduct for them much on the lines which govern barristers, and solicitors as officers of the court'. Mr James was speaking as the head of a body primarily concerned with arbitration, but what he then said applies to evidence given before tribunals of all kinds. Under his tireless guidance the Chartered Institute of Arbitrators has set up syllabuses and courses for training in the giving of expert evidence and has prepared guide-lines of good practice for expert witnesses.

I am also particularly indebted to Mr G. J. R. Hickmott, Past Chairman of the Chartered Institute of Arbitrators, and to Mr F. E. Rehder, CVO, a Vice-President, for their help, and to my son, Mr Paul Mildred, for much valuable advice. I am also grateful to Miss McOlvin and to Mrs Harris for the typing and retyping of proofs.

The term 'tribunal' has been used throughout the book to include all those courts and tribunals before which expert evidence may have to be given. A brief outline of the judicial system is given in the Appendix. The laws, specific rules and detailed procedures described in this book are applicable only to England and Wales and are not necessarily applicable to Scotland and Northern Ireland. Readers practising in those countries will be aware of the differences in these matters that apply locally. The extracts from the Rules of the Supreme Court and from the Lands Tribunal Rules are taken from the 1980 rules in each case.

My examples are based upon actual cases and experiences, but I have changed details – mainly names, places and dates – to avoid any possible embarrassment.

Finally, I am most grateful to Lord Diplock, a past President of the Chartered Institute of Arbitrators, for the interest he has shown in the writing of this book, for his patience in reading the proofs and for the honour he has done me in writing the foreword.

Acknowledgement

My thanks are due to those who have given permission to reproduce material in this book:

To the Controller, Her Majesty's Stationery Office, for the Civil Evidence Acts 1968 and 1972 and extracts from the Rules of the Supreme Court and from the Lands Tribunal Rules (Crown Copyright); for extracts from the Law Reform Committee Seventeenth Report (Evidence of Opinion and Expert Evidence October 1970 Cmnd 4489) (referred to in the text as 'The Law Reform Committee Report') and for extracts from 'The Complete Plain Words' (Sir Ernest Gowers, revised by Sir Bruce Fraser).

To the Institution of Civil Engineers for extracts from a paper by the Rt. Hon. Lord Macmillan of Aberfeldy PC, GCVO, LLD, HON MICE entitled 'The Giving of Evidence' read before the Institution on 20 June 1946.

To the Chartered Institute of Arbitrators for quotations from papers read before the Institute by Lord Roskill and Lord Justice Donaldson.

To Sweet & Maxwell Limited for extracts from Phipson's Manual of the Law of Evidence (see Chapter 3, Definitions); and for extracts from Osborne's Concise Law Dictionary (Sixth Edition) (see Appendix A, Glossary of Legal Terms).

To Macdonald & Evans Limited for extracts from General Principles of English Law by P. W. D. Redmond, (Fifth Edition, revised by J. P. Price and I. N. Stevens) (See Appendix B, Types of Tribunal.)

Contents

Chapter 1 The Function of the Expert Witness

THE PURPOSE OF TRIBUNALS

The function of a tribunal is to decide the matter or matters in issue. For this purpose it has material put before it which should enable the tribunal to come to a true and proper decision. This material is called evidence, and evidence is put before the tribunal by witnesses. The purpose of witnesses is therefore to assist the tribunal to come to a true and proper decision.

This may sound trite and obvious, but it is a fundamental fact that must be understood from the outset: the sole true purpose of a witness whether lay or expert – and the difference between the two will be explained later – is to assist the tribunal. The fact that a witness is called and in certain circumstances may be paid by one side or the other does not alter the position.

WITNESSES

Broadly speaking, witnesses are of two kinds, witnesses of fact (lay witnesses) and witnesses of opinion (expert witnesses).

A witness of fact has personal knowledge of events which happened in the past and were perceived by his physical senses. Thus a witness of fact in a case involving a motor accident may give evidence as to place, time, the vehicles involved and the facts relating to the occurrence generally. Such a witness is not normally permitted to express an opinion arising from his knowledge of those facts, e.g. he would not

give his opinion as to the cause of the accident or the liability of the parties in relation to it.

This rule is however becoming increasingly eroded because statements about speed and distance made by such a witness are expressions of opinion deriving from his experience in such matters applied to the facts which he perceived at the time of the accident which he is describing.

A witness of opinion has special knowledge acquired for example in the course of professional training and experience. This knowledge enables the witness to assist the tribunal in coming to a decision by giving his opinion on the facts before the tribunal. Thus in the case of the motor accident referred to above, an expert witness who was not at the scene of the accident when it occurred could give an opinion based on examination of the vehicles involved as to whether the accident was caused by a mechanical failure or not.

Two quotations from legal authorities describe the role of the expert witness. The first is from Best's treatise on Evidence and runs as follows:

> 'On questions of science, skill, trade and the like, persons conversant with the subject-matter . . . are permitted to give their opinions in evidence; i.e. to state conclusions whether drawn from facts which have fallen under their own observation or from such as are proved at the trial by other evidence. Thus, medical practitioners are allowed to give their opinions as to the probable cause of disease or death or the probable result of a wound or injury; artists to give their opinions as to the genuineness of a picture; shipbuilders to give their opinions as to the seaworthiness of a ship; and the like.'

The other passage is from Smith's 'Leading Cases':

> 'The opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgement upon it without such assistance; in other words, when it so far partakes of the nature of a science or art as to require a course of previous habit or study in order to the attainment of a knowledge of it.'*

* Lord Macmillan of Aberfeldy 'The Giving of Evidence'.

The Law Reform Committee Report sets out the difference between evidence of fact and evidence of opinion. The reader should acquaint himself with the Report and in particular with those sections reproduced in the Appendix. Paragraph 29 headed 'The Nature of Experts' Reports', while leading on to the question of the disclosure of reports, sums up a judicial view of the expert witness, as follows:

> 'All expert opinion is based upon facts which the expert, for the purposes of his opinion, assumes to be true. However highly qualified the expert, if the facts which he has assumed differ in any material respect from those which are ultimately accepted by the judge at the trial as being the true facts, the opinion of the expert is not directed to the real issue upon which his expert assistance is needed to enable justice to be done. This consideration points to a relevant distinction between experts' reports made before trial, according to the kinds of facts upon which the opinion of the expert is based. If they are facts of a kind which, so far as they are not already agreed, can be ascertained before the trial with reasonable certainty by the expert himself by the exercise of his own powers of observation, or are within the general professional knowledge or experience, a report made by him before the trial is likely to be directed to the actual issue upon which his assistance is needed. We should regard as being within an expert's general professional knowledge or experience any matters which are within the common knowledge of the profession by reason of their having been published in books or professional journals or which have been observed by the expert himself in the course of his professional studies or practice. If, on the other hand, the report is based upon facts which are in dispute between the parties to the action, the expert's opinion given before trial upon a version of the facts supplied by the party on whose behalf he is instructed will only be of assistance if that version is ultimately accepted as the true version by the judge at the trial. Furthermore, experts' reports in the latter category involve disclosing alleged facts which the party instructing the expert will seek to prove at the trial by witnesses other than the expert himself and to this extent involve disclosing material which will be included in the proofs of those witnesses. If the opinion of the expert based upon the alleged facts so disclosed is unfavourable to another party to the action, there might be a temptation to that other party to trim the version of the facts presented by him and his

witnesses at the trial so as to weaken or destroy the factual basis of the unfavourable expert opinion. We would not wish to overstress this risk. Most witnesses of fact, even though they are parties to litigation, are honest and intend to be candid. But human memory is fallible and parties in particular are prone to convince themselves without any intentional dishonesty that what would most assist their own case was what actually happened.'

An arbitrator being a person appointed with special expertise in the subject matter of the dipute may not need the assistance of expert witnesses but a lay tribunal will need guidance on technical matters.

A witness of opinion may also be a witness of fact. An example of this is the engineer engaged on construction works and present at the time of a failure of those works, such as the collapse of a retaining wall. His evidence of fact would relate to the actual events as witnessed by him and perceived with his own physical senses. His evidence as an expert would be his opinion based on the known facts as to the cause of the collapse.

In such a position his duty as a witness on oath is to give his true opinion based upon his knowledge and experience and not to act as an advocate for the party calling him. His prime function is to assist the tribunal by giving a fair and honest opinion and not to assist his client to win his case, despite his being called and paid by the client.

There is therefore a clear distinction between that of the expert and that of the advocate, although in certain types of procedure the expert may have to fulfil those two roles. While the prime function of an advocate (be he counsel, solicitor or lay advocate) is to assist the tribunal to a just decision, his duty is to persuade the court as to the construction it should place upon the facts and the opinions placed before it. His own opinion on the merits or otherwise of his client's case are of no concern to the tribunal. Normally the advocate accepts any brief sent to him unless there is a strong reason for his not doing so, and only in the most exceptional circumstances does an advocate give evidence himself. The opinion of an advocate on the merits or demerits of the case he is arguing is irrelevant and not to be stated by him. He can 'submit' a proposition without alleging, averring or denying it.

The opinion of an expert can be of great importance to the tribunal in giving guidance on technical matters on which the court could not be expected to be informed and it is therefore essential that the witness of opinion should speak only the truth as he sees it regardless as to

whether his opinion on a certain aspect of his evidence supports his client's case or not. If an expert cannot in honesty support his client's case in principle he should not accept instructions in the matter. Truth, not sophistry, is the business of the expert.

Many matters touched on above will be dealt with more fully later in this book but it is necessary that the true function of the expert witness be fully understood at the outset.

ASSESSORS

In certain types of case, notably in the Admiralty Division of the High Court, an expert assessor sits with the judge. His function is not to give evidence but, (in an Admiralty action):

> 'to provide the judge with such general information as will enable him to take judicial notice of facts which are notorious to those experienced in seamanship about the corresponding characteristics of ships and of traffic conditions upon navigable waters, so that he may be qualified to reach an informed opinion about the standards of care to be observed by reasonable users of those waters. In effect, the nautical assessor's function is to enlarge the field of matters of which the judge may take judicial notice so as to include matters of navigation and general seamanship.
>
> Consultation between the judge and the nautical assessor is continual and informal, both in court and in the judge's room. The advice which the judge receives from the assessor is not normally disclosed to counsel during the course of the hearing, although the judge may do so if he thinks fit. In his judgment he does usually state what advice he has received on particular matters and whether he has accepted it or not. But he is under no obligation to do so and the practice is not uniform among all judges.'*

As the assessor does not give evidence his opinions cannot be subjected to the test of cross-examination.

* Law Reform Committee Report paras 9 to 10.

COURT EXPERTS

Provision for the appointment of a court expert is made by Order 40 of the Rules of the Supreme Court (See Appendix) but this power is rarely used, except in cases involving the custody or care of infants.