

Veterinary Expert—or not ?

The role of the veterinary surgeon as a witness in Court proceedings is a position of enormous importance, professionally, ethically and morally. And it isn't taken seriously enough.

Recent cases make it clear that many veterinary surgeons do not understand their duty to the Court, their status as a witness, the effect of their opinion, and it is just as clear that the moral and professional dilemmas that often arise haven't been considered before the Expert exposes themselves to inevitable criticism.

What sort of Witness ?

You may be a Witness of Fact, where you simply state your observations, or an Expert Witness, or both at the same time. It is in the latter case that an immediate conflict arises. If the witness of fact then gives an Expert opinion on their factual statement which leads to charges being laid, it is very difficult for that person to be objective if contrary (and persuasive) Expert opinion is offered, as a change of mind will destroy the prosecution case. The RSPCA often employ a second veterinary Expert Witness to support the opinion of the Expert of fact, which avoids the dilemma.

Veterinary Surgeons employed by state agencies such as Defra and MHS have a further dilemma in that it is their duty to enforce the legislation. This increases their need for objectivity, but also increases the risk that the law might be used as a weapon to control those who do not perfectly comply with those who audit their farms and abattoirs.

The Game.

UK law is adversarial, unlike the inquisitorial European systems where information is provided to the Court which makes its determination on the facts. In this country the prosecution and defence present their contrary cases and argue (often aggressively) to persuade the Magistrates or Judge to decide in their favour. It's a game, and a game of war in which the object is to discredit the Expert Witness for the other side. By nature the veterinary surgeon does not enjoy criticism and is accustomed to providing advice and guidance, which in the main is accepted with gratitude. However, under cross examination it is entirely normal for the opposing advocate to attack the statement, opinion and competence of the unsuspecting Expert, which can seem a most unpleasant personal and professional assault, but is to be expected in contested cases.

Effect of Opinion.

The effect of a veterinary surgeon's opinion that unnecessary suffering has been caused to an animal is to provide the prosecution with a hugely powerful tool to secure a conviction, and of course this results in criminalising the defendant. Added to this there may be a custodial sentence or financial penalty (1 year and £20.000 under the Animal Welfare Act 2007), and disqualification from keeping animals, or any particular sort of animal for any length of time.

Under the Rehabilitation of Offenders Act 1974, most criminal convictions can become 'spent' or forgotten after a 'rehabilitation period' of five years.

There is however a very large category of people for whom convictions can never be spent, including people working in the following professions: doctors, dentists, nurses and midwives, lawyers, opticians, teachers, police officers and people working with children and vulnerable people.

Giving an opinion which may result in someone receiving a criminal record carries with it a very heavy burden of responsibility to ensure that the opinion is objective, educated, considered, and truthful, and these duties are laid down in law.

Duties of an Expert Witness

An expert, according to the Civil Procedure Rules 1998 Part 35 is a person “ instructed to give or prepare evidence for the purposes of Court proceedings”, and this requirement is also followed in criminal matters as laid down by Lord Justice Cresswell in the case “The Ikarian Reefer” :

The evidence of an expert should be:

- ◆ Independent objective and unbiased.
- ◆ Relate to matters in their field of expertise.

The expert should:

- ◆ State facts and assumptions which form the basis of their expert opinion.
- ◆ Consider facts which are capable of detracting from their opinion.
- ◆ Clearly indicate when a matter falls outside their expertise, or that there is insufficient information to form more than a provisional opinion.
- ◆ Where the expert could not swear that the content of their report was true without adding a qualification, the expert should state that qualification.
- ◆ If it is so an expert should state, after exchange of expert reports, that their opinion has changed.
- ◆ The expert should provide the other party with photographs, clinical data, laboratory results etc to which their evidence refers.

The duty of the expert is to the Court, irrespective of the party instructing them.

A very common misconception is that because an Expert is called either by the prosecution or defence lawyers, their loyalty lies towards that party. This could not be further from the truth. The duty is to assist the Court with technical details of

veterinary issues that the Court might not otherwise understand, and help them come to a fair conclusion.

Of course the expert may have formed a view as to the strength or otherwise of the alleged charge, but it is NOT their duty to be judgmental, but to provide a balanced view of all associated issues so as to best allow the Court to make the ultimate decision.

Writing Statements.

The opinion should be that of the independent practitioner, and as such not dictated or assisted by a third party, nor written on the headed paper of that third party. The format of the statement can be found on any expert Witness website and should contain a statement of truth, qualifications and experience of the writer relative to the issues at trial, be dated and signed by the author and in complete compliance with the rules of the Ikarian Reefer and/or CPR 1998 Part 35, depending on whether the matter is heard in the Criminal or Civil Court.

The evidence should not be discussed with any other Witness in the same case, nor should the writer be coerced into attending joint meetings with any other witnesses or enforcement agents as this is regarded as witness “coaching” .¹ It has the potential for a prosecuting body to allow the witnesses to rehearse their evidence before trial, and repair any weaknesses in the case.

Court Etiquette.

As a professional person you have a duty of courtesy to the Court which should be reflected in your dress—sober and formal, your manner, professional, objective and properly detached and particularly under cross examination, your manners. To the naïve witness the perceived aggressive affront during the testing of their evidence can cause a confrontational reaction—much to the satisfaction of the opposing advocate because it can reduce the credibility of the witness in front of the Court, particularly a lay bench of Magistrates. In the Crown Court the Judge is less likely to permit bullying of a professional witness, but the object is still the same—to discredit the witness to *any* extent.

It is sensible to ask advice of the advocate as to how to address the bench, when to sit or stand, and how to answer questions, whether in full, or succinctly, but it would be even more useful for the aspiring witness to attend Court before appearing themselves to see the gladiatorial theatre !

In summary.

A Veterinary Expert Witness is not judge or jury, or a hired gun for either party, but a robustly independent professional person, with best knowledge and understanding of the matters at issue before advancing an opinion that may assist to criminalise a

¹ R v Momodou [2005] EWCA 177 02/02/2005.

defendant. They should consider all the evidence available, and ensure that is sufficient to form their opinion, rather than make an immediate assumption based on a “snapshot” of information.

Everything about their behaviour should express their objectivity, and their proper conviction.

Madeleine Forsyth BVSc Cert.WEL MRCVS Barrister.