

Expert witnesses

- What you do and don't want from your experts
- Royal Faculty of Procurators Glasgow
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- Expert witnesses are frequently required in court to assist the court
- Scotland has an adversarial system of justice
- Central to that system is the right to challenge an opponents case
- This is frequently done by leading expert witness evidence
- The purpose of this lecture is to consider the nature of expert witness evidence, and the role of the expert in the process of litigation
- I will consider what you do and don't want from your expert witness



Increasing concern about the use of experts

- In recent years there has been concern about the use of experts in the UK courts. In England there was significant reform following Lord Wolf's review of expert evidence
- In response to the Scottish Courts Review the Scottish Legal Aid Board and others expressed concern about the increased reliance upon experts and the consequent costs
- This was also discussed in the Taylor Review of Expenses and Funding of Civil Litigation in Scotland in 2013
- The introduction of judicial case management of complex cases has been part of the response to the deficiencies



The power of the expert to do great harm

- It is perhaps in criminal cases that the question of problems with expert witnesses in our courts have received the most publicity
- Sally Clark was found guilty of murder of her children on the basis of pathological evidence that was flawed and also the flawed statistical evidence of Professor Sir Roy Meadows
- Angela Canning was also found guilty of the murder of her babies and Professor Sir Roy Meadow gave evidence in her case



Why is an expert needed?

- An expert is required if there are issues in the case which require specialist knowledge or experience for their resolution
- The evidence that is being adduced from the expert must be appropriate to those issues
- The expert must have the relevant specialised knowledge or experience appropriate to those issues
- An expert who does not have the relevant experience and knowledge is of no assistance to the court



Special status

- Since the mid-sixteenth century expert witnesses have been accorded a special status as a witness
- They are entitled to provide opinion evidence to the court
- The expert offers an opinion to the court based on their special knowledge
- An expert may also give evidence of fact. They can give evidence of what he or she has observed if it is relevant to a fact in issue.
- Skilled witnesses can also give evidence based on his or her knowledge and experience of the subject matter, drawing on the work of others



The expert should not usurp the function of the court

- In *Kennedy v Cordia* there was reference to *Pora v The Queen* [2015] UKPC 9 where it was said:
- “It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues.
- The expert witness should be careful to recognise, however, the need to avoid supplanting the court’s role as the ultimate decision-maker on matters that are central to the case.”
- It was recognised that an expert may have to express views in a way that addresses the ultimate issue before the court expert assistance does not extend to supplanting the court as the decision maker



Duty of the expert

- It is the duty of the expert witness to “furnish the judge or jury with the necessary scientific criteria for testing the adequacy of their conclusions, so as to enable the judge or the jury to form their own independent judgement by the application of these criteria to the facts proved in evidence”
- ***Davie v Magistrates of Edinburgh*** [1953] S.C. 34 at 40
- The court said they were not bound to accept the view of an expert even if uncontradicted because the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert



Admissibility of expert evidence

- In ***Kennedy v Cordia*** reference was made to the South Australian case of ***R v Bonython*** (1984) 38 SASR which gave relevant guidance on the admissibility of expert evidence
 - The first question is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible and that is divided into two parts
 - (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area



Admissibility of expert evidence

- (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.
- The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court



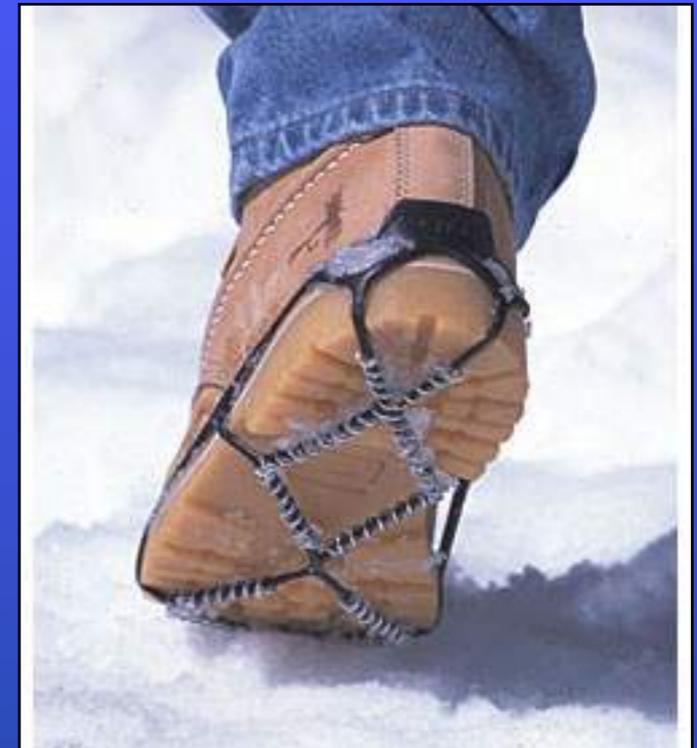
Kennedy v Cordia (Services) LLP

- The pursuer was employed by Cordia as a home carer.
- The case related to a slip on icy ground when the pursuer was visiting to assist a person with personal care
- She was wearing flat boots and the defenders were aware that employees had slipped previously
- The question was whether the defenders should have provided the pursuer with yaktrax's and whether had these been provided the accident would have been avoided
- The pursuers led expert witness evidence from Mr Greasly and the defenders took issue with his expertise as an expert



Kennedy v Cordia

- In the Outer House Lord McEwan found Cordia liable for the accident and accepted the evidence of Mr Greasly.
- He repelled the objection made to Mr Greasly's evidence on the ground that he did not have special skill, experience and learning
- The Lord Ordinary's decision was reversed by an Extra Division of the Inner House
- Lord Brodie gave the leading judgment and said that Mr Greasly should not have been allowed to give evidence and the Lord Ordinary had abdicated his role as decision maker. The dispute that required to be resolved did not require expert evidence



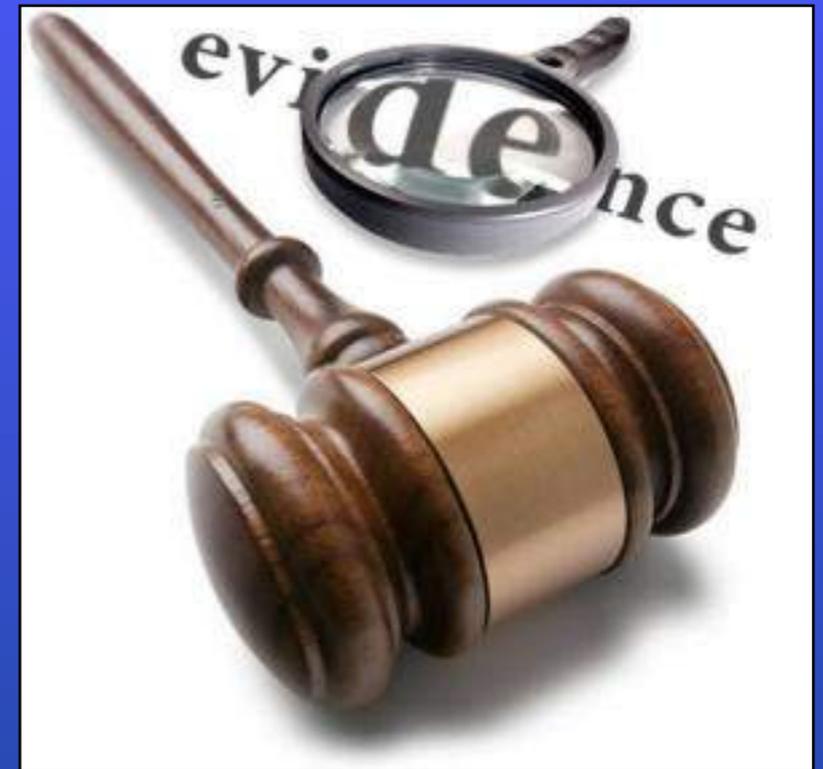
Principles from Kennedy

- The Supreme Court said that four matters required to be addressed
 - the admissibility of expert evidence
 - The responsibility of a party's legal team to make sure that the expert keeps to his or her role of giving useful information
 - The court's policing of the performance of expert's duties
 - Economy of litigation



Kennedy v Cordia

- The Supreme Court said that there are four considerations which govern the admissibility of skilled evidence
 - Whether the proposed skilled evidence will assist the court in its task
 - Whether the witness has the necessary knowledge and experience
 - Whether the witness is impartial in his or her presentation and assessment of the evidence; and
 - Whether there is a reliable body of knowledge or experience to underpin the expert's evidence
- The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others



Reasons

- What really matters in most cases is the reasons given for the opinion.
- In ***Dingley v Chief Constable, Strathclyde Police*** 1998 SC 548 at 604 “As with judicial and other opinions, what carries weight is the reasoning, not the conclusion”
- In ***Kennedy v Cordia*** the court said that an expert must explain the basis of his or her evidence when it is not personal observation or sensation
- A mere assertion or bare *ipse dixit* carries little weight as was said in ***Davie v Magistrates of Edinburgh***
- In ***Kennedy v Cordia*** it was said that such an opinion was worthless
- If the reasons stand up to scrutiny the opinion stands up



Basis of fact

- The expert opinion is based on facts and it is of no value unless the facts are proved in evidence
- The expert witness should state the facts and assumptions on which his opinion is based
- Where there is dispute about the facts the expert should be aware of that from his instruction
- The expert should not omit to consider material facts which do not support the opinion he advances
- Where there are more than one possible set of facts it is not the role of the expert to select which factual scenario is the correct one as that usurps the function of the court
- The expert witness should make it clear when a particular question or issue falls outside his expertise



Researched

- It is recognised that an expert opinion must be properly researched and supported by literature, national guidance and textbooks
- Experts should not simply select important papers that help the argument. Experts should bring to your attention all relevant material.
- Where there are technical terms used these should be explained
- Pictures, videos or drawings may be of assistance to the court
- Articles and literature referenced in the report should in fact support the opinion advanced
- lawyers should cross check this whether its their expert or they are preparing for cross-examination as it is surprising how many experts cite papers and articles that when read in full do not support the opinion they advance



Impartiality

- The ***Ikarian Reefer*** provided that expert evidence presented to the court should be seen to be the independent product of the expert uninfluenced as to form and content by the exigencies of litigation.
- The expert witness should provide independent assistance to the court by way of an objective unbiased opinion in relation to matters within his expertise. The expert witness should never assume the role of an advocate
- It is important to note that it is the opinion rather than the expert himself that should be objective and unbiased although the independence of the expert and his opinion are clearly linked



Duties of those instructing experts

- The Supreme Court in ***Kennedy v Cordia*** said that it was the responsibility of counsel and solicitors who propose to adduce the evidence of a skilled witness to assess whether the proposed expert does have the necessary expertise and whether his or her evidence is otherwise admissible
- They also said it was the role of the legal team to ensure that the proposed expert witness is aware of the duties imposed upon an expert witness
- The legal team have a duty to disclose to the expert all of the relevant factual material which they intend should contribute to the experts evidence



Conflict of interest

- Where the expert has a conflict of interest or potential conflict of interest this should be disclosed as early as possible
- The conflict may be of any kind including a financial interest, a personal connection or an obligation as a member or officer of some other body
- ***Toth v Jarman*** [2006] EWCA Civ 1028 is of assistance on this point. It is settled following *Toth v Jarman* that the presence of a conflict of interest does not automatically disqualify the expert from giving evidence. The key question is the issue of independence.
- ***McCulloch v Forth Valley Health Board***, Lord Tyre Outer House of the Court of Session, 2020. There was an objection by the defenders to the pursuer's expert on the basis he knew the doctor under attack- ultimately they did not proceed with this objection



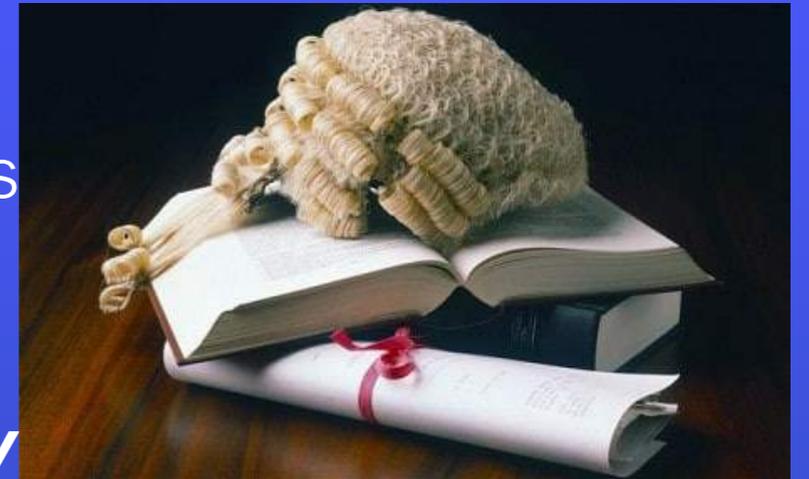
GMC Guidance for expert witnesses

- The GMC has produced guidance for expert witnesses
- They recognised that doctors play an important role in the administration of justice system by contributing evidence both as an expert witness and witness of fact
- They emphasise that the duty is to the court and not to the party instructing them
- They reinforce that the duty is to act independently and that experts must be honest, trustworthy, objective and impartial
- They also state that it is the duty of the doctor to ensure that any report written or advice given is accurate



Expert witnesses-medical negligence

- Expert witnesses are vital in medical negligence cases
- In such cases the duty of the expert is to consider professional practice in terms of the ***Hunter v Hanley*** test in Scotland and ***Bolam*** test in England
- It is not the experts role to assess determine whether there is negligence -that is the role of the court having assessed the expert evidence presented to it
- An expert who makes a determination of negligence usurps the function of the court



Bolitho

- The court must apply the principles in ***Bolitho v City and Hackney Health Authority*** to the expert opinion evidence led by the defenders on the issue of failure in care
- It is always open to the court to conclude that a practice which is institutionally recommended is not the legal standard.
- The court is not necessarily bound by expert witness evidence that the professional standard has been met.
- Where there is expert opinion advanced in support of a practice this must be subject to judicial analysis.
- It is ultimately for the court, not the medical profession, to decide what the standard of care is in the circumstances of a particular case.



Bolitho

- Lord Browne-Wilkinson agreed that the court was not bound to conclude that a doctor can escape liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice.
- In cases involving the weighing of risks against benefits the judge, before accepting a body of opinion as responsible, reasonable or respectable, will need to be satisfied that in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter



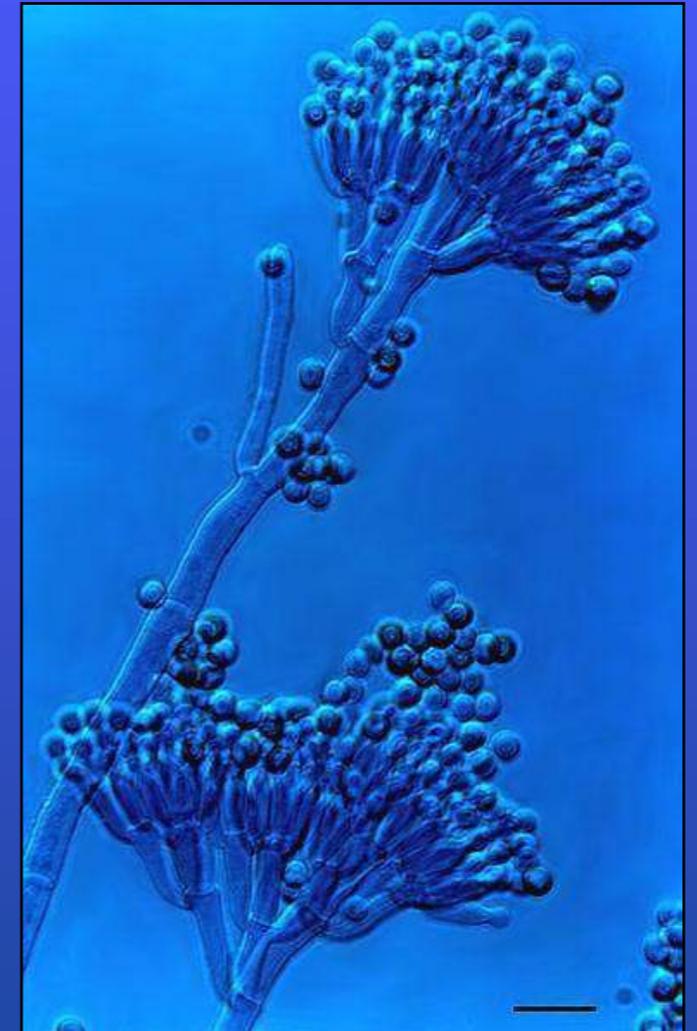
Bolitho

- It is the process rather than the result that brings down the expert evidence where the expert has not considered and weighed all the countervailing factors relevant to the issue.
- There is a distinction between what the professional practice test demands from the doctor and what *Bolitho* expects from the expert.
- The expert opinion is not sanctioned as responsible and defensible unless that opinion has weighed the comparative risks and benefits of the doctor's conduct and what alternatives may have been available to avoid the adverse outcome.
- The opinion should also be internally consistent and make cogent sense as a whole such that no part of the opinion contradicts with another.



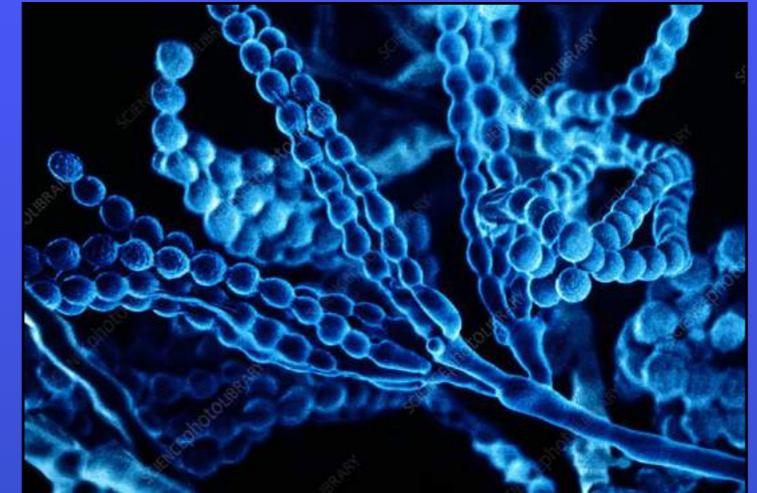
Hucks v Cole

- In *Bolitho* there was reference to *Hucks v Cole* a case decided in 1968 but reported in 1993.
- It was said that this was a decision that demonstrates how a judge would be entitled to approach expert professional opinion.
- In *Hucks v Cole*, a doctor failed to treat with penicillin a patient who was suffering from septic spots even though he knew that this could lead to puerperal fever.
- A number of distinguished doctors gave evidence that they would not have treated with penicillin in the circumstances. The English Court of Appeal found the defendant to have been negligent.



Hucks v Cole

- It was recognised that the fact that other practitioners would have done the same thing as the defendant practitioner is a very weighty matter to be put on the scales on his behalf but it is not conclusive.
- Where a practice knowingly exposes a patient to a risk of grave danger however small the risk the court must examine the practice.
- This is particularly so where the risk can easily and inexpensively have been avoided
- The court should analyse the reasons given for not taking the precautions and if it is not reasonable that the risk should be taken it is the function of the court to state that it constitutes negligence



Professional practice

- In *Bolitho* there was also reference to *Edward Wong Finance Co.Ltd v Johnston Stokes & Master* where the Privy Council held there was negligence despite the fact the practice in question was almost universally adopted in Hong Kong and was therefore in accordance with a body of professional opinion.
- Again, the focus was on an obvious risk that could have been guarded against and the body of professional opinion although universally held was not reasonable or responsible.



Marriott v West Midlands Health Authority

- In this case the English Court of Appeal held that the trial judge was entitled to reject the defendant's expert evidence.
- The claimant sustained a head injury in a fall and was admitted to hospital and discharged.
- He continued to feel lethargic and a GP attended and advised analgesics. Four days later he deteriorated and underwent emergency surgery for a skull fracture but was left seriously disabled.



Marriott

- The trial judge subjected the body of opinion to analysis to see whether it was properly regarded as reasonable.
- She had considered the small risk of something going wrong but weighed that against the seriousness of the consequence for the claimant if the risk did materialise.
- The fact that facilities were readily available was also a factor in the analysis.
- A practice is unreasonable if it exposes the claimant to unnecessary and unjustifiable risk of harm particularly when viewed against a simple and easily accessible precaution.
- The English Court of Appeal upheld the rejection of the evidence on the basis of the *Bolitho* test.



Expert witness-medical negligence



- Whether commenting on the standard of care or on causation is vital that the expert selected has the appropriate experience
- In ***Coyle v Lanarkshire Health Board*** [2013] the defenders midwifery expert had the appropriate experience but she was not practicing as a midwife at the time of the birth
- Dr Lee had a law degree and then worked only briefly as a midwife becoming a lecturer in midwifery in 2003
- *“it was not clear that Dr Lee had been appraised of and understood the duties to the court of a person called as a skilled witness”*

Coyle

- “As she gave evidence i formed the clear impression that she did not have the expertise to qualify her to give expert evidence on the standard of care reasonably to be expected of a midwife..”
- Her answers during examination in chief lacked confidence; she used expressions such as “probably” and “i think” in response to questions which should in my view have received more straightforward answers
- She appeared to be unaware that the defenders had conceded that there was a failure at 23.00 hours
- She proceeded on the incorrect factual assumption that Dr Anderson had attended on four occasions
- Her opinion conflicted sharply with all other midwifery and obstetric opinions expressed and with guidance contained within midwifery textbooks



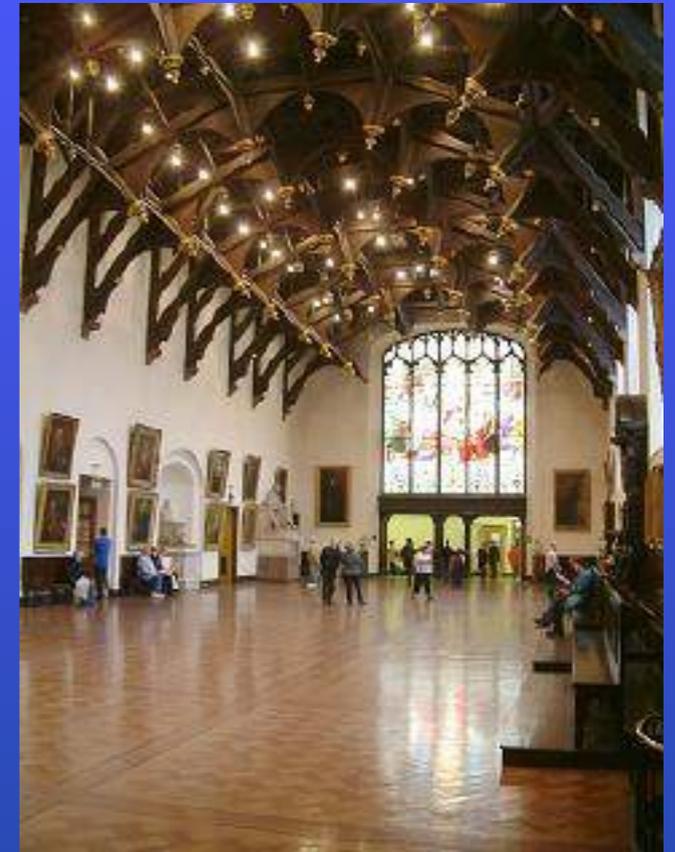
McCulloch v Forth Valley Health Board

- Decision of Lord Tyre, 2020 -Appeal next year
- The defenders expert Dr Peter Bloomfield, removed from his expert report reference to a number of witness statements he had been given when preparing his first report
- He then related the report and on the face of it he had not seen any witness statements
- However, he did not remove some information he had taken from the witness statements and during his evidence it became clear that there were two reports
- If fact one report had been lodged by the pursuers and one by the defenders.



McCulloch

- Lord Tyre said that it was an entirely inappropriate course of action para [84]
- The defenders fairly conceded that they had asked Dr Bloomfield to remove reference to the statements because they did not wish the pursuers to seek to recover them
- Lord Tyre said perhaps the question would have arisen whether the statements fell within legal privilege as communications *post litem motam*
- He said these matters should have been canvassed openly and not concealed
- He then found that this did not affect his impartiality as an expert
- He concluded that his opinions were honestly held



Meetings of Experts

- Chapter 42A of the Rules of the Court of Session and 36 A of the Sheriff Court Rules provides for a meeting of experts (skilled persons)
- Meetings of experts can be useful in focusing the issues in the case but to be useful the correct experts must meet, and there must be exchange of witness statements and reports prior to the meeting.
- It is also important to have a clear agenda prepared for the experts setting out the questions they require to address for the court agreed between the parties
- The experts can be instructed to agree any scientific or medical definitions that may be of use to the court at the meeting



Conclusion

- Expert witnesses are vital to our system of justice whether that is in the criminal or civil courts
- However, expert witnesses become very dangerous when they fail to follow the basic principles and rules for expert witnesses and miscarriages of justice occur
- Lawyers have an active role to ensure not only that expert witness evidence is tested in court but that only those having suitable experience are giving evidence in cases.

