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Court Appearances: The Arborist as Expert Witness

Article 4/6 for ISA Arborist News (August 2012)

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In this fourth article in a series on arboricultural consultancy, Jeremy Barrell examines the role of the expert witness, particularly when all the reports are done and the time has come to be tested in court. Even for the most experienced expert this is a rare event, so there is very little opportunity to learn from past mistakes. Cross-examination by lawyers intent on exposing your every weakness and grinding away your credibility, piece by piece, is a truly lonely place. To be a successful expert witness is both technically and psychologically demanding, with many consultants seeing the appearance in court as the pinnacle of professional practice.

The following article was adapted .from an item first published in The ARB Magazine, the quarterly magazine for members of the Arboricultural Association (www.trees.org.uk).

Appearing in a civil case at The Royal Courts of Justice in London, England, is the ultimate challenge for expert witnesses in the UK, and only the very best succeed in this daunting legal institution.

In very general terms, witnesses of fact in legal proceedings are people who have actually been involved in an event as a participant or a bystander, and any of us could find ourselves in court in this capacity. Once in court, examination revolves around what was done and seen to establish the facts, with no requirement to provide opinions. In contrast, the role of an expert witness is to assist the court in analyzing facts of a specialist nature that are beyond the experience of the court, and to provide opinions. The court then assesses the weight that should be applied to those opinions as part of the process of arriving at a judgment on the issues being considered. In practice, expert witnesses can appear in a range of formal proceedings where a specialist's advice is needed, including criminal prosecutions, civil claims for damages, and tribunals or inquiries relating to land use planning. In this article, the focus is on acting as an expert witness in civil proceedings in the UK, although the principles explored will broadly apply to similar circumstances around the world.

Civil courts are where arguments and disputes are heard for the purpose of deciding liability — who is responsible and what damages, if any, are

appropriate so as to compensate for any harm suffered? For the majority of expert witnesses involved in civil cases, much of their time is spent preparing formal reports because actually appearing in court does not happen very often. Many cases are settled on the basis of the expert reports, which is an important benefit of expert involvement. Other cases settle on the court steps or are abandoned part-way though, as one side realizes their cause is lost and concedes. There are no reliable statistics, but some experts report as few as one in every ten to fifteen instructions results in a court appearance!

Once in court, the normal procedure is for the aggrieved party (called the claimant in the UK and the plaintiff in the U.S.) to set out their case first, followed by the accused party (the defendant) to explain why they are not to blame. In most instances, each party has solicitors (counsel) and barristers (trial attorneys) to present their position, and expert witnesses assist in that process. Each expert is led through the points at issue by their own counsel, called Examination-in-Chief (often called Direct Examination in the U.S.), followed with Cross-examination by the opposing counsel, and then an opportunity for Re-examination (often called Redirect in the U.S.) by their own counsel. A judge listens to all the evidence, forms a view on how much weight to assign to each position, and delivers a judgment that is usually final, but permission to appeal to higher courts is sometimes granted.

If you are an expert with aspirations to appear in court, being mindful of these points may assist in making the most of the opportunity:

Attention to detail: A frequent pastime of cross-examining counsel is to explore the seemingly insignificant detail of an expert's opinion and expose any cracks, inconsistencies, or weaknesses. Most big things, including expert opinions, are made up of lots of smaller parts, fitted together. A commonly effective strategy for inflicting damage to that overall opinion is to create doubt about — or even worse, to prove false — one of the constituent parts. The individual elements that make up a position or view seem important to lawyers and judges, which in turn means that experts who ignore paying careful attention to this aspect, do so at their peril. Everything matters — spelling, typos, names, dates, times, measurements, and records of conversations. Every detail that an expert gets caught on is accumulating damage to credibility, and puts them one step closer to the precipice of failure.

Public speaking: Thankfully, for those of us who are not natural public speakers, this is a skill that can be learned and developed. There are many, simple applicable techniques that can make a huge difference in the caliber of one's presentation and minimize the stress induced. Public speaking is an essential expert skill that will have to be mastered by all those with high ambition. If public speaking is a source of anxiety for you, then look for help from professionals, get plenty of practice, and prepare thoroughly every time. Most of us will probably never be fully at ease, but the more you do it, the easier it gets.

Courtroom awareness: It is almost a reflex action to look at, and answer to, the person who asks a question, but it is wise to re-think that approach when in court. The expert's duty is to the court, and the judge represents where the focused expert should concentrate. Cross-

examining counsel's job is to engage, distract, disorientate, and destabilize that focus through a range of tactics. Effective experts will always avoid directly engaging with cross-examining counsel, answer directly to the judge, pause while a judge is writing, and take the lead from the judge, rather than the multitude of distractions that can be thrown by the other side.

Good manners and common courtesy: Generally, judges do not take kindly to bad manners or any type of discourtesy. Experts should always observe these common courtesies: never interrupt, talk over other speakers, or show disrespect for the opinions of others. If an expert is being bullied or if these courtesies are lacking, then an appeal voiced directly to the judge will usually settle the matter (and often deal a psychological blow to the other side at the same time if the appeal is upheld). The perfect scenario for the other side is that an expert is goaded into responding to these pressures by being equally discourteous, and is then pulled up by the judge.

First impressions: Successful experts work very hard to align people to their opinions by creating positive impressions. First impressions really do matter. We make decisions every day (and often very quickly) that are based on how people look, or the written material they produce. Interactions that are pleasant, personable, interesting, professional, tidy, concise, and easy to understand, facilitate alignment and engagement. Impressions that are boring, untidy, bland, amateur, and complicated foster alienation, and are often difficult to recover from — especially in the courtroom.

Body language: It is well known that effective communication is highly influenced by body language. The posture and disposition of the speaker often makes a much stronger initial impression than the content of the words being spoken. This subconscious language is not apparent in the preparation of reports, of course, but it is there to be used in court, where visual and verbal cues dominate the impact on proceedings. Whether we recognize it or not, we are all highly influenced by the gestures, expressions, posture, and tone of the people we meet, and experts are no different. The most effective expert witnesses will be aware of this power of persuasion and use it to their advantage by enhancing the positives and suppressing the negatives. Smiling, open gestures, and dominant posture are all hallmarks of polished performers, and essential parts of a successful package.

Confidence versus arrogance: There is a fine line between being confident — that is, having a deep understanding of your position and being arrogant, which is showing a disregard of other perspectives to the extreme. Experience breeds confidence, which is why having done what you are talking about is so important. Cross-examining counsel will attack opposing experts from all sides. It is debilitating and demoralizing to be continually ground down in this way, but that is the nature of being an expert witness. Confidence is born from a thorough analysis and understanding of the germane issues, and spending time in advance to work on this detail often proves a wise investment when the day in court finally arrives.

Passion: Enthusiastic people who care about their work can be more of an exception than the rule, but it makes a big difference. Passion, in moderation,

can have a very positive effect, and even the most cautious judges are likely to be more receptive to an expert's opinion if they detect a caring attitude and a deep-held belief in the reasoning. If it is just a job and that is all it ever will be, then being an expert witness is probably not for you.

Calmness: Effective experts remain calm at all times and are never provoked into emotional or uncontrolled outbursts. Cross-examining counsel often try to engage an expert directly and stir up as much emotion as they can. One of the primary objectives for an expert is to provide balanced and well-reasoned opinions that are free from emotional bias. Any display of poor emotional control when under pressure can undermine an expert's objectivity, and hand the initiative to the opposition. Experienced experts avoid direct engagement with the questioner and direct their answers to the judge or jury.

Honesty and integrity: One tough challenge for expert witnesses is to build up and maintain a positive perception of honesty. Courtrooms are inherently confrontational, and although an expert's duty is to be above advocacy, it can be an uphill struggle because they are perceived to be part of a team (supporting either defendant or claimant/plaintiff) that has precisely the opposite duty — to advocate one position or the other. The conflicts are very real and the only way to succeed is to be meticulously honest. Avoid arguing a lost point and always concede immediately if you are proved wrong. That is easy to say and psychologically hard to do, but the odds are, it can be more damaging if you persist in trying to fight a lost cause.

Supporting your team: Although bound by the professional constraints of independence and impartiality; an expert is still part of a team, which would normally include a barrister (trial attorney), an instructing solicitor (counsel), and possibly experts from other disciplines. An overriding duty to the court does not preclude them from supporting the team effort, and the most effective experts will do this, where there is no conflict. A great way to help your barrister/attorney is to take detailed notes of all the examination and testimony, including accurate quotes of key statements, where possible. Although most cases are recorded, the recordings are not available for barristers/attorneys to prepare their summing up at the end of the case, and they do not have time to write down every detail as they examine each witness. Taking long and accurate notes is tough to do, especially if the case runs for days, but it can pay big dividends to have an accurate record of who said what and when. Although there is certainly a lot to think about, there are no obvious secrets to becoming a successful expert witness. Careful consideration of many small things can often add up to a big result and so meticulous attention to detail is very important. When in court, the difficulty is often trying to remember all of those little points when bigger distractions dominate. Supreme experts balance all these considerations in the heat of the moment, using the poise of their experience to deliver the perfect performance. Such moments are rare indeed and, when one comes along, there is usually only one chance to get it right!

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In the next article in this series, Jeremy Barrell takes a look at the standard of the duty of care relating to trees. When a tree failure results in harm, the courts will be focused on the duty of care and whether it was met by the duty holder. The author will discuss how much management is enough in the context of recent English court cases and emerging good practice for tree inspections.

Jeremy Barrell has worked with trees all his life, building up a modest contracting business in the early 1980s and 1990s before concentrating on full-time consultancy in 1995. From those humble beginnings, Barrell Tree Consultancy (www.barrelltreecare.co.uk) now has six consultants advising on planning and legal issues throughout the UK.