



Going to Court

Keith Rix

[T]he jury should be asked to consider whether the expert has, in the course of his evidence, assumed the role of an advocate, whether he has stepped outside his area of expertise, whether he was able to point to a recognised peer – reviewed source for his opinion, and whether his clinical experience is up to date and equal to that of others whose opinions he seeks to contradict.

Lord Clarke in *Hainey v HM Advocate* [2013] HCJAC 47

Avoiding It

The best way to avoid going to court is to produce a report that enables the parties to settle the case or which is so straightforward that in a criminal case parts of it are read to the jury or it is read by the judge without your having to attend.

The Order of Proceedings

If you are a party-appointed expert, you will probably be called to give evidence by the party that has instructed you, but there is 'no property in a witness'. An expert may be called by any party to the proceedings notwithstanding that his original instructions came from another party (*Harmony Shipping Co. SA v Saudi Europe Line* [1979] 1 WLR 1380). This is particularly likely to happen if you have prepared a report for the CPS and upon which the CPS does not want to rely. It will have been disclosed to the defence, so you may be called by the defence.

It is usual for one party, such as the claimant in a civil case or the prosecution in a criminal case, to call all of its evidence and then for the other party, such as the defendant in a civil case or the defendant in a criminal case, to call its evidence and for its expert evidence to be heard in rebuttal. The expert evidence usually follows that of the party's lay witnesses. However, you may be called before or after the other side's expert ('back to back') so that all of the evidence from your medical speciality is heard at the same time and so that both, or all, experts have heard, or can be informed about, all of the factual evidence. Indeed, you may be asked to attend to hear some of the factual evidence because experts, unlike lay witnesses (other than in Ireland), are permitted to hear the evidence of other witnesses before they give their own evidence (*Tomlinson v Tomlinson* [1980] 1 WLR 322). So, beware the zealous usher who, having identified you as an expert witness, seeks to exclude you from the court until you are called to give evidence. Give them a copy of the *Tomlinson* judgment.

Concurrent Expert Evidence

A development to be watched is 'concurrent expert evidence', 'hot-tubbing' or what in Ireland is called a 'debate'. Now established in Australia and becoming established in the British Isles, this involves calling all the experts at the same time. One side's experts may be in the dock and the other side's experts in the jury benches. There may be an agenda based on the matters not agreed at the experts' meeting supplemented by any additional issues that have arisen in the trial thus far. Counsel may be invited to contribute to the agenda. At the hearing, the judge takes control of the proceedings, effectively acting as chairman. In relation to each issue, the judge asks each expert the same questions or asks each expert to give an outline of the agreed evidence followed by presentation of the evidence on which they are not agreed. Where there is disagreement, the experts are able to explain why. The experts may be encouraged to add to, or explain, their own or another's evidence and they may be invited to question each other so that a healthy debate or discussion ensues. This means that experts must be thoroughly familiar with the detail of the case, ready and able to question the other party's or parties' experts on the hoof and sufficiently intellectually agile to assess immediately changes in assumptions or the assumed facts – and all this with an audience of at least three lawyers who may be hanging on to their every word. Then the parties' representatives are given the opportunity to ask their questions, but only to test the correctness of an expert's view or clarify it. They should not cover ground already fully explored and in general a full cross-examination or re-examination is not appropriate and will only take place if deemed necessary by the judge. Finally, the judge may seek to summarise the experts' positions and ask them to confirm or correct the summary. Such an approach favours the well-prepared expert and the expert who prepares carefully their questions for the other experts, but it may require experts to learn some advocacy skills. Where concurrent evidence on a child's future care was given by two psychiatrists and a clinical psychologist in *Local Authority v A (No. 2)* [2011] EWHC 590 (Fam), the judge estimated that evidence which would have filled two days of court time was completed within four hours.

Preparation

The best preparation for going to court is to prepare a quality report that enables the parties and the court to narrow down your evidence to that which needs elucidation and which deals with as much as possible of what might be put to you in cross-examination.

You need to have a basic understanding of court procedures. This helps you coordinate optimally with your instructing solicitors or their counsel and engage effectively with the trial judge. If it is the first time you are going to court, it should not be. You certainly should not enter a courtroom for the first time in your life when you go to give expert evidence. Shadow another expert, sit in the public gallery in a few cases or ask your presiding judge if you can sit with a judge and benefit from her tuition. Otherwise, watch a few episodes of *Kavanagh QC* or *Judge Deed*, but not US crime dramas, and do not expect all judges to have such interesting private lives as Judge Deed. I have written two fully scripted 'teaching plays', one based on a homicide in a psychiatric hospital and the other based on an accident at work, which allow participants to dress up as policemen, barristers and judges and in other outrageous costumes, as barristers and judges do every day, and have fun as well as learn about court procedures. There are details of these on my website.

On the subject of judges, Bill Braithwaite QC recommends that you should ask *about* the judge, his or her foibles and professional background. Please note the word 'about' – although many judges joke about being the subject of a psychiatric report, they may not take too kindly to a formal psychiatric assessment before your examination in chief. Perhaps experts should contribute to a website devoted to judges' foibles. This might make as interesting reading as the files some barristers maintain on experts. If you know the judge, point this out as the judge will have to decide if there is a real possibility that they may be subconsciously biased as a result of your relationship.

Allow sufficient time to read not only your report, but also other expert reports, although *in Scotland or Ireland*, in a action where there is no prior exchange of reports, you may find yourself going into court without knowledge of your opposing expert's opinion because it is intended to lead only their oral testimony. You may need to read transcripts of the evidence of other witnesses. In *O'Driscoll (Minor) v Hurley* [2015] IECA 158, the Irish Court of Appeal rejected the assertion that giving an expert transcripts of the evidence of previous witnesses was unacceptable 'prepping'; it was not unusual and perfectly proper. Familiarise yourself again with the factual basis for your opinions. Remind yourself of, and annotate, key evidence in medical records, witness statements or documentary exhibits. If you are allowed to take your own files into the witness box, which is almost always allowed, use coloured marker tags and highlighting to make it easy to navigate your way around the important information. Anticipate questions and have coloured tags with the subject written on them. If you know your way around the documents, you will be a more confident and authoritative witness. If you have to fumble backwards and forwards through your files or retrieve scattered sheets of paper from the well of the court, your credibility may be damaged. But you need to ask counsel whether or not you can take annotated and marked files into the witness box.

If you are not going to be able to take your own files, because the court insists that you work from a 'clean copy', try to memorise a small number of key points and practise reducing your opinions into a few memorable bullet points, but it is preferable to have them written down. However, giving evidence should not be a memory test or game. Be that as it may, be clear about your main points before you give evidence and be able to define them succinctly. Do a 'dummy run' with your secretary or some other lay person, or even a teenager. Make a list of what you think are the questions that will be put to you in cross-examination and your answers.

Usually, there will be a trial bundle. Get this in advance and number the pages of your report to correspond to its page numbers in the trial bundle or put your copy of the report into the bundle, with corresponding numbering, so that you have everything at your fingertips. Familiarise yourself with the organisation and contents of the trial bundle and where your opinion relates to key passages in, for example, medical records, have these tagged so that you can refer to them quickly and be ahead of the game. Remember that sometimes pagination, especially of medical records, will differ from the pagination in the records as they were originally supplied, and you may even have to spend time changing all the page references in your report to correspond to the numbering in the trial bundle.

Performance on the day is proportional to preparation. As a final stage in preparation, remind yourself of the test which the judge will apply when evaluating your evidence (Box 17.1). As to demeanour in the witness box, you will be participating in a drama, probably a costume drama, and there may well be some repartee, but leave the theatrics to the lawyers and remember *Coughlan v Whelton* (High Court (Ireland), unreported, 22 January 1993),

Box 17.1 The Judge's Test of Oral Testimony

- the internal consistency and logic of the evidence;
- the care with which the expert has considered the subject and prepared his evidence;
- his precision and accuracy of thought as demonstrated by his answers;
- how he responds to searching and informed cross-examination;
- the extent to which the expert faces up to and accepts the logic of a proposition put in cross-examination or is prepared to concede points that are seen to be correct;
- the extent to which the expert has conceived an opinion and is reluctant to re-examine it in the light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held;
- whether or not the expert is biased or lacks independence;
- the demeanour of the expert in the witness box.

where the court was more impressed with the defendant's experts than with the theatrical presentation of the plaintiff's.

When in Rome

Dress and behaviour should convey an appropriate professional demeanour. Be punctual. Nod or bow slightly in the direction of the judge when entering, leaving or moving about in court. If you need to speak to someone, keep your voice down. Do not speak or move about when a witness or juror is taking the oath or affirming or, if you are present, during the judge's summing-up.

Outside Court

A lot of time is spent outside the courtroom. Be careful to whom you speak. You can talk to those instructing you. Do not discuss your evidence with other witnesses, especially the witnesses for the other side, without permission. Do not talk to the other side's solicitor or barrister unless specifically instructed to do so. This does not mean that you cannot exchange greetings or other pleasantries. As long as the parties agree, there is usually no reason why you should not talk to your opposite number about matters unrelated to the case. Occasionally, experts are asked to confer on an issue, on a without-prejudice basis, and report back to their respective solicitor or barrister. This can assist the parties in narrowing issues further.

Forms of Address

Etiquette requires an appropriate form of address for the judge. Ask the barrister or solicitor how to address the judge. Some courtrooms have a notice outside that gives the form of address. You may have the opportunity to hear how the solicitors or barristers do so. If you are stuck, you may or may not want to apply the convention of calling every police constable 'sergeant', and although a circuit judge will not object to being 'My Lord' instead of 'Your Honour', you will only draw attention to your ignorance if 'Your Honour' comes out as 'Your Holiness' (as a coroner was recently addressed).

Giving Evidence

When you are called to give evidence, go to the witness box. The judge, jury and other side's counsel may be looking at you for the first time. First impressions! If you have not already been asked, whisper to the court usher and tell her whether you will take the oath, on an appropriate religious text, or make the affirmation.

Face the judge. If it is the oath, take the book in your right hand and hold it just below shoulder level with the elbow flexed at about 45 degrees (not with arm outstretched like a Nazi salute). Either repeat the oath after the usher or judge or read it from the card. If possible, wait for eye contact with the judge, but do not wait too long! If you make eye contact at this point, you are already establishing a rapport with the judge.

The judge may invite you to sit. Standing usually makes a better impression unless you cannot see to read. However, *in Ireland* witnesses sit. The judge and jury will scrutinise your body language closely. Remember that as the judge does not have to think about the next question to ask, he is well-placed to observe your non-verbal communication and body language as you respond to the questions.

If there is an adjournment during your evidence, do not talk to anyone about the case. The judge should remind you of this. *In Ireland* this only applies if you are under cross-examination at the time.

Evidence in Chief

Your counsel starts unless it is an inquest and the coroner calls you. You will be asked your full name, possibly your address and your appointment. Give your professional address. Keep your feet facing the judge and swivel to listen to counsel ('the turning technique'). Swivel back, if there is no jury, address your answer to the judge and, if there is a jury, still address the judge, but look at the furthest juror and make sure your voice reaches him or her. Addressing the judge or judge and jury is courteous and it further assists with rapport building.

Keep your eye on the judge or she will tell you to watch her pen or her fingers. She

will usually be writing or typing your evidence. If she is not, do not panic, but ask yourself why not. It might be a rare situation in which there is a computer link from the court stenographer to the judge's bench. Only when she has finished writing or typing, turn back slowly to face counsel and signal that you are ready for the next question. Keep control. There will probably be a microphone. This is usually to record your evidence and not to amplify your voice. If you are repeatedly reminded to speak up, or more slowly, it will

adversely affect the impression you make.

You will be asked to look at the signature page of your report, in the trial bundle, confirm that it is your report and signature, and confirm, or otherwise explain if not, that it continues to be your opinion. Correct any significant errors and indicate whether or not your opinion needs to be modified in the light of any evidence you have heard. Any other change of opinion should already have been communicated; if necessary, remind the court that you have done so.

In a criminal case, you may be asked for your qualifications. If you have set them out fully, in your report's Appendix 1, you may be asked to confirm 'x', 'y' and 'z'. Counsel should have advised you how much he wants to elicit. If given free rein, do not confuse the jury with letters of the alphabet in what they will see as random order. 'The basic qualification of a medical doctor' makes more sense than 'MB, BS' and even Latin scholars will not

immediately understand 'MB, BChir'. In a civil or family case, you may be asked only to confirm that your qualifications are as set out in what should be Appendix 1 of your report. The judge will have read the report.

If there is a jury, remember that you must be understood by the least intelligent member and remember that few lawyers and, at the time of writing, no judges are medically qualified, although some medically qualified barristers sit as deputy high court judges and recorders. It is not enough to have a glossary of medical terms at the end of the report. You will have to communicate 'technical' information simply and clearly as you go along by either avoiding or explaining what will be seen as medical jargon.

A few weeks after I gave evidence about hyperventilation in a rape case, I was in the same court building and responded, with two or three pathologists, to a request for any doctor in the building to make their way to the jury waiting area. On the stairs, we met the court clerk, who had been in my previous case, and he told us that there was no hurry as it was just a case of hyperventilation and the juror was recovering with the aid of a paper bag. His diagnosis and treatment were correct.

This is your evidence in chief. Questioned by your counsel, in a criminal case, you will be taken over the key points in your report. Jurors are particularly likely to attend and understand when the facts of the case are woven into a comprehensive, unfolding story of the evidence. The longer this takes, the more your confidence grows. Try to recreate orally the structure of your written report with 'signposts' – for example: 'There are four groups of symptoms that are important. First ...'. However, in a civil case, your report stands as your evidence in chief, so do not expect much more than a request to confirm that it remains your opinion, although some judges do like to hear the expert explain their relevant expertise and set out their key points.

If you want to refer to a document, suggest to the judge that it may be helpful to do so and indicate where it is to be found. Wait for the judge to find it. She will probably read it, or at least scan it, so wait until she looks up before making the point that arises from it. As you do so, you can use a change in the tone of voice and emphasise words like 'conclude' to focus attention on what you regard as the significance of the document.

Counsel may get you to expand on certain points or respond to questions based on evidence already given of which you are unaware or of which you were unaware when you prepared your report. But do not be tempted to moderate your opinion without good reason. In *England v Foster Wheeler* (Sheffield County Court, unreported, 14 August 2009), the judge preferred the evidence of the defendant's experts to that of the claimant's expert, as 'there seemed to be no new factor that Dr X brought into consideration in moderating his view ... there was no real explanation for resiling from his view set out in the joint statement'.

It is important how you give your evidence – 'authoritative, careful and straightforward' (*Manning v King's College Hospital NHS Trust* [2008] EWHC 1838 (QB)). You have to appear, as you should be, the master of the facts and your opinion; you need to be convincing and authoritative. Make use of your voice and learn to vary the tone for effect, employing a persuasive tone where appropriate. The better structured your evidence is, the more convincing it will be, and it will be easier to follow if you explain the structure. If you are not convincing and authoritative, you will lose credibility with the judge, the jury or both. As Braithwaite and Waldron (2010) say: 'Part of the art of being a good witness, and therefore a good expert, is to be able to communicate opinions clearly, despite provocation from opposing counsel, to someone who seems ignorant of the basics.'

Cross-Examination

Then comes cross-examination. Remember to swivel back to face the judge and/or jury when you have heard the question. Keep calm as a change in demeanour can give the wrong impression. Not looking at your cross-examiner helps. Console yourself in the fact that you and the other experts know more than counsel or the judge does about the subject of your evidence. Barristers are not experts in your field, but they may try to give that impression. They have the advantage, however, of knowing what the next question will be; they are likely to have done extensive reading on your subject, with the help of other experts; and they may also have the advantage of being assisted by your opposite number, who will be furiously scribbling adhesive notes that your cross-examiner will line-up where you can see them in order to remind you who she thinks is in control.

The purpose of cross-examination is to weaken, qualify or destroy the other side's case. So, be prepared for an attack on your veracity, reputation and expertise. '[E]xperts must be prepared for everything they do and say to be the subject of challenge' (*County Council v SB*). Be able to explain why your qualifications and experience are relevant and why you should be regarded as at least comparable in qualifications, training and experience to the other side's expert. The bigger the case, the more likely it is that your cross-examiner will use your CV to persuade the judge that you are not qualified and use any other information, whether or not in the public domain, to discredit you. You may be asked about your fees, as if to suggest that the higher the fee, the greater the difficulty you have in being impartial, but in *O'Driscoll*, the Irish Court of Appeal held that there was no basis for a 'bald assertion' that a fee of €5,000 was likely to affect impartiality and such questioning challenging the expert's honesty, independence and integrity could not be put without any evidence to back it up. If it is suggested that your name is on a website devoted to judicial criticism of experts, you are entitled to ask for details, as this may be no more than 'dirty tricks'.

If you survive any attack on your credibility, cross-examination will then move on to the testing of the validity of your opinions and bringing out evidence that supports the other side's case.

Remember a Maudsley-style case conference where several professors and other psychia-trists question your opinion. Try to bear in mind, but you should have anticipated, the stimulating, helpful and clarifying points that you would make in response to their questions.

Do not be drawn into a contest or argument or try to evade the question. In *Siegel v Pummell*, a neuropsychiatrist called by the defendant was criticised by the judge because '[h]is evidence was combative' as well as 'dismissive of that of other medical professionals who were not in the same field as himself, this being a reference to the neurologist and neuropsychologist called by the claimant. In *R (PS) v G (Responsible Medical Officer)* [2003] EWHC 2335 (Admin), a psychiatrist was criticised for his 'evasive and overdefensive approach in answering questions when cross-examined'. Defensiveness may be interpreted as a sign of lack of objectivity.

You are there to assist the court. It is the lawyers who argue:

While I am sure that both experts were trying to assist the Court, I found the evidence of Dr. (X) of more assistance than that of Dr. (Y). Although Dr. (X)'s measured and careful approach was more persuasive than Dr. (Y)'s more argumentative and didactic approach, it was not just the manner in which they gave their evidence. It seemed to me that the content of Dr. (Y)'s evidence was unconvincing: for example ... (Simon J in *Rabone v Pennine Care NHS Trust* [2009] LS Law Med 503)

The judge wants to know your opinion not witness, or have to referee, an argument, a slanging match or even a joust. In *Qualcomm Inc. v Nokia Corp.* [2008] EWHC 329 (Pat), the judge considered that the expert was more interested in jousting with counsel, and scoring what he thought were points for his side, than in answering the technical questions put to him.

The case is not about you. As soon as you start arguing, you lose your objectivity and give the impression that you are not impartial. Remember that 'anything other than a courteous, moderated and seemingly impartial response to questioning in court will damage [your] credibility' (Lewis 2006). If your cross-examiner does engage in fencing, the judge may not like it.

According to expert witness folklore 'crafted in the wine bars of The Strand ... [the cross examiner] has three minutes to unsettle the expert and consign the expert's opinion into the bin marked "Thank you very much for coming". If this is not achieved, it is said, the barrister's task will be that much harder' (Smethurst 2006).

So, keep calm. Do not rush into answering the question. This may allow time for your counsel to object or require clarification and it allows time for your considered response. But do not delay too long.

You may be asked a very technical/medical question at an early stage and your cross-examiner will be wanting to try and unsettle you with an impression that she has an immediate and full grasp of the medical issues (Smethurst 2006). Barristers are taught only to ask questions to which they know the answer. If you have to ask for clarification, it may be she who becomes unsettled. In *Scotland*, such questions may be put by reference to academic journal articles of which you have no forewarning as there is no requirement to lodge such documents or identify them in advance of the trial.

You will be asked 'yes'/'no' questions, but do not hesitate to add some important qualification if appropriate. If you do not, you will have forgotten it later or you will not see how to introduce it. If you think that an explanation is needed, give it. If you do not say all you need to say on an issue, you have only yourself to blame if it was your only opportunity. If necessary, appeal to the judge and make it clear that the answer depends on 'x' or 'y'.

Answer the question asked. It was a finding of the GMC in *Pool* that Dr Pool's evidence was 'very unclear and [he] often gave long, rambling answers that did not address the question'. It is not in your interests to answer, however well, anything other than the question you have been asked. In *Manning*, an expert was criticised because he often volunteered 'by way of addition, answers to questions which he had not been asked which appeared to support the Defendant's case'. Wait to answer the next question, even if you know what it is, and do not be evasive. If the question takes you outside your expertise, say so and, if necessary, appeal to the judge.

Do not hesitate to ask for a question to be repeated or clarified; but asking for too many questions to be repeated can give jurors a bad impression.

Do not be rushed. If it is a particularly difficult question, write it down and do not be afraid to ask for more time. The judge wants your carefully considered opinion and not the first thing that comes into your head.

Keep your answers to the point. Do not give a lecture. The longer the answer, the more cross-examination it generates.

If your cross-examiner creates a 'pregnant pause', beware filling it. If in doubt, it is even more important to keep answers brief; this is when you are most likely to fall into hidden traps.

If you are asked several questions in one, repeat the questions you remember, write them down, answer these and then ask to be reminded of the others. There is no reason why you should not write down even a single question in order to be sure that you understand it and answer it rather than another question. You will not be criticised for asking to be reminded of the questions, although counsel may be criticised for asking so many at once.

If you are interrupted – for example, with ‘We’ll come back to this point’ – but perhaps because the cross-examiner does not want to hear what you have to say, politely insist on completing your answer.

If you are asked to make an assumption, do not be afraid to question it. If you do not, it might be assumed that you accept it. Even if you are not sure about its basis, it tips off your counsel, so, by the time you are re-examined, she may use your evidence to invalidate the assumption. Make it clear how your answer differs according to whether it is based on hypothesis or what appear to be the actual facts.

You may be told to respond to a question that relates to something in a document. Ask to be taken to the document. It gives you time to think, you can check exactly what is in the document, which may not be what was in the question, and you may want to draw attention to the context so that the reference is not taken in misleading isolation. Address the context before the question.

You may be asked if the opinion of the other side’s expert is within the range of reasonable opinion. If you agree, say so, but say why you think that your opinion should be preferred.

Do not be afraid to make appropriate concessions where necessary and which on all of the evidence, perhaps now better clarified, it is reasonable to concede. It is not the same as wholesale surrender. You may impress the judge by your integrity in making appropriate concessions and this will add to your credibility. As Lord Justice McFarlane has observed, the most impressive and valuable experts are those who can accept parts of an alternative analysis whilst disagreeing with other parts, and who are not partisan or dogmatic (Keynote Address, Bond Solon Experts Conference 2018). You will gain no respect for sticking to your opinion through thick and thin and when forced into a corner if the evidence does not justify this. Doing so will risk creating the same impression as the expert who ‘perhaps because he believed in the Defendant’s case ... was somewhat inflexible in his answers and reluctant to concede points which on their merits were persuasive’ (*Manning*).

Be prepared for opinions that do not appear to survive cross-examination. Be careful not to appear to be scraping the bottom of the barrel. If an abandoned opinion can be salvaged, your counsel will return to it on re-examination.

You should be able to recognise when you are being led up the garden path and the end of the path is obvious. If there do not seem to be answers that can halt your passage, do not fear. If there was no alternative but to go to the end of the path, you will be credited for having gone there. If there was another path you ought to have taken, your own counsel will probably have seen it and will take you there in re-examination.

You may be asked questions which require some memory of the evidence. However well you have prepared, there will be some evidence that you will have forgotten. Do not answer if you do not remember the evidence. Ask to be reminded. Take time, but not too long, to look through your documents.

Cross-examination is meant to be conducted with courtesy. Occasionally, it is not. However unpleasant your cross-examiner is, remain calm and relentlessly polite. Do not lose your cool, get angry or flustered, or allow her to get under your skin. Avoid being

defensive or argumentative. Do not descend into the arena and try to score points. Concentrate on the question and not how it is asked. If it appears that a question is based on a misunderstanding, answer in a way that implies counsel's misunderstanding rather than her total ignorance. Appeal to the judge more in sorrow than in anger. If it seems that your cross-examiner is trying to be really offensive, appeal to the judge, but with some restraint, suggesting that you have been misunderstood. The case is not about you; unless you have failed in your duties as an expert, you should not be subjected to personal attack. When the judge or jury retires, you may have made the better impression.

Watch out for questions that tempt you to give a different answer, perhaps disguised, to that already given in evidence or in your report. Just confirm what you have already said.

However well you think you have prepared and however good your report, you are bound to be asked something that you have not anticipated. Take your time. Remember that you are there to assist the court and it is not a contest between you and your cross-examiner. Give your answer after careful consideration. Give your opinion rather than an argument for one side or the other. Avoid being too definite. Avoid 'never' and 'always', but equally beware of 'possibly'. What should hopefully come across as an obviously genuine degree of uncertainty on one matter may make the court more likely to accept evidence you have given on another matter without such uncertainty.

If questioning appears to have blown a hole in your side's case, do not try to repair the damage unless you can do so as an expert. By the time you are re-examined, your counsel will have had time to think about this and, if you missed a defence of the case, you may be led to deliver it.

If you think that you have given an incorrect answer, say so as soon as possible, even if it means interrupting another line of enquiry. It will be useless writing three weeks later.

If the cross-examiner responds with a look of disbelief or puzzlement, do not worry. Like the pregnant pause, it may be intended to encourage you to say something you might not otherwise say. Wait for the actual question. There may not be one.

Do not be taken by surprise at the suddenness of the ending of the cross-examination, but, if your cross-examiner says that she has only a few more points, or it will not last much longer, do not lower your guard. However, cross-examination will come to an end.

This is the best time to turn to the judge, if appropriate, and ask to be allowed to make further points, if you think that the thrust of your evidence has not been taken on board. But be careful: (1) you should have got your message across already; (2) if permitted, it will inevitably invite further cross-examination; (3) you are about to be re-examined. Counsel should have picked up anything which needs rectifying or clarifying.

Throughout, remember that you are there to assist the court and not to support the side that has instructed you. For this reason, do not make non-verbal contact with those instructing you when under cross-examination; it will give the wrong impression. Assisting the court depends on your ability to connect with judge and/or jury and come across as likeable (friendly, respectful, kind, well-mannered, pleasant), confident or demonstrably self-assured, knowledgeable and trustworthy (Parrott *et al.* 2015). Contrast this with criticism of the expert in *Re U (Serious Injury: Standard of Proof)* [2004] EWCA Civ 567: 'The court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour-propre is at stake, or the expert who has developed a scientific prejudice.'

Box 17.2 lists a number of 'don'ts' for experts.

Box 17.2 Don'ts for the Expert Witness

- act in a condescending manner;
- act pompous;
- pontificate;*
- appear egotistical;
- be pedantic;
- be dogmatic;*
- argue with counsel;
- praise oneself;
- be arrogant;
- be boring;
- be cute;
- be overconfident;
- be sharp;
- be evasive;*
- be verbose;
- change demeanour on cross-examination;
- answer the wrong question;*
- confuse the jury;
- patronise;
- engage in nervous habits;
- fumble for papers or documents;
- look or act anxious, nervous or worried;
- turn your back on the jury;
- overwhelm the jury.

*Added by the author.

Based on Babitsky *et al.* 2000

Re-examination

Now your re-examination. This is limited to the clarification of points made in cross-examination. It is not your opportunity to make any new points or get over what you have forgotten. Only with the leave of the court can new points be introduced. This is your counsel's opportunity to regain ground lost, or repair damage sustained, during your cross-examination. As you are there to assist the court, not those instructing you, resist the temptation to join battle. Just answer the question; keep it simple. Your credibility depends on the judge and/or jury seeing you as independent. Any other approach will undermine your evidence. Generally, no leading questions are allowed, lest they suggest an answer that is different to what you have given in cross-examination; so, re-examination may be limited or non-existent. This is the best time to turn to the judge, if it is appropriate, and ask to be allowed to make some further points. It may be your last chance to get your points across, but you are entering into highly fraught territory. There may be a profound heart-sink moment on one side, but likely apprehension all round. Be assured that more cross-examination is likely.

Remember:

The way in which you give your evidence affects the weight of credibility attached to it. Imagine that, if your evidence is clear, succinct and truthful, it will weigh down heavily on the scales of justice ... If, however, your evidence is confusing, and you are nervous, aggressive, pompous, rambling and inflexible, it will be given little or no weight. (Bond *et al.* 2007)

Psychiatrists will be relieved to know that the following judicial criticisms were not of a psychiatrist, but of a social work expert (*Re IA*):

... quite extraordinarily uncompromising, interested only on repeating her own view and seemingly unwilling to countenance she may have misjudged anyone ... quite

arrogant ... delivered her evidence at breakneck speed and could not be persuaded to slow down notwithstanding several reminders. She referred to the mother throughout as 'Mom' which seemed to me to be somewhat disrespectful.

Questions from the Judge

Even if the judge has already asked some questions, be prepared for more and remember that your counsel and your cross-examiner may want to clarify your answers.

Afterwards

The judge will probably thank you for your attendance. Reciprocate with a simple nod and, without grovelling, express appreciation, if appropriate, for accommodating your attendance to minimise interference with your professional duties or to allow you to go on that much deserved foreign holiday. However, if there is a jury, limit yourself to an appropriately formal response.

You may be released by the court, but your counsel may want you to assist in her cross-examination of the other side's expert (if you have not already done so). To do so, you will need to sit behind counsel and pass forward handwritten notes suggesting questions. For this, you need a pad of adhesive notes so that they can be attached to the back of the seat adjacent to her and then you need the confidence to tug at her gown, when it is necessary to draw attention to them, but also the skill to avoid distracting her from what she is saying. This is not so daunting in a case with leading and junior counsel, or if you are sitting next to the solicitor, as junior counsel or the solicitor can screen your notes and decide when to send them forward.

Afterwards, find out about the outcome. Do not be disheartened if the judge has not accepted your evidence. Judges are entitled to disagree with an expert witness, although to do so there must be a safe basis for the disagreement and as the judge will have to explain fully his reasons for rejecting expert evidence or for preferring the evidence of one expert to that of another, you may have something useful to learn from the judgment.

It matters not 'which side has won'. Has your testimony assisted in the delivery of justice?