BJPsych Advances (2015), vol. 21, 295–303 doi: 10.1192/apt.bp.115.014464

When is an expert not an expert? Question time for expert psychiatric witnesses†

ARTICLE

Keith J. B. Rix

SUMMARY

Although medical experts are valued in the administration of justice, the cases in the UK of Meadow and others, including most recently Pool, have all contributed to understandable anxiety on the part of doctors who carry out court work. This article uses an in-depth analysis of these cases and details of some other medical regulatory cases to draw out some lessons for potential medical expert witnesses. Although the most recent judgment in Pool leaves a number of unanswered questions, steps are identified that may be taken to reduce the risk of regulatory investigation by the General Medical Council.

LEARNING OBJECTIVES

- Understand why Professor Meadow and Dr Pool fell foul of the General Medical Council and its regulatory procedures
- Recognise the difficulties now facing potential expert medical witnesses as a result of the judgment in Pool
- Identify good practice for potential medical expert witnesses that will reduce the risk of regulatory investigation and restriction on their registration if their fitness to practise as experts is found to be impaired

DECLARATION OF INTEREST

K.J.B.R.'s daughter Rowena Rix is a solicitor in the Regulatory and Professional Discipline Department of Kingsley Napley, the solicitors who instructed Dr Pool, but she was not involved in his case and she has had no part in the preparation of this article. K.J.B.R. and Dr Pool were members of the same peer group, but the article does not include any information acquired from peer group meetings and Dr Pool is in agreement with its publication.

The importance of expert evidence for the administration of justice is well recognised (Box 1). However, recent General Medical Council (GMC) and Medical Practitioners Tribunal Service (MPTS)[a] cases, beginning with that of the paediatrician Professor Sir Roy Meadow and now including that of the psychiatrist Dr Richard Pool, have drawn attention to the risks that medical experts run of regulatory investigation and of potential restrictions on their registration if their fitness to practise as experts is found to be impaired.

Following the Meadow case it was observed that one of its results had been 'a haemorrhage of experts prepared to consider child protection issues' and 'anxiety among those who continue to carry out court work that an honest error might result in humiliation and the loss of their livelihood' (Wise 2006), although there had already been a report of a fivefold increase in complaints against doctors in child protection work in 2004 (Anonymous 2004). Dr Pool's case has the potential to increase that anxiety among psychiatrists who provide expert opinions to courts and tribunals.

The purpose of this article is to set out the lessons that can be learned, highlight the important questions left unanswered by the Pool case and provide guidance that may assist psychiatric expert witnesses in avoiding referral to the GMC and the MPTS.

BOX 1 The value of expert evidence in the administration of justice

'Expert medical witnesses are a crucial resource. Without them we [the judges] could not do our job. I hope that […] the coming years will see many more in the medical profession offering their skills to the courts.' Dame Elizabeth Butler-Sloss (Butler-Sloss 2002)

'The need for expert evidence in a number of difficult cases under the Children Act is, in my view, incontrovertible. We all need high quality expert advice. In this context "we" includes not only the judiciary and the legal profession but, above all, it means the litigants and the children concerned. The work could not be more important or more crucial to the outcome of cases and to individual children's lives.' The Rt. Hon Lord Justice Wall (Wall 2008)

'The evidence given by expert witnesses is absolutely crucial not only to the criminal justice system but to the justice system generally.' Professor Graham Zellick, Chair of the Criminal Cases Review Commission, in the Lund Lecture delivered to the British Academy of Forensic Sciences, 22 November 2006 (Zellick 2010)

Keith Rix is an Honorary Consultant Forensic Psychiatrist in the Norfolk and Suffolk NHS Foundation Trust and Visiting Professor of Medical Jurisprudence, Institute of Medicine, University of Chester, where he is involved with the new MSc in Medicolegal Practice. He has recently been elected an Honorary Fellow of the Faculty of Forensic and Legal Medicine of the Royal College of Physicians.

Correspondence Professor Keith J.B. Rix, The Grange, 92 Whitcliffe Road, Cleckheaton BD19 3DR, UK. Email: keith@drkeithrix.co.uk

†For a related commentary see pp. 304–306, this issue.

a. The MPTS has taken over the adjudicatory role that the GMC previously had in professional regulation. The GMC continues to investigate cases and present them at fitness to practise panels of the MPTS.

https://doi.org/10.1192/apt.bp.115.014464 Published online by Cambridge University Press

The case of Sir Roy Meadow

Professor Meadow gave evidence in 1999 in the trial of Sally Clark for the murder of her two sons. This led to a GMC finding of serious professional misconduct and an order for erasure of his name from the medical register. He successfully appealed to the High Court, but the GMC then appealed to the Court of Appeal, which found, but only by a majority, that although Professor Meadow was guilty of professional misconduct, it was not serious professional misconduct[b] (*General Medical Council v Meadow* [2006]).

An outline of the Meadow case is given in Box 2 and its lessons are set out in Box 3.

b. Before its amendment in 2003, in a conduct case, the Medical Act 1983 required a finding of serious professional misconduct before the GMC could take action on a medical practitioner's registration and this applied in Professor Meadow's case. Following amendment of the Act, it is open to the fitness to practise panel to find fitness to practise impaired by reason of misconduct, which may fall short of being serious misconduct, and take action on that basis.

BOX 3 The lessons from Meadow

- Know the limits of your expertise
- Make it clear when a particular question or issue falls outside your expertise
- Do not give evidence outside your area of expertise
- Beware of reliance on statistics, or other facts, of uncertain source
- Avoid colourful or graphic analogies that might make an opinion appear to the jury more persuasive than it ought to be
- In the choice of analogies, avoid being insensitive to the feelings of the defendant or claimant or any other party to the proceedings

The case of Dr Pool

Dr Pool is a consultant psychiatrist who prepared a report for solicitors acting for the (then) Health Professions Council (HPC) in a fitness to practise case. At a preliminary hearing, the HPC concluded that he did not have sufficient expertise and decided not to admit his evidence. The practitioner in the case admitted that her fitness to practise was impaired, but complained to the GMC, which brought Dr Pool before a fitness to practise panel (FPP) of the MPTS. The FPP found Dr Pool guilty of misconduct amounting to an impairment of his own fitness to practise and ordered his suspension from the medical register for 3 months (MPTS 2014, unreported). He appealed. Although unsuccessful in his appeal against the findings of misconduct and impaired fitness to practise, the court varied the sanction to one of not accepting instruction to act as an expert in fitness to practise proceedings for 3 months (*Pool v General Medical Council* [2014]).

Box 4 sets out the history of Dr Pool's case up to his referral to the GMC by the practitioner.

BOX 2 The case of Professor Sir Roy Meadow

In 1999, at the trial of Sally Clark, who was charged with the murder of her two children, Professor Meadow's evidence included, critically, the assertion that, if the likelihood of an infant dying of sudden infant death syndrome (SIDS) was 1 in 8543, the chance of a second death by SIDS in the same family could be calculated by squaring the risk of one such death, i.e. 1 in almost 73 000 000. However, this is a valid calculation only if each of the deaths is truly independent of the other, but there was no such independence on the facts of this case. In his oral testimony, Professor Meadow equated this to the chances of backing four 80 to 1 winners of the Grand National in successive years. Mrs Clark was convicted and initially appealed unsuccessfully.

Her second appeal was allowed on the ground that the verdicts were unsafe because of material non-disclosure by the Crown's pathologist. Although Professor Meadow's evidence was not subjected to full argument, the court indicated that, if it had been, the appeal would in all probability have been allowed on that ground too. The court suspected that the graphic Grand National reference may have had 'a major effect on [the jury's] thinking notwithstanding the efforts of the trial judge to down play it'.

Mrs Clark's father then made a complaint to the General Medical Council (GMC), and in July 2005 Professor Meadow was found guilty of serious professional misconduct. His name was ordered to be erased from the medical register. At the hearing he did express regret at having used 'the insensitive Grand National analogy'.

Professor Meadow appealed to the High Court, and in February 2006 his appeal was allowed by Mr Justice Collins. The GMC appealed to the Court of Appeal.

In July 2006 the Court of Appeal, by a two to one majority, dismissed the GMC's appeal. Lord Justice Auld found that Professor Meadow was guilty of some professional misconduct in that, in the preparation for, and presentation of evidence at, the trial he fell below the standards required of him by his profession, but without intending to mislead the trial court and with an honest belief in the validity of his evidence when he gave it. He agreed with Mr Justice Collins in the High Court that Professor Meadow made a mistake and could properly be criticised for not disclosing his lack of expertise, but this did not justify a finding of serious professional misconduct. Lord Justice Thorpe found that Professor Meadow's failings were not extreme and he shared the evaluation and conclusion of Mr Justice Collins that it was 'difficult to think that the giving of honest albeit mistaken evidence could save in an exceptional case properly lead to such a finding [of serious professional misconduct]'. In the minority, Sir Anthony Clarke, Master of the Rolls, was of the opinion that the failure of Professor Meadow to adopt the principles set out in *National Justice Compania Naviera SA v Prudential Assurance Company Ltd (The Ikarian Reefer)* [1993] and to take the precaution of saying that his opinion fell outside his particular expertise, so that all reasonable steps could be taken to check its validity, amounted to serious professional misconduct. He referred to how attractive to the jury might have been the colourful way in which he gave his evidence. However, Sir Anthony did acknowledge that Professor Meadow was held not to have acted in bad faith or to have intended to mislead the court or anyone else.

BJPsych Advances (2015), vol. 21, 295–303 doi: 10.1192/apt.bp.115.014464

BOX 4 The case of Dr Pool – the Health Professions Council (HPC) stage

The practitioner had been diagnosed as having a personality disorder and post-traumatic stress disorder, in part resulting from abuse in childhood. The fitness to practise case called for the assistance of someone who was expert in the field of general adult psychiatry.

Dr Pool, at the time, was a consultant psychiatrist working in a secure hospital in the independent sector. He was on the General Medical Council's (GMC's) specialist register in the category of psychiatry of learning disabilities, but in the information that he provided to his instructing solicitors he did not identify the category under which he was registered. His experience of general adult psychiatry had been as a senior house officer between 12 and 17 years earlier. Subsequently, he had worked in the field of personality disorder. He had worked with female patients who had suffered sexual abuse and had been diagnosed as having personality disorders and post-traumatic stress disorder. This experience had been acquired in secure hospitals. He did not have Membership or Fellowship of the Royal College of Psychiatrists. He had a postgraduate diploma in psychiatry. He had not undertaken higher specialist training.

On the instructions of solicitors acting for the HPC, and following provision of his CV and an exchange of emails, Dr Pool then prepared a report in which he concluded that the practitioner's fitness to practise was wholly and indefinitely impaired.

At a preliminary hearing, the practitioner challenged Dr Pool's expertise. The hearing was postponed in order for Dr Pool to attend. At the hearing, Dr Pool was questioned about his understanding of the role of an expert and the training and experience required to give expert evidence. He was also questioned about his own qualifications and experience. There was evidence that the hearing was 'uncomfortable' because Dr Pool could not answer the questions put to him (MPTS 2014, unreported). His answers were described as rambling and unclear, but he says that he felt 'shocked' and 'disorientated' by what he felt was continual and harsh questioning (*Pool v General Medical Council* [2014]). The panel was not satisfied that he had sufficient expertise in the field of personality disorder and did not accept his evidence as expert evidence. The practitioner then referred Dr Pool to the GMC.

The case before the FPP

The allegations about Dr Pool at the MPTS FPP fell into three categories:

1 that he strayed into the field of general adult psychiatry, in which he did not have expertise (the expertise allegations);
2 that he failed in discharging his duties as an expert witness as he did not provide adequate reasons for his opinion as to fitness to practise (the reasoning allegations); and
3 that he did not display an adequate understanding of the role and responsibilities of an expert witness (the competence allegations).

The GMC called an expert, Dr Martin Baggaley, to report to the FPP on Dr Pool's expertise. Although Dr Baggaley began his evidence by identifying expertise as knowledge or skill that could be acquired in a number of ways, including clinical practice and research, he then advanced a number of further 'tests' of expertise (Box 5). The legal test of expertise formulated in *Phipson on Evidence* (Malek 2013), which was also before the FPP, is given in Box 6.

In support of what might be called 'the standing above one's peers test' (Box 5), which the FPP interpreted as meaning 'standing out from his peers', being 'deferred to by his peers' and being 'above the line in terms of hierarchy', he used the illustration from the trust of which he is medical director, stating, 'I have got 200 consultants and I should think I would not probably put forward more than 20 or 30 of those as experts'. Counsel for the GMC relied on this test and submitted that 'although a doctor may have been working for years in a certain area, [Dr Baggaley] would not

BOX 5 Baggaley's eight 'tests' of expertise for a psychiatrist

1 Being on the specialist register in the appropriate category (i.e. general adult psychiatry)
2 Having Membership or Fellowship of the Royal College of Psychiatrists
3 Having undergone higher professional training
4 Having held a substantive NHS consultant post or working as a consultant in general adult psychiatry ('the consultant test')
5 Having publications in the form of articles in peer-reviewed journals and chapters
6 Having experience of working in the relevant setting ('the setting test')
7 Standing above one's peers in some respects/being above the line in terms of the hierarchy of expertise/there being something about the psychiatrist's training and experience that sets them apart as an expert ('the peer/hierarchy test')
8 Not being a trainee psychiatrist unless very expert in a particular area

(MPTS 2014, unreported)

BOX 6 The legal test of expertise

The legal test is formulated in *Phipson on Evidence* (Malek 2013: p. 1189):

'Though the expert must be skilled by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not admissibility [. . .]. Equally, one can acquire expert knowledge in a particular sphere through repeated contact with it in the course of one's work, notwithstanding that the expertise is derived from experience and not formal training.'

necessarily regard that doctor as an expert'. The 'setting test' was a particular issue, and one of Dr Pool's experts, Dr Harris, albeit as a professional rather than expert witness, dismissed as nonsense 'the suggestion that a person who worked exclusively in a secure setting was in some way at a handicap in making a risk assessment in relation to working in the community'. Dr Harris added that he had been instructed by the GMC in fitness to practise cases when he worked in secure settings. Dr Bradley, who was Dr Pool's expert witness, gave similar evidence.

Dr Pool's case was that he did have the requisite knowledge and experience, specifically the relevant expertise in general (i.e. adult) psychiatry, and that he had not been misleading or misrepresented his training and expertise in his curriculum vitae (CV).

Although the allegations listed in Box 7 were found proved, the FPP did accept that Dr Pool had considerable experience in the treatment of women with personality disorder, but added that this was not in the community and not focused on their occupational functioning. It acknowledged that he had some experience in general psychiatry, but stated that he could not be considered an expert. It concluded with an order for Dr Pool's suspension from the medical register for 3 months. This did not take place, as Dr Pool appealed.

Dr Pool's appeal

At Dr Pool's appeal before Mr Justice Lewis, his counsel identified a number of issues (Box 8).

Mr Justice Lewis decided that the first issue was whether or not Dr Pool was an expert in general adult psychiatry, specifically someone who was 'an expert […] in assessing the fitness to practise of an individual working in the community' or '"expert" in the field of fitness to practise of an individual carrying out a particular role in the workplace' (*Pool v General Medical Council* [2014]). He found that Dr Pool was not such an expert (Box 9). It is clear that Mr Justice Lewis adopted four of Dr Baggaley's tests (Box 5): the specialist register test, the higher professional training test, the consultant test and the relevant setting test. With regard to the relevant setting test, he found that Dr Pool 'was not an "expert" by reason of his day to day experience as that involved assessing patients in a different setting in a different context'.

In relation to the reasoning allegations, Mr Justice Lewis found that Dr Pool did not provide adequate reasoning for his opinions as to the degree of impairment of the practitioner's fitness to practise or how long it was likely to last. Having made this finding, he did not need to deal with the issue of whether the FPP could find Dr Pool's

BOX 7 Dr Pool's case – the Medical Practitioners Tribunal Service (MPTS) stage

At the MPTS fitness to practise panel (FPP), the allegations against Dr Pool included the following:

1 Prior to producing his report, he did not make it clear to those instructing him that:

(a) he was not an expert in the field of general adult psychiatry

(b) his inclusion on the specialist register was in the category of psychiatry of learning disabilities rather than general adult psychiatry.

2 In his report he failed to:

(a) adequately explain his opinion that the practitioner's fitness to practise was:

(i) wholly impaired

(ii) indefinitely impaired

(b) restrict his opinion to:

(i) areas in which he had expert knowledge or direct experience

(ii) matters that fell within the limits of his professional competence

(c) state where a particular question fell outside his area of expertise.

3 At a Health Professions Council (HPC) hearing he failed to:

(a) display an adequate understanding of the role and responsibilities of an expert witness

(b) admit that he did not have appropriate expertise in the field of general adult psychiatry.

The FPP heard evidence from Dr Martin Baggaley as to whether or not Dr Pool should have prepared an expert report on the practitioner. Dr Baggaley's evidence was that Dr Pool was not an expert and he set out what can be regarded as eight 'tests' of expertise for a psychiatrist (Box 5).

Dr Pool's case was that he had acquired the relevant expert knowledge from experience gained in the course of his work and that he had provided reasoning as to the practitioner's current condition and prognosis.

Although Dr Baggaley accepted in cross-examination that his peer test had no foundation in the legal test of expertise as formulated in *Phipson on Evidence* (Box 6), the FPP made no reference in its determination to the Phipson test and referred instead to 'the peer test' and 'expert hierarchy' in concluding that Dr Pool was not an expert in the field of general adult psychiatry. In finding that he had failed to restrict his opinion to areas in which he had expert knowledge or direct experience the FPP relied on his lack of any recent experience of general psychiatry at a consultant level in the community and his lack of experience of working with patients with personality disorders in the context of fitness to practise proceedings.

The FPP found the allegations proved. It went on to find first that this amounted to misconduct as 'There is clearly a strong public interest in ensuring that doctors do not act outside their competence and do not put themselves forward as experts in areas in which they do not have adequate knowledge and expertise'. Second, it found that this misconduct had resulted in impairment of Dr Pool's current fitness to practise. It took into account what it regarded as his lack of insight in persisting in his belief that he was an expert in general psychiatry and that he did nothing wrong in accepting the instructions. Taking into account his lack of insight, the finding of misconduct and the public interest, the FPP decided against doing no more than imposing conditions on Dr Pool's registration. Instead, it suspended his registration for 3 months, adding that erasure would have been wholly disproportionate.

(MPTS 2014, unreported)

BJPsych Advances (2015), vol. 21, 295–303 doi: 10.1192/apt.bp.115.014464

BOX 8 Dr Pool's case – the issues at the appeal as identified by Dr Pool's counsel

- The test to be applied in deciding what constitutes expertise
- Whether the fitness to practise panel (FPP) was wrong to ignore the overwhelming weight of evidence that Dr Pool had the necessary expertise and conclude that he lacked sufficient experience in the relevant psychiatric areas
- Whether the FPP was wrong to draw a distinction between an expert who practises in the community and one who practises in secure settings ('the setting issue')
- Whether the FPP was wrong to find the reasoning allegations proved in that Dr Pool had, albeit briefly, set out the reasons for his conclusions about impairment
- If the FPP had been correct to find the reasoning allegations proved but not the others, whether it would have been appropriate to make a finding of impairment
- Whether suspension was appropriate and proportionate

(*Pool v General Medical Council* [2014])

fitness to practise impaired if the only allegations proved were the reasoning allegations.

Mr Justice Lewis did find the FPP's decision as to sanction (suspension from the medical register for 3 months) flawed and substituted a condition prohibiting Dr Pool from acting as an expert in fitness to practise proceedings for 3 months.[b]

Putting these cases into context for psychiatrists

Between 2007 and 2012 only three psychiatrists faced FPPs. One was a child psychiatrist whose inappropriate, misleading interview of a child for family proceedings was found to amount to misconduct, but not serious misconduct, and so their fitness to practise was not found to be impaired. The second was a staff grade psychiatrist criticised by a judge for having prepared an expert report in family proceedings that was beyond his expertise. The FPP found that he had dishonestly claimed to have been supervised by a consultant and that there was evidence of other dishonesty in failing to report a caution and conviction. Misconduct and impaired fitness to practise were found and the sanction was erasure of his name from the medical register. The third was a consultant, who was found to have been reckless, misleading and negligent in his role as an expert psychiatric witness in a murder trial.

BOX 9 Dr Pool's case – the appeal judgment as to expertise

Mr Justice Lewis held that Dr Pool was not an expert in general psychiatry for the following reasons:

- he was not on the specialist register in the category of general psychiatry
- he had not completed any higher professional training
- he was not currently, and he had no recent experience at a consultant level of, treating general psychiatry patients in community settings
- his experience was not focused on the occupational functioning of patients
- he had no direct experience of working with patients with personality disorders in the context of fitness to practise proceedings.

(*Pool v General Medical Council* [2014])

Discussion

What is an expert witness?

An expert witness is an expert whose evidence is relevant to the case being tried by the court or tribunal ('relevance') and whose evidence is admitted by the court or tribunal ('admissibility') (Rix 2011a). A number of cases have shaped the approach to be taken when determining admissibility (Rix 1999). The fundamental test of expertness 'is skill, and skill alone' (*R v Bunnis* (1964)). The case of *R v Silverlock* [1894] established that the expert's skill does not have to be acquired 'in the way of his business or in any definite way', and Bunnis referred to the acquisition 'by dint of training and practice' of a 'good knowledge'. As *Phipson on Evidence* (Box 6) makes clear, this means that the skill can be acquired by special study or experience, including repeated contact with their subject in the course of their work. But it is for the court to decide whether or not, having regard to these and other matters, the expert's evidence should be admitted and that thereby the expert should be an expert witness in the case.

Whether or not the expert's skill or knowledge is relevant depends on the issue or question, outside the experience and knowledge of the judge, jury or tribunal, that requires elucidation (*R v Turner* [1975]). Again it is for the court to decide on the relevance. The court must avoid getting the wrong expert. *Environmental Defence Systems Ltd v Synergy Health plc and Gravitas* [2014] is a recent example of a case in which the wrong expert was appointed. This was a patent case concerning flood barrage units that comprise absorbent pads to absorb water. The claimant had an expert in personal hygiene products with expertise in absorbent pads, but unfamiliar with the field of flood defences. The defendants had an expert in flood risk management. It was not until the trial

b. When the MPTS FPP reviewed Dr Pool's case in January 2015 (MPTS 2015, unreported) it observed that Dr Pool had made a significant effort to improve his expert witness report writing skills, that he had made significant progress in relation to the various matters of concern and that the CPD he had undertaken was impressive. The FPP relied on evidence from a senior member of his peer group to the effect that he had wholeheartedly accepted his advice, which had included consideration of the first draft of this article, and realised that, had he received and acted upon such advice before accepting instructions in the HPC case he could have avoided appearing before the MPTS.

that it became apparent that the claimant needed an expert in flood management. But this does not mean that the claimant's expert was not skilled, by study or experience, in the field of absorbent pads.

How should the expert witness be identified?

For the court or tribunal to be satisfied that it has the right expert to be an expert witness in a case it is necessary to match the expert's knowledge or experience to the issue or issues that require expert elucidation. This requires a dialogue between the expert and the instructing solicitors. The expert has to provide sufficient information as to the training and clinical practice or research on which their knowledge and experience is based so as, using the terminology of rule 33.2 of the Criminal Procedure Rules[c] (Ministry of Justice 2014), to define 'the expert's area or areas of expertise'. The instructing solicitors have to provide the expert with sufficient information as to the issues.

What Dr Pool's case illustrates is the approach that will probably now be taken in deciding whether an expert has sufficient expertise to be an expert witness in a particular case. The difficulty, however, is that although the judgment explains why Dr Pool was not the right expert (Box 9), it does not explain what the minimum qualifications are for the expert medical witness.

Higher professional training?

The relevance of higher professional training seems obvious, but that training may have been acquired a long time ago. What is important is whether the training has been kept up to date and there is evidence of this in the doctor's continuing professional development record. The important unanswered question, as also in the case of specialist registration, is what higher professional training is relevant in a particular case and what significance attaches to the considerable expertise that may be acquired in other areas of psychiatry after higher training is completed and following specialist registration.

Relevant specialist registration?

Mr Justice Lewis was clear that Dr Pool was 'not qualified to be an "expert" as he was not on the relevant Specialist Register'. But who decides, and how do they decide, what the relevant specialty is?

What if he had been on the specialist register in the category of forensic psychiatry? This ought to have been regarded as a relevant specialty. Forensic psychiatry is not just about offending and the criminal law. The American Academy of Psychiatry and the Law (2005) identifies forensic psychiatry as 'a subspecialty of psychiatry in which scientific and clinical expertise is applied in legal contexts involving civil, criminal [or] regulatory […] matters'.

Or would he have needed to be registered additionally in general adult psychiatry? The answer should be no. As Dr Harris said in his evidence in Dr Pool's case, 'forensic psychiatry is really just a branch of general psychiatry with much greater emphasis on risk assessments' (MPTS 2014, unreported), and as Gunn & Taylor (2014) state, 'without a firm foundation in general adult psychiatry there could be no forensic psychiatry'.

The corollary is whether a psychiatrist registered in the category of general adult psychiatry can be an expert witness in a criminal case. Before forensic psychiatry came to exist as a specialty, it was usually what would now be called general adult psychiatrists who assisted the criminal courts with their expertise. They have continued to do so. This judgment should not stop them.

But what about the 64-year-old claimant in a personal injury action who might be well over 65 when the case comes to trial? Is the relevant specialty general adult or old age psychiatry? Should the case have experts from both specialties? What if there is a psychotherapeutic issue in a criminal case? Notwithstanding that one of the skills of the forensic psychiatrist is to develop a psychodynamic formulation, is the relevant specialty psychotherapy?

These are issues not just for psychiatrists. In a case of disfiguring facial injury, is the relevant specialty plastic surgery or oral and maxillofacial surgery? In a case involving the management of multiple trauma, is the relevant specialty emergency medicine or trauma and orthopaedic surgery?

In cases such as that of a 66-year-old, where arguably general adult psychiatry is a relevant category of specialisation for the expert, these issues ought to be, and in everyday legal practice probably are, resolved by deciding how much weight to attach to the respective experts' evidence. However, this is of little consolation to general adult psychiatrists afraid that they may be found guilty of failing to restrict their opinion to areas in which they have expertise.

Relevant recent experience as a consultant?

Dr Pool was a consultant and he had experience of general adult psychiatry in the community, but not currently as a consultant. But what do 'current' and 'recent' mean? How 'recent' does the experience need to be? The answer ought not to be an arbitrary number of years, like that which divides general adult and old age psychiatry. It ought to depend on whether or not there have been changes or developments that invalidate the expert's experience. In Dr Pool's case, no evidence

c. As of 5 October 2015, Part 33 will become Part 19 of the 2015 rules. The rule numbering will not change, so rule 33.2 will become rule 19.2 and rule 33.4 will become rule 19.4, etc. (www.legislation.gov.uk/uksi/2015/1490/contents/made).

BJPsych Advances (2015), vol. 21, 295–303 doi: 10.1192/apt.bp.115.014464

was given that since he was a senior house officer in 1999 there has been a change in the way in which personality disorder can affect occupational functioning or any significant developments in the assessment of occupational functioning.

The more troubling question is whether expert medical evidence can be given by a specialist who is not a consultant. The GMC's expert witness Dr Baggaley did not think that a trainee psychiatrist could prepare an expert report unless they were very expert in a particularly narrow area. It is unfortunate that, at a time when there continue to be concerns about the supply and quality of expert witnesses, there should now be a judgment that might appear to prevent specialist registrars from gaining experience in preparing expert reports. At the time that Lord Justice Thorpe gave his judgment in Meadow and addressed the problem in the family justice system of the demand for expert witnesses exceeding supply, there had been only 'limited progress […] with the introduction of training and mentoring schemes for specialist registrars' and there were imminent proposals for 'incentives to encourage specialist registrars to undertake forensic work'. The need for such schemes, for example as I described in a previous article (Rix 2011b), is now even more acute in that forensic specialist registrars are having increasing difficulty gaining experience in the preparation of court reports and the generations of forensic psychiatrists who gained considerable experience of preparing reports as senior registrars are now retired or retiring. The curriculum for training in forensic psychiatry drawn up by the Royal College of Psychiatrists and published by the GMC on its website at the time of Dr Pool's appeal identified two of the skills that it expected to be acquired in higher training in forensic psychiatry as the ability to 'prepare reports for […] Courts of Law (coroners, criminal and civil)' and to 'receive and negotiate instructions to prepare reports' (Royal College of Psychiatrists 2010). Since then, the GMC has published an approved curriculum for training in forensic psychiatry which refers to demonstrable 'ability to prepare medicolegal reports for the […] Criminal Courts [and] Civil Courts' and demonstrable 'ability to give live testimony in formal settings including […] Magistrate [sic] Courts, Crown Courts [sic]' (Royal College of Psychiatrists 2013). Yet the GMC's own expert in Dr Pool's case effectively rules out this training for all but an exceptional minority of trainee psychiatrists and the judgment of the court effectively endorses his position.

Perhaps those who expect to recruit as expert witnesses consultant psychiatrists who are able to negotiate complex instructions that bear on the definition of the limits of their expertise, combine their professional skill with reasoning and ability sufficient to inform a court or tribunal and communicate their knowledge in a way that is intelligible, convincing and robust enough to withstand testing should contemplate the following scenario. They are admitted to hospital and need emergency surgery. The consultant surgeon about to operate is newly appointed but has never previously carried out the operation as they were not allowed to do so, even under supervision, when they were a specialist surgical registrar.

If the answer to this is that the Pool judgment is not meant to apply outside the context of fitness to practise proceedings, where the 'drastic consequences' may be the loss of the practitioner's registration and career, what makes them so different from the criminal proceedings in which many of today's older generation of forensic psychiatrists first gave evidence in court? Surely giving evidence in a section 41 Mental Health Act 1983 restriction order case, where the evidence may make the difference between a finite, unrestricted hospital order and detention without limit of time with restrictions is also as much to do with 'drastic consequences'.

Does the setting of the expert's practice matter?

The Pool judgment makes it clear that the expert needs to have recent experience of the setting of the subject of the report. This seems to mean that experts who do not have an out-patient practice will not be able to report on, for example, claimants in personal injury cases who have not been admitted to in-patient care. Where the subject of the report was an in-patient at the material time, does this mean that the report will need to be prepared by an in-patient consultant? There is a question as to whether a forensic psychiatrist who works only in a secure unit or hospital can give evidence in the case of someone with no history of in-patient treatment who is charged with an offence that has occurred in the community or in the case of someone who is the subject of fitness to practise proceedings.

Are there particular implications for experts in professional regulation cases?

Two of the reasons given for not accepting that Dr Pool was the right expert relate specifically to fitness to practise cases and more generally to professional regulation cases. The expert's experience has to be focused on the occupational functioning of patients and there is a need for the expert to have experience of working with patients with the condition in question in the context of fitness to practise proceedings. The need for experience focused on occupational functioning is

MCQ answers
1 d 2 b 3 a 4 c

hardly surprising and most psychiatrists who care for working-age adults will have such experience. The requirement that the experts should have direct experience of working with patients in the context of fitness to practise proceedings is likely to have a significant impact on the supply of psychiatric experts for regulatory proceedings. I ran a staff clinic for health professionals for a number of years, frequently having to consider whether or not my patients were fit to work, or fit to work with particular adaptations or conditions, before I first had the care of a patient undergoing fitness to practise proceedings. With the benefit of hindsight gained from the Pool case, I should not have been preparing expert reports for professional regulatory proceedings. The pool of potential experts is likely to reduce to mainly psychiatrists who treat and supervise doctors and nurses who are subject to their professions' regulatory health procedures, but this could be a diminished pool because a number of these may be ineligible as they are forensic psychiatrists who are not on the specialist register in the category of general adult psychiatry.

Are experts at risk if their opinions are inadequately reasoned or they cannot display an adequate understanding of their role and responsibilities?

Reasoning

Reasoning is crucial to the expert's report. As Mr Justice Jacob said in *Routestone Ltd v Minories Finance Ltd* [1997], 'What really matters in most cases is the reasons given for the opinion'. That said, experts are not the only players in the justice system who can fall short in this regard. Between 2003 and 2009 it was a frequent ground of appeal against GMC FPP decisions that the panels had not given reasons for their decisions on impairment and sanction, even though there is a statutory duty on them to do so (Rix 2010). Indeed, in the case of *R (on the application of Paterson) v General Medical Council* [2006] the doctor's appeal succeeded because the panel's reasons did not 'at least grapple with the principal controversial issues', but in my experience as an FPP panellist and panel chairman, panellists who failed to give any, or any adequate, reasons for their decisions were not subjected to professional regulatory procedures.

Understanding the role and responsibilities of an expert witness

Expert witnesses must understand their role and responsibilities. The latest *Guidance for the Instruction of Experts in Civil Claims* (Civil Justice Council 2014) makes it mandatory to include a statement to the effect that the expert understands his or her duties and is aware of the Civil Procedure Rules Part 35 'Experts and Assessors' (Lord Chief Justice 2014), its practice direction and is aware of the *Guidance*. It is entirely reasonable that the examination of an expert witness should include questions about the duties and responsibilities of an expert.

What changes to practice arise from the Pool case?

Box 10 sets out the steps that potential medical expert witnesses can take to try to avoid finding themselves in the position of Dr Pool. Most of these are steps that should be taken in the course of negotiating instructions, a skill that the Royal College of Psychiatrists, if not also the GMC, expects experts to acquire in their higher forensic training. They are steps that should assist in ensuring that the courts get the right experts providing properly reasoned opinions. If a psychiatrist prepares a report and only subsequently is found to be the

BOX 10 Lessons from the Pool case

- Provide sufficiently detailed information as to your qualifications, training and experience and the nature and setting of your everyday practice, to put your instructing solicitors in the best possible position to judge the appropriateness and sufficiency of your expertise.
- Avoid holding yourself out as an expert in a particular area or field in the sense of being seen to persist with a demand that you are accepted as an expert witness. Instead, state which of your qualifications, training or experience may make it appropriate for you to be instructed, but make it clear that you expect your instructing solicitors to satisfy themselves as to the sufficiency of your expertise and as to your suitability before confirming instructions.
- Particularly if there might be a question as to whether your category on the specialist register is the relevant one or as to the sufficiency of your expertise, indicate your willingness to attend a preliminary hearing to determine the admissibility of potential expert witness evidence before accepting instructions.
- Make it clear that, if your instructing solicitors have any doubt as to your suitability, they should say so and you will decline the instructions.
- If you are in any doubt as to whether the issues are within your area of expertise, discuss this with a colleague, consult your medical defence organisation, discuss this with your instructing solicitors; be careful to create and retain copies of correspondence and records of telephone calls; if any doubt remains, decline the instructions.
- In the covering letter that accompanies your report, indicate that you have done your best to provide reasoned opinions and request your instructing solicitors to delay disclosure of the report and give you the opportunity to revise it if they find that the reasons for your opinions are unclear or insufficient.

BJPsych Advances (2015), vol. 21, 295–303 doi: 10.1192/apt.bp.115.014464

wrong expert, the fact that they honestly believed that they had the right expertise will be regarded as indicating a culpable lack of insight.

Conclusions

The common feature of the cases of Meadow and Pool is of experts failing to limit their opinion to areas in which they had expert knowledge or direct experience or which fell within their areas of professional competence. Post-Pool, improved, more detailed and possibly more protracted communication between instructing solicitors and potential expert witnesses is going to be necessary to avoid similar cases.

References

American Academy of Psychiatry and the Law (2005) *Ethics Guidelines for the Practice of Forensic Psychiatry.* AAPL (http://www.aapl.org/ethics.htm).

Anonymous (2004) News: complaints against doctors in child protection work have increased fivefold. *BMJ,* **328**: 601.

Butler-Sloss E, Hall A (2002) Expert witnesses, courts and the law. *Journal of the Royal Society of Medicine,* **95**: 431–4.

Civil Justice Council (2014) *Guidance for the Instruction of Experts in Civil Claims.* Civil Justice Council.

Gunn J, Taylor PJ (2014) Introduction. In *Forensic Psychiatry: Clinical, Legal and Ethical Issues* (2nd edn) (eds J Gunn, PJ Taylor): 1–17. CRC Press.

Lord Chief Justice (2014) *Civil Procedure Rules: Part 35 – Experts and Assessors.* Ministry of Justice (http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35).

Malek HM (ed) (2013) *Phipson on Evidence* (18th edn). Sweet and Maxwell.

Ministry of Justice (2014) *Criminal Procedure Rules: Part 33 Expert Evidence (as in force on 6 October 2014).* Ministry of Justice (https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-proc-rules-2014-part-33.pdf).

Rix KJB (1999) Expert evidence and the courts: 1. The history of expert evidence. *Advances in Psychiatric Treatment,* **5**: 71–7.

Rix KJB (2010) *Are the Fitness to Practise Procedures of the General Medical Council Fit for their Purpose? A Review of Appeals and Judicial Reviews Involving General Medical Council Fitness to Practise Procedure between April 2003 and March 2009.* LLM dissertation, De Montfort University, Leicester.

Rix KJB (2011a) *Expert Psychiatric Evidence.* RCPsych Publications.

Rix KJB (2011b) Medico-legal work of psychiatrists: direction, not drift. Commentary on… 'You are instructed to prepare a report'. *Psychiatrist,* **35**: 272–4.

Royal College of Psychiatrists (2010) *A Competency-Based Curriculum for Specialist Training in Psychiatry: Specialists in Forensic Psychiatry (amended October 2014).* Royal College of Psychiatrists (http://www.gmc-uk.org/Forensic_submission_October_2010_Oct14Update.pdf_58455926.pdf).

Royal College of Psychiatrists (2013) *A Competency Based Curriculum for Specialist Training in Psychiatry: Specialists in Forensic Psychiatry (GMC approved 15 May 2015).* Royal College of Psychiatrists (http://www.gmc-uk.org/Forensic_Psychiatry_Curriculum_April2013_GMC_approved_May_2015.pdf_61355496.pdf).

Wall N (The Rt Hon Lord Justice) (2008) Medical evidence in child abuse cases: problem areas. *Family Law,* **April**: 320–33.

Wise MJE (2006) Where expert witnesses fear to tread: in the UK their steps are now more protected. *BMJ,* **332**: 500–1.

Zellick G (2010) Papers presented to the Society. *Medico-Legal Journal,* **78**: 11–20.

Cases

Environmental Defence Systems Ltd v Synergy Health plc and Gravitas [2014] EWHC 1306 (IPEC).

General Medical Council v Meadow [2006] EWCA 1390.

National Justice Compania Naviera SA v Prudential Assurance Company Ltd (The Ikarian Reefer) [1993] 2 Lloyd's Rep 68.

Pool v General Medical Council [2014] EWHC 3791 (Admin).

R (on the application of Paterson) v General Medical Council [2006] EWHC 891 (Admin).

R v Bunnis (1964) 50 WWR, 422.

R v Silverlock [1894] 2 QB, 766.

R v Turner [1975] 1 All ER 70.

Routestone Ltd v Minories Finance Ltd [1997] BCC 180.

MCQs

Select the single best option for each question stem

1 Professor Meadow:

a was found to have intended to mislead the court in the murder trial of Sally Clark
b gave evidence at Sally Clark's second appeal with the effect that the appeal was successful
c failed to express regret for the insensitivity of his Grand National analogy
d would have had his finding of serious professional misconduct upheld if either Lord Justice Auld or Lord Justice Thorpe had agreed with the judgment of Sir Anthony Clarke, Master of the Rolls
e Incorrectly calculated the square of 8543.

2 Dr Pool:

a had his evidence excluded by the Health Professions Council on the grounds that he had no experience in the field of personality disorder
b was found to have failed adequately to explain his opinion that the practitioner's fitness to practise was wholly and indefinitely impaired
c was found by the fitness to practise panel of the Medical Practitioners Tribunal Service to lack experience in the treatment of women with personality disorders
d avoided erasure from the medical register by the Medical Practitioners Tribunal Service because he recognised that he had been wrong in his belief that he was an expert in the field of general adult psychiatry
e had the condition imposed by the Medical Practitioners Tribunal Service on his registration that he should not undertake expert witness work for 3 months.

3 The fundamental test of expertness for a medical expert witness:

a is skill alone
b having publications in the form of peer-reviewed articles
c being above the line in terms of the hierarchy of expertise
d being able to receive and negotiate instructions to prepare expert reports
e the ability to give reasons for the opinion.

4 Negotiations that precede the acceptance of instructions to act as an expert witness should include:

a providing brief information as to your qualifications, training and experience and the nature and setting of your everyday practice
b relying on the confidence of your instructing solicitors as to your suitability as an expert for the case if you have doubts
c defining your area or areas of expertise
d demanding that your expertise is recognised if it is challenged
e holding yourself out as an expert in a particular area or field.