

Expert Witness

Precognoscer's Handbook

"Expert" is an English term although it is now used throughout the UK in place of the older Scottish term, "skilled witness". Whilst there is no precise definition, for practical purposes it can be said that:

"A skilled witness is a person who through practice, or study, or both, is specially qualified in a recognised branch of knowledge, whether it be art, science or craft" - Dickson on Evidence, Third Edition, paragraph 398.

To make the point that formal study is not requisite, a Drug Squad Officer with the necessary experience will be considered an expert by the court. It is always necessary to set up in evidence, and therefore to cover at precognition, the witness's qualifications and expertise whether these are formal or by experience.

The general rule is that examination of witnesses must be on facts which fall under their own observation, not on matters of opinion or inference, which are for the jury, not the witnesses.

An exception to the general rule against examining witnesses on matters of opinion occurs wherever the issue involves scientific knowledge, or acquaintance with the rules of any trade, manufacture, or business, with which persons of ordinary intelligence are not likely to be familiar. It should be noted that the witness can only give opinion evidence within the areas of the witness's expertise.

An expert witness does not need to know, and ordinarily will not know, the facts of the case from his or her own knowledge. Accordingly, his or her knowledge of the facts has to be obtained from information supplied to him or her and from his or her inspection of documents and real evidence. It may, with the trial judge's agreement, be supplemented by his or her presence in Court during the testimony of witnesses to fact. If it is intended to do this, there should be an application to the Court at the outset although the expert is not allowed to be present while other experts are giving evidence.

Where appropriate the Procurator Fiscal should instruct and obtain expert evidence. The need for more than one expert opinion must always be considered, [REDACTED]

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An expert witness must be given all necessary and relevant information to enable him or her to provide an informed opinion of injuries sustained by a deceased or a complainer. It may assist to arrange an early meeting, loosely described as a case conference, with the experts who are to undertake the work in order to ensure that they are aware of all relevant information and that their work is focused and their instructions are clear. All relevant lines of enquiry should be followed whether or not it is of benefit to the prosecution.

Much is to be gained by precognosing expert witnesses.

Where the expert is speaking to something which is obscure and complex, great care should be taken to ensure that the precognition accurately reflects what the expert is saying.

Careful consideration must always be given to the question of cost of expert work and to the requirements of [Money Matters 3 - Witnesses](#) to agree rates of payment and, in any case where the expert is not prepared to work within the prescribed rates in Schedule 1, or where the expense is likely to be considerable, to refer the matter to the Area Procurator Fiscal/Area Business Manager for instructions with an indication of the importance of the potential evidence to the case (and including a note of Crown Counsel's view if the case has reached that stage). Such requests should be submitted to the Area Procurator Fiscal/Area Business Manager and should, wherever possible, contain a detailed proposal for the expert work to be carried out and an estimate for the work or at least the basis for charging.

There is no general rule that evidence of an expert witness does not require to be corroborated. If the essential fact in dispute is a matter of technical science, it cannot be established by the uncorroborated testimony of a single expert witness. But an expert opinion given on the basis of facts which are established by corroborated evidence does not itself require corroboration.

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There are, however, exceptions or modifications to the general rule requiring corroboration of expert evidence as to fact, such as in the Civil Evidence (Scotland) Act 1988 (for FAs), the Criminal Procedure (Scotland) Act 1995, Sections 280 and 283 and particular modifications for specific statutes such as the Road Traffic Offenders Act 1988, Sections 15 and 16.

The Court requires of expert witnesses the highest standards of accuracy and objectivity. An expert witness for the Crown should disclose, in a written report, all relevant information and indicate how his or her conclusions may be tested and what inferences cannot properly be drawn from his or her evidence.

However, it is not for the expert to usurp the function of the Court which is not bound to accept the evidence of a witness, even an expert witness who is not challenged. Scottish Courts traditionally adopt a discriminating approach to the assessment of conflicting expert evidence and thus are accustomed to resolving technical issues without excessive difficulty.

Cross examination of a witness will normally be with a view to challenging the soundness of the conclusions drawn by the witness from the facts as the witness has assumed them or had them presented to him or her: or to elicit an opinion on the facts as the cross-examiner hopes to establish them.

If the witness's conclusions are founded on certain facts then it is necessary for the Crown to establish that factual basis. This is a primary concern of a Precognoscer as is the requirement that the expert should be tested on the validity of his or her conclusions, i.e. is there any other inference which might legitimately be drawn?

Although not essential, it is obviously useful if a report can be produced by the expert witness which can be listed as a production and which s/he will be able to speak to in Court. Such a report should contain information on the following points:

The witness's qualifications and experience and expertise;

The factual basis on which the views are based;

The conclusions;

The reasons for discounting other explanations.

A good report will also set out clearly, if appropriate, the scientific background and the presumptions on which his conclusions are based. If the report is lacking in any such respect then this should be made good by precognition.

When experts are employed, the choice of expert is the responsibility of the Procurator Fiscal (not the Police or other Reporting Agency). The attendance of the Procurator Fiscal and, if appropriate, the Precognoscer, at the locus of any serious or complicated incident with such expert assistance as is considered necessary has obvious advantage and this practice is commended by the [Book of Regulations, Paragraph 2.2](#).

However, if an expert is being used, it is essential that that expert's use is approved by an appropriate member of the legal staff who should bear in mind the provisions in [Money Matters 3 - Witnesses](#), in particular as to obtaining Crown Counsel's authority to engage accountants and as to the maximum fees payable to experts (with reference to the Area Procurator Fiscal should it be proposed to exceed those maxima).

Crown witnesses - precognition interview

Where an expert instructed by the Crown, including an expert medical witness, is to be asked to express an opinion, s/he should always be contacted for the purposes of

precognition interview, even where a written report has been produced by the witness as the witness may wish to or be able to expand upon the terms of the report at interview. This contact should be made prior to the case being reported to Crown Office or, where for any reason this is not possible, as soon as possible thereafter.

The nature and extent of the precognition interview will depend on the significance of the evidence to the case. The interview should usually be conducted in person, although there may be particular circumstances where interview by telephone will be appropriate. Where an expert report is signed by two or more witnesses, all signatories to the report should be interviewed.

When contact for precognition interview is not necessary

It is not necessary to contact Crown expert witnesses for the purposes of precognition interview where:

- The evidence relates to routine forensic analysis; or
- Confirmation has been provided by the defence that the evidence will be the subject of agreement.

In addition, it is not necessary to interview Doctors, where a satisfactory statement has been submitted by the police in accordance with the Serious Crime Protocol. If the quality and accuracy of any Doctor's statement is inadequate, the police should be asked at this stage to obtain statements of a satisfactory standard in accordance with their responsibilities under the Protocol. Any such request should be made with specific reference to the relevant paragraph of the Protocol. Therefore, precognition interview only need occur where, on consideration of a statement from the police of a satisfactory standard, there is a clear investigative need to be addressed.

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Any Crown expert witness contacted for the purpose of precognition interview should be given adequate notice before the interview to allow him or her to prepare properly for it. The precognoscer should ensure that the expert has the opportunity to see and consider all the productions, such as photographs, on which his or her evidence and opinion may require to rely. As indicated above, the qualifications, experience and expertise of an expert witness, including an expert medical witness who is being asked to express an opinion, should always be established at the outset of the interview. The witness should also be interviewed as to whether s/he is qualified to express an expert opinion and is prepared to do so.

Defence witnesses - precognition interview

Where the defence witness list in a High Court case includes an expert witness, s/he should be contacted for the purposes of precognition interview by the precognoscer or other member of the Procurator Fiscal's staff who should be acquainted with the case under consideration and the apparent significance of the expert's involvement.

In High Court cases defence experts must be interviewed as soon as possible after intimation of the defence witness list and in any event prior to the commencement of the trial. Any factor which prevents the interview of defence expert witnesses prior to the commencement of the trial in a High Court case must be brought immediately to the attention of the trial Advocate Depute, whom failing the High Court Division.

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