

The role of the Expert Witness in health & safety prosecutions

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Agenda for this afternoon

- What is an expert witness
- When / why they are needed and what they do
- Some cases that you may have seen reported in the public domain
- Lessons that duty holders can learn from health and safety cases
- Q&A

What is an Expert Witness?

- No definitive legal definition, but Crown Prosecution Service defines an Expert as:
 - *“A person whose evidence is intended to be tendered before a court and who has relevant skill or knowledge achieved through research, experience or professional application within a specific field sufficient to entitle them to give evidence of their opinion and upon which the court may require independent, impartial assistance”*
- Their duty is:
 - To give to the Court or tribunal an **impartial opinion** on particular matters within their expertise which are in dispute
- They are NOT:
 - An advocate for their client’s case

What qualifies me to act an Expert Witness ...

- Chartered Engineer (FICE, FIStructE) with over 30 years' experience
- PhD in the safety of existing structures
- Extensive research / produced guidance on safety of existing structures
- Led >40 projects for HSE on safety-related topics
- Advised HSE / duty holders on CDM since 2001
- Led independent evaluation of CDM 1994 and CDM 2007
- Published articles & reports on CDM, construction / structural safety
- Invited to join Structural-Safety and CROSS (HSE, ICE, IStructE)
- Instructed by prosecution and defence in over 30 cases in last 12 years

An Expert Witness will typically ...

- Review the evidence
 - From a range of sources including contracts, designs, RAMS, correspondence, site visits, tests, witness statements and interviews
 - Review new evidence and assess whether it affects your opinion
 - Sometimes large quantities of evidence (up to 32 lever arch files!!)
- Produce a report that addresses the solicitor's instructions
 - To provide opinion on the evidence in plain English
- Meet with other parties' experts
 - To establish and record points of agreement and disagreement
- Give evidence and face cross-examination in Court
 - To help inform the Judge and Jury

Expert Witnesses are needed ...

- To provide opinion to help Courts and tribunals understand complex issues to resolve a dispute
- To ensure a just outcome
- Civil cases (e.g. personal injury, defects, cracking, strength, lack of fit)
 - To help settle disputes via arbitration, adjudication or expert determination
 - To help settle litigation about costs
- Criminal cases (when there is exposure to material risk / accident)
 - To explain the risks faced
 - To help explain what a defendant's duties were, how they fulfilled those duties, what the differences were and the significance of those differences
 - To put defendants' actions into perspective given the constraints they faced

Expert Witnesses are typically instructed by ...

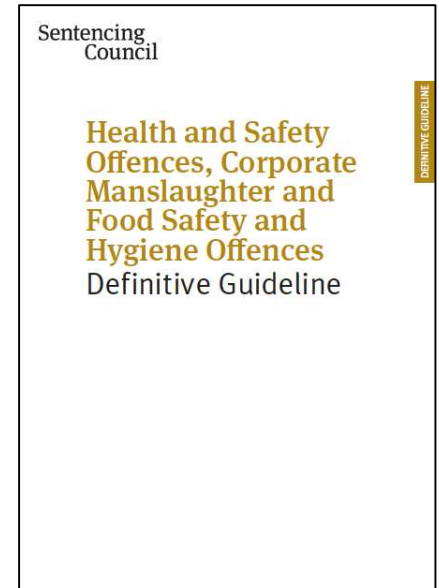
- Defence
 - Solicitors
 - Being instructed by a solicitor allows legal privilege to be invoked
- Prosecution
 - Solicitors
 - Prosecuting authority (HSE, ORR, local authority)
 - Crown Prosecution Service (for manslaughter cases)

Expert Witnesses are needed to help legal teams when ...

- Challenging a Notice of Contravention
- Challenging an Improvement or Prohibition Notice
- Assessing their client's position after an incident
- Advising their client on how to plea to a charge
 - Plead 'guilty', get the 33% discount and then mitigate; or
 - Plead 'not guilty' and go to trial
- Mitigating a 'guilty' plea
 - Sentencing Hearing
 - Newton Hearing
- Going to trial following a 'not guilty' plea

The need for Expert Witnesses has increased as the sentences for getting it wrong have gone up significantly

- Sentences *sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation*
- Sentences based on Culpability, Harm (Risk) and Turnover
- Large fines for companies:
 - Largest fine rose from £1m to £2.6m in first year
 - Medium-sized companies now getting fines that only large companies got in past
- Low threshold for custodial sentences for individuals (Site Managers and Directors)
 - Custodial sentences up from 1 in 3 to nearly 1 in 2



Construction-related cases cover a range of issues ...

- **Falls** – through fragile roofs, from external roofs, from roofs of internal structures, from scaffolding, through fragile materials, through structural openings, through ceilings
- **Collapses** – bridge beam during installation, retaining walls during construction / refurbishment, flooring during construction, scaffolding, structures during demolition, mantelpieces, retail barriers, rebar cages, glass panels in storage and gallery frames stored outside building
- **Temporary works** – trench excavation, reinforced cavity masonry retaining wall, sheet piling, rebar cage and scaffolding
- **Other hazards** – timber frame off-site fire risk, gas flue blockage, cable strike, electrocution, entanglement in chain, and manual handling

Some cases that you may have seen in the public domain

One of the few prosecutions of a Designer following a fatal fall ...

- Ladder descending from a roof-top plant room
- Just over 1m clearance between footing of ladder and parapet
- 9m drop and no guard rails on parapet
- Would need to come down the ladder backwards
- Architect & Planning Supervisor: £120k fine (CDM) + £60k costs
- Principal Contractor: £75k fine (S3) + £68k costs



Unbraced rebar cage collapse trapped and killed four workers ...

- Ground beam 23m long x 3m wide x 2m high
- Little room to manoeuvre between links
- Very heavy top reinforcement
- No diagonal bracing, Z bars or tie-back
- Racking failure of reinforcement cage whilst workers were inside
- Client: £500k fine (CDM) + £100k costs
- Principal Contractor: £200k fine (S3) + £50k costs
- PC's Director: 7.5 months suspended (S37) + 200 hours community work + £7.5k costs
- Contractor: Charges left on file



Collapse of frames leading to the death of a passer-by ...

- 3 frames weighing 655 kg left stored against the building overnight
- Everyone thought they had been strapped to the building
- Frames fell onto passer-by
- Subcontractor: £250k fine + £33k costs
- Subcontractor's Site Supervisor: 12 months jail (GNM) + £33k costs
- Principal Contractor's Site Manager: 6 months suspended (S7) + £33k costs
- Other 4 defendants: Not guilty



Lessons for duty holders

The main lesson for duty holders

Written, contemporary notes and documents provide better evidence than recollections

In relation to documents ...

- Site Managers should keep a daybook with short notes of who said what to who, any significant decisions made and why they were made
- If actions are noted they must be tracked and closed out
- Keeping records of what is covered in each toolbox talk and induction, along with a signed list of attendees
- Emails do make it into court documentation – don't say anything to anyone in an email that you wouldn't feel happy being examined on later in court

The role of a Principal Contractor typically boils down to

1. Selecting competent subcontractors
 - Needs to be obvious that they are competent to do the job
2. Checking that what subcontractors are proposing in their RAMS is safe
 - A lot of focus on RAMS documents by both prosecution and defence
 - If a PC hasn't checked or approved a subcontractor's RAMS, it puts them in a difficult position as prosecution will see it a serious weakness
 - Important that RAMS is communicated to right people / need their signatures
3. Monitoring the subcontractor
 - To make sure that they do what they said they were going to do
 - Mix of monitoring & risk based

Other useful lessons for duty holders

- Employers need to be able to demonstrate that H&S is being treated the same as other business issues
- Learn the lessons from previous incidents
 - Important to show that lessons were learned, and actions were taken
- If you are a design & build contractor, take design as seriously as build
- Focus on doing what is reasonably practicable
 - That is what an employer is judged against, and the prosecution has to prove beyond reasonable doubt that you didn't
 - If an extra risk control would have 'cost a few hundred pounds', the prosecution will claim that you didn't do all that was reasonably practicable

Any questions?