

# He who pays the piper

INVITED COMMENTARY ON ... THE PSYCHIATRIST AS EXPERT WITNESS,  
PARTS 1 AND 2<sup>†</sup>

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**Abstract** It has been clearly established as a matter of legal principle that the duty of expert witnesses is to the court, and not to the cause of those who instruct them. I will suggest that many experts fail to maintain this neutrality, for both conscious and unconscious reasons. If this is so, there may be real dangers in the use of single joint experts, even if there is the benefit of lower costs. In England and Wales, expert witness practice is now seen as part of medical practice by the General Medical Council: the whole profession needs to engage in a debate about how this should be scrutinised and regulated.

A decade ago, Dr Phil Joseph wrote an article entitled 'He who pays the piper' in a forensic journal (Joseph, 1998). It was a short and thought-provoking article, and radical for its time. I have deliberately re-used his title, not just because imitation is the sincerest form of flattery, but because the current social and political climate has forced us to think differently about our role in the litigation arena. I think what Dr Rix has achieved (Rix, 2008a, 2008b: this issue) is admirable, partly because of the depth of his coverage (from civil to criminal courts and potentially including the administrative courts) and because the bottom line is made very clear, through clear enunciation of legal rules, codas, and dicta: the expert plays his<sup>1</sup> pipe for the court, no matter who pays the piper.

Not exactly counter-intuitive or flying in the face of conventional wisdom, is it? Yet I would like to present a few arguments in support of the premise that, although instruments of the court, experts can never fully extricate themselves from the semiconscious or unconscious 'call of the wild'; that they often feel tempted to stray from the guidelines and diktats, from neutrality into partiality. The curious thing about this is that when it happens, these experts passionately believe that what they said or did was not wrong, but that the system misinterpreted them. Given that conscientious objection is never a very good defence, one must at least be thoughtful about the forces in play that can so powerfully tempt an expert away from his duty to the court.

1. As noted by Dr Rix, my usage of masculine pronouns merely follows convention.

## Forensic countertransference

One of the common pitfalls of psychiatric practice is identification with the patient, often manifested as countertransference. Tom Gutheil (a doyen of American forensic psychiatry) describes as 'forensic countertransference' an expert's alignment with one of the parties, regardless of who has hired him (Gutheil, 1998: pp. 19–39). This has a major bearing on whose instructions the expert will accept. Does he decide purely on a rigid system of 'Who approached me first?' Or is it more to do with 'Which side could I work with?' In considering this second question, one has to be at least mindful that the prospect of success, publicity, career advancement and monetary benefits are but a few of the factors influencing the decision to take a case or not.

## Do we need the 'specialist expert'?

In every jurisdiction in the world, the bulk of psychiatric expert evidence in the civil courts is given by general psychiatrists, who may or may not have additional 'forensic training'. This is especially true of North America, where 'forensic psychiatry' has a different, almost literal, meaning. Even in the UK, the definition has been expanded to include a very wide range of functions, some of which were not even known to be the remit of an ordinary psychiatrist. It is true that 'general psychiatrists' do not foray

<sup>†</sup>See vol. 14, issue 1, pp. 37–41 and this issue, pp. 109–114 and 119–121.

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much into the criminal courts (possibly because they might not be able to practically assist in admitting a serious offender to a hospital or in other mental health disposals) and the family courts are not awash with child psychiatrists. There is a severe shortage of experts in both the family courts and the administrative courts; although regrettably, no shortage of 'crooked experts' (Mossman, 1999).

I prefer that a general psychiatrist be used as an expert (in preference to a specialist in forensic psychiatry) because there is nothing particularly clever about giving an honest opinion to the court after an honestly and properly done evaluation. It is probably the perceived hassle of appearing before the court that deters the majority of psychiatrists from appearing as experts, rather than their lack of training in forensic psychiatry. When an appearance is unavoidable, for example in a mental health review tribunal, most psychiatrists perform well. There will be a few cases in which special expertise is needed (say for example on a rare disorder) but a good lawyer will pick that expert.

So we come to the fundamental question, which is a political one. What prompted former Lord Chief Justice Lord Woolf (of the Woolf reforms) to lay down in law (Department of Constitutional Affairs, 1999) what is expected of an expert witness in the civil courts? And why did the criminal courts follow suit? Was it the case of Sir Roy Meadow (*General Medical Council v. Meadow* [2006]) that led to a perceived need to regulate expert witnesses reporting on criminal cases? I think the major argument is, and has been, whether giving expert testimony is part of medical practice or not. In the recent past some medical experts have given testimony when neither registered with the General Medical Council (GMC) nor practising medicine, the latter being used to justify the former. I remember a case in the early 1990s where the expert was not GMC registered but acting as an expert none the less, and I understand that the GMC's response at that time was, 'He is not practising medicine'. Yet in the Meadows case, the GMC took the view that expert testimony is an aspect of medical practice. Times have indeed changed.

## The question of honour

I suspect that Dr Rix's two articles in this journal will lead to another series of articles and arguments in much the same vein as has appeared in the American psychiatric literature over the past decade, which seek to convince that there is honour after all in the expert witness business. Even if the profession is not accused of 'prostitution' (as some psychiatric experts in the USA have been; Mossman, 1999), one can safely assume that there will be a

more serious scrutiny of who these individuals are, whether they really are experts, what they say and what they have said.

I recently asked a barrister to look up the previous testimony, written or oral, of a particular psychiatrist who had made a reputation for himself as a defence expert; and found out that the existing legal database could not go that far. At present, legal databases do not extend to recording expert testimony, whether written or oral. Is the recording of such information coming? One hopes so. When experts are judged not only on their current testimony, but also on their previous positions on similar cases, the courts can expect a more robust and thus more helpful expert. If the expert is funded by public money, as they are in most criminal or family court cases, the courts (and by extension the Legal Services Commission – formerly known as Legal Aid) can demand that this public expenditure be justified. It was interesting to note that Dr Rix mentions the curious case of a doctor censured by both the GMC and the court in relation to expert testimony (*Phillips & Ors v. Symes & Ors* [2004]). This is a salutary indication of things to come.

What does all of this mean for the 'jobbing expert'? A couple of things at least. The expert witness is under more scrutiny than ever before. Although the Appeal Court in the Meadow case overturned the High Court's judgment (*General Medical Council v. Meadow* [2006]) on the issue of immunity from prosecution relating to expert witness work, it did not go into the matter of the sanction of erasure from the medical register, which the High Court also had overturned. The GMC to its credit, did not labour this point either. The overturning of the High Court's judgment opened a legal can of worms. Can there be immunity for the expert from prosecution and/or regulatory investigations, as ordered by Justice Collins (*Meadow v. General Medical Council* [2006])? Or should there be no immunity for proclamations made in the witness box, even when done in good faith, as held by the Court of Appeal? And who exactly decides good faith? If one concedes that the determination of good faith is a job for society through the courts, where do the regulatory bodies come in?

## Is bias unavoidable?

Bias is an absolute bar to good evidence, at least expert evidence. But what degree of bias can be tolerated or even professionally encouraged? If bias is related to one's politics, what kind of politics can one bring to work or, in this case, to the courtroom? I mentioned above identification with one side or the other, which is fairly common even among very notable experts. Think about the doctor who is biased

in favour of his patient at a criminal trial, believing that the outcome 'ought to be' a mental health disposal. Also think about the expert in criminal trials who always acts for the prosecution, and feels that justice can be served only by bringing the criminal to account. Are these experts working unethically? Or are they just consciously defending a political or moral view? One of the founding fathers of forensic psychiatry in the USA, Dr Bernard Diamond, consciously refused to work for the prosecution. He was able to do this because he was a good forensic psychiatrist, the judges and lawyers feared him, and he could afford to reject cases he did not like. But it is hard not to think that Dr Diamond's choice reflected a particular moral or political view in relation to prosecution work.

Now imagine that this moral/political view is unconsciously allowed to contaminate the evidence. No amount of expert's declaration at the end of a report will eliminate this. And who is going to detect it and differentiate it from genuine bad testimony given for less honourable reasons? Is the jury sufficiently trained to do so? Can the judge smell it? If one goes by the American experience, where jury selection and change of court has become an art form, it seems that neither is particularly adept at detecting or eliminating it. Once you accept that what experts have to say is beyond the domain of the layperson (jury) and accord special dispensation to their evidence (admission of hearsay evidence, the expression of opinion, allowing experts to remain in court to hear the testimony of the opposing side), further erosion is not only possible but inevitable. However, as noted by Dr Rix (2008b), Dame Elizabeth Butler-Sloss, former President of the Family Division of the High Court, said: 'Expert medical witnesses are a crucial resource. Without them we [the judges] could not do our job' (Butler-Sloss & Hall, 2002).

## Rogue experts

Throughout the history of the Anglo-American legal system, the rules (or philosophy) of evidence have remained essentially unmodified. The unwholesome possibility of rogue experts that the courts is now trying to eliminate is not new. Such individuals, willing to tailor their testimony to the cause, were there in ancient times, and they are here now. It would be fair to guess that they will remain, although possibly fewer in number and, one hopes, detected and removed much more promptly. One must therefore ask just what the Woolf and Auld reforms (Department of Constitutional Affairs, 1999, 2006) are expected to achieve. If it is political mileage, they may already have succeeded. But is the quality of evidence demonstrably better? One can justifiably ask to see the evidence of that. Of course

the Woolf reforms managed to cut costs, almost a miracle in today's society. However, they achieved this simply by limiting expert testimony, and by extension, expenditure.

## Counting the cost

Giving the court the power to direct that evidence be given by a single joint expert (Department of Constitutional Affairs, 1996: Rule 33.7; 2006: Rule 35.7) is admirable as a practical tool but in my view it dilutes the power of litigation. Litigation, as we all know, is the last resort. Should there not be an opportunity to test views contrary to those of the expert? Should the jury not have the benefit of deciding which testimony is more credible? If there is still room for calling witnesses (as long as they are relevant and agreed in advance), why not include the expert among them? Cost-saving has been achieved but as one colleague complained to me, 'Why not do away with trials? That will save a truckload of money!' Obviously he was being sarcastic but the meaning is clear.

## Conflict resolution

The reforms apply to all expert witnesses, not just medical experts. But no other expert group has to deal with the tremendous conflict of justice *v.* welfare that faces the medical expert. Wanting to do good is embedded in the ethics of medicine; it is only relatively recently that justice has become an overriding concern of the physician. The concept of autonomy and choice in healthcare came to prominence in the 1960s, coinciding with the civil rights movement. But the conflict between welfare and justice is eternal. Laudable as it is, I do not believe that codifying how the expert should behave in court is going to resolve that conflict, at least in the medium to long term. What we need is debate regarding resolution, rather than slavish subscription to the view that the expert's duty is to the court alone and it is only by this route that he serves society. True, one might argue that society has a claim to the knowledge and expertise of its experts because this knowledge was imparted to them by society in the first place. But this is not an absolute claim; and it is a claim that has been resisted by the medical profession in various forms. Let the Woolf reforms, and its clones in the Criminal Court, be the foundation on which we build our ethical practice. The former Attorney General Lord Goldsmith has recently told the Expert Witness Institute's annual conference that evidence is the business of justice, but it would be dangerous if the giving of evidence were to become a business in itself (Expert Witness

Institute, 2007). The Institute said that a system of formal accreditation for expert witnesses is inevitable (Expert Witness Institute, 2005). Yet the Royal College of Psychiatrists' Scoping Group on Court Work was not persuaded that this is the way forward (Royal College of Psychiatrists, 2008). Let the debate begin. Join in.

### Declaration of interest

S.P.S was a member of the College's Scoping Group on Court Work. He works as an expert in Criminal, Civil, Administrative and Family Courts. He is an associate of the GMC and sits on its Fitness to Practice Panels. The views expressed here are personal views and do not reflect that of either the GMC or the Royal College of Psychiatrists.

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