



**barrell**  
TREE CONSULTANCY

## ***Extreme consulting; is being an expert witness for you?***

*(Article 2/3 for Arboriculture Australia's The Bark – March 2013)*

*This article is adapted from an original article published in the Arb Magazine ([www.trees.org.uk](http://www.trees.org.uk)).*

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In this second article of a three-part series on professionalism, Jeremy Barrell ([www.barrelltreecare.co.uk](http://www.barrelltreecare.co.uk)) explores the demands of acting as an expert witness. It is easy to claim to be an expert, but the cold reality of standing in a hostile court with some of the finest minds around doing their best to pick your credibility apart, word by word, is a different world from the comfort of a warm, cosy office amongst friends. Even for the most experienced experts, appearing in court is a rare event, so there is very little opportunity to learn from past mistakes. To be successful is both technically and psychologically demanding, with many consultants seeing it as the pinnacle of professional practice. If you have expert aspirations, then check out Jeremy's top tips that may make the difference between ending up a winner or a loser!

#### **THE UK EXPERT WITNESS ARENA**

In the UK, the majority of arboricultural expert witness activity is split between the planning and legal sectors. Taking the legal side first, experts are required in both criminal proceedings, where the law has been broken and the state prosecutes the offence, and civil cases, where disputes are settled through an independent judiciary. Typical expert involvement includes a review of relevant information, which may include a site visit to collect data, the preparation of a written report and a formal court appearance to examine the position of each party.

In a planning context, the UK is highly regulated; space for development is scarce and all construction projects require planning permission (Photo 1). If existing trees may be adversely affected, there is a legal obligation to consider them by the determining authority. Experts on both sides will assist that process and, in the event of a failure to agree, an independently appointed inspector will hear the evidence at a Public Inquiry before making a final decision. Common issues explored include tree quality, the impact of construction activity on trees and appropriate protective measures. It is highly adversarial, with all the formality of the courtroom.

In practice, expert witnesses can appear in a range of formal proceedings where specialist advice is needed, including criminal prosecutions, civil claims for damages, and tribunals or inquiries relating to land use

planning. In this article, the focus is on acting as an expert witness in civil proceedings in the UK, although the principles explored will broadly apply to similar circumstances around the world.



**Photo 1:** Assessing tree quality and demonstrating how the retained trees can be protected through construction activity is a busy area of work for UK expert witnesses.

#### **THE LEGAL FRAMEWORK**

In very general terms, witnesses of fact in legal proceedings are people who have actually been involved in an event as a participant or a bystander, and any of us could find ourselves in court in this capacity. Once in court, their examination revolves around what was done and seen to establish facts, with no requirement to provide opinions. In contrast, the role of an expert witness is to assist the court in analysing facts of a specialist nature that are beyond the



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experience of the court, and to provide opinions. The court then assesses the weight that should be applied to those opinions as part of the process of arriving at a judgment on the issues being considered.

Civil courts are where arguments and disputes are heard for the purposes of deciding liability, i.e. who is responsible, and what damages, if any, are appropriate to compensate for any harm suffered. For the majority of expert witnesses involved in civil cases, much of their time is spent preparing formal reports, and actually appearing in court does not happen very often. Many cases are settled on the basis of the expert reports, which is an important benefit of expert involvement. Others settle on the court steps or are abandoned part-way though, as one side or the other realises their cause is lost and concedes. There are no reliable statistics, but some experts report as few as one in every ten to fifteen instructions results in a court appearance!

Once in court, the normal procedure is for the aggrieved party (called the claimant in the UK) to set out their case first, followed by the accused party (called the defendant) to explain why they are not to blame. In most instances, each party has solicitors and barristers (counsel) to present their position, and expert witnesses assist in that process. Each expert is led through the points at issue by their own counsel, called *Examination-in-Chief*, followed with *Cross-examination* by the opposing counsel, and then an opportunity for *Re-examination* by their own counsel. A judge listens to all the evidence, forms a view on how much weight to assign to each position and delivers a judgment that is usually final, but permission to appeal to higher courts is sometimes granted (Photo 2).

### **THINKING OF ACTING AS AN EXPERT WITNESS?**

Acting as an expert witness can be particularly demanding because the focus in court is on confrontation and survival, as

opposed to the cooperation and teamwork ethic that is typical of the more mainstream tree consultancy. This is the front-end, where the finest legal minds do their best to challenge your credibility and expose even the smallest weaknesses for all to see, including your client! It is a hostile and unforgiving environment, where only the best succeed, so it is wise to think very carefully before making it a career choice.



**Photo 2:** Appearing in a civil case at The Royal Courts of Justice in London is the ultimate challenge for expert witnesses in the UK, and only the very best succeed in this daunting legal institution!

In the previous article, it was advocated that ASCA's seven core principles of competence, due care, impartiality, independence, integrity, objectivity and public trust, should be the foundation of professional behaviour. Of course, expert witnesses must enthusiastically engage with these ideals, but what are the practical implications in their daily work? How do everyday procedures need to be upgraded to meet these most demanding of standards, and are they



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practically attainable or just hopeless aspirations?

If being an expert interests you, there is no simple recipe for making the grade; instead, success is likely to be dependent on the accumulated impact of lots of small improvements across the spectrum of normal working practice. Most of these qualities can be learnt rather than relying on a rare aptitude to do the job, which is good news for the majority and not just the fortunate few who are naturally good at it.

For those who may be tempted, it is good to start early – at least 20 years before you plan to appear in court is ideal! There is no substitute for having done the time; the very best have been around for many years with full careers, and they will draw on all that experience to deliver their finely crafted reports and court appearances. If you think being an expert witness may be for you, then here are a few general pointers that may be useful along the way:

- **Qualifications and experience:** An essential cornerstone for providing reliable tree management advice, and therefore the best possible foundation for an outstanding expert witness career, is practical experience. Those that do not have it will try to play it down, but there can be little doubt that the experts of tomorrow are out there today climbing around in trees, digging them up or planting them. Of course, there are academics who would argue that qualifications come first in the wish-list of credentials for an expert witness, but without experience to place the theory into context, even the most impressive qualifications count for very little. Armchair arborists can be eloquent and articulate, and frequently turn up as entry-level experts. However, as they progress up the skill ladder, the bluff becomes increasingly hard to sustain, and it is only a matter of time before any weaknesses are exposed. The most potent combination is extensive practical

experience with heavy-duty qualifications, but that is a rare recipe and takes time to compile. It is not a quirk of statistics or coincidence that the most accomplished expert witnesses are all over 40 years old. There is simply no substitute for years of experience; no books, no courses, no way, except to use painful mistakes to hone vital skills. Of course, there will always be the young upstarts trying to make their names, but with them comes a lament of stumbling and embarrassment before they get anywhere near the top. There is no short cut; to be wise, you have to do the time.

- **Organisation and accurate records:** To be well-organised takes time; it is always a delicate balance between doing so much in the background that there is scarcely time to do any work, and not quite doing enough, which can compromise your credibility when you need the detail. Keeping reliable and meticulous records is a hallmark of the best experts, and there is no easy formula. The test will be a simple one, and it will come when you are in court, where your paying client is likely to see first-hand your success or failure. If you can answer where, when, why, how and what, without delay, you will have passed the test. Immense credibility flows from being able to retrieve simple facts, quickly and correctly. It is very hard to appreciate that what seems so burdensome and unnecessary when there is no pressure, can suddenly become so pivotal in the cauldron of the courtroom. The most successful experts are highly organised in every aspect; if you are not a natural, it can be learnt, but if you have no enthusiasm for it, then it may be best to avoid this career path!
- **Reputation:** One of the most valuable assets of a successful expert is an impeccable reputation, with an unblemished record. However, judges will not hold back on criticising experts if they have not complied with appropriate



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standards of behaviour, which has the potential for career-ending implications. Written judgments remain in the public domain in perpetuity and so do any criticisms of experts recorded in them. It is very difficult to sustain a good reputation with serious written criticisms that can be accessed by opposing lawyers and brought to the attention of judges in future cases. There will always be pressure on experts from clients who desperately need to win and lawyers whose fees may be dependent on the outcome of the case. Experts who succumb and compromise independence or objectivity, by allowing interference from lawyers in the preparation of any written submissions, run a real risk of being found out in court, with the potential for very serious consequences.

- **Consistency of opinion:** Whenever providing advice, there is an understandable subtle pressure on experts to be as helpful as possible to their clients; it's human nature. Clients can be very persuasive; they have a vested interest in promoting their own position, which is often manifested as an exaggeration of the positives and turning a blind eye to the negatives of their situation. Inexperienced experts that succumb and say what the client wants to hear rather than deliver bad news, are likely to pay a high price if the case ever gets to court. The jackpot for the cross-examining lawyer is an expert that changes position, from one view in the written report (given in the comfort of friendly company) to a different view in the face of hostile verbal examination in front of a judge. Such changes are common, and can be fatal to the case. There are always two sides to every story, each one often as compelling as the other when heard in isolation. Consistency of opinion, irrespective of the forum where it is expressed, i.e. the core quality of independence, is essential

for long-term survival as a credible expert witness.

### WRITING THE REPORT

The way individuals write is very much about personal preference and what helps one person may do quite the reverse for another! Legal reports are complex and require full, focused attention; any distractions can have very serious consequences, so dipping in and out for a few hours at a time is probably not a good idea. Most accomplished experts have the ability to concentrate on the case issues in an extreme way; once they start working on a case, that is all they do. Almost every available minute is spent thinking about the issues, from waking in the morning to sleep at night!

There are a host of writing principles that must be observed; always separate out facts and opinion, keep it simple, avoid jargon, focus on the issues, do not decide on issues that are for the judge, etc. But, be warned; although these may seem obvious as listed above, they are the commonest points of failure, so ignore them at your peril. Other important matters include:

- **Technical referencing:** A common writing misconception is that the more technical references an expert uses, the better the argument or the more robust the opinion. In practice, it is very much the reverse; almost invariably, a closer analysis will reveal that the references have been used selectively, i.e. extracts that do not support the argument have been omitted, or the included extracts are hardly relevant to the point being made. Inexperienced experts will frequently rely on references because they just do not have the confidence to run the argument based on their own first-hand knowledge. In contrast, the more seasoned operators will have the confidence to rely on what they have seen and know. Technical referencing is not a reliable measure of competence; in



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the very subjective world of trees, it is wise to use it sparingly and with caution.

- **Innovative explanations:** A primary expert role is to assist the court in understanding, often complicated technical issues, and there are very few rigid boundaries on how to do it. Traditionally, expert evidence has been text orientated, but photographs, animations, models and even videos can often be of great benefit, especially if they enhance the comprehension of concepts or sequences of events that are difficult to visualise. This can even extend to reconstructions on site such as re-fitting fallen branches back onto the tree to clarify the orientation and visibility of defects before the failure (Photo 3). Creative and innovative explanations of complex issues within the report can be the difference between winning and losing, and can elevate an expert's reputation from average to exceptional.
- **Negotiation reports:** This is a dark concept that is rarely talked about, but it frequently occurs, especially with inexperienced experts. Here is how it works. Expert reports are primarily a negotiating tool for the lawyers from both sides to work out the merits of the case, usually resulting in one side or the other accepting a compromise settlement rather than risk losing in court. The only time a report will be thoroughly tested and examined is if the case actually gets to court, which does not happen very often. This leaves an opening for the unwitting or unscrupulous expert to write a very favourable report for their side, exaggerating the strong and neglecting the weak aspects of their case. This provides their lawyers with a very robust negotiating position, the biased nature of which cannot be properly exposed unless the case goes to court. Of course, this is against all the expert protocols, but the temptation lies in a low risk of being found out balanced against potentially

substantial benefits. If a negotiation report ever does get to court, then the expert is likely to be exposed and will either be forced to concede points or have the judge find against their side, both of which can severely affect case and career prospects. Experts looking for a long and distinguished career never write negotiation reports.



**Photo 3 caption:** In the case of *Atkins v Scott* ([www.aie.org.uk](http://www.aie.org.uk)), a failed branch on a large oak tree, which caused serious harm to a car occupant, was temporarily fitted back onto the tree to prove that a small crack in the branch would not have been visible from a ground-based inspection.

Of course, there is much, much more to successful writing than the few points outlined above, but these do offer an insight into one of the most challenging tasks that any consultant ever has to perform.



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### APPEARING IN COURT

If you are an expert with aspirations to appear in court, being mindful of the following points may assist in making the most of any opportunities:

- **Public speaking:** Thankfully, for those of us who are not natural public speakers, this is a skill that can be learnt and developed, with many simple techniques that can make a huge difference to the calibre of presentation and how stressful it is to deliver. It is an essential expert skill and it will have to be mastered by all those with high ambition. Anyone anxious about speaking in public should seek specialist help, get plenty of practice and prepare thoroughly every time. Most of us will probably never be fully at ease, but the more you do, the easier it gets.
- **Attention to detail:** A frequent pastime of cross-examining counsel is to explore the seemingly insignificant detail of an expert's opinion and expose any cracks, inconsistencies and weaknesses. Most big things, including expert opinions, are made up of lots of smaller parts, fitted together to produce the end result. A commonly effective strategy for inflicting damage to that overall opinion is to create doubt about, or even worse to prove false, one of the constituent parts. The individual elements that make up a position or view seem important to lawyers and judges, which, in turn means that experts who ignore paying very careful attention to this aspect, do so at their peril. Everything matters; spelling, typos, names, dates, times, measurements and records of conversations. Every detail that an expert gets caught out on is accumulating damage to credibility, and one step closer to the precipice of failure.
- **Courtroom awareness:** It is almost a reflex action to look at, and answer to, the person who asks a question, but it is wise to re-think that when in court. The

expert's duty is to the court and the judge represents where the focused expert should concentrate. Cross-examining counsel's job is to engage, distract, disorientate and destabilise that focus through a whole range of tactics. Effective experts will avoid directly engaging with cross-examining counsel, will always answer directly to the judge, will always pause while a judge is writing and will consistently take the lead from the judge, rather than the multitude of distractions that can be thrown by the other side.

- **Good manners and common courtesy:** Judges do not generally take kindly to bad manners or any type of discourtesy. Experts should always observe the common courtesies of never interrupting, talking over other speakers or showing disrespect for the opinions of others. If an expert is being bullied in a bad-mannered way, then an appeal directly to the judge will usually settle the matter (and often deal a psychological blow to the other side at the same time if the appeal is upheld). The perfect scenario for the other side is that an expert is goaded into responding to these pressures by being equally discourteous, and is then pulled up by the judge.
- **First impressions:** Successful experts work very hard to align people to their opinions by creating positive impressions. First impressions really matter; we all make decisions every day (and often very quickly) that are based on how people look or the written material they produce. Pleasant, personable, interesting, professional, tidy, concise and easy to understand, facilitate alignment and engagement; boring, untidy, bland, amateur and complicated foster alienation, and are often difficult to recover from.
- **Body language:** It is now widely accepted that effective communication is highly influenced by body language, i.e.



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the posture and disposition of the speaker often makes a much stronger initial impression than the content of the words being spoken. This subconscious language is redundant in the preparation of reports, but it is there to be used in court, where visual and verbal cues dominate the impact on proceedings. Whether we recognize it or not, we are all highly influenced by the gestures, expressions, posture and tone of the people we meet, and experts are no different. The most effective expert witnesses will be aware of this power of persuasion and use it to their advantage by enhancing the positives and suppressing the negatives. Smiling, open gestures and dominant posture, are all the hallmarks of the polished performers, and are an essential part of a successful package.

- **Confidence or arrogance?** There is a fine line between being confident, i.e. a deep understanding of your position, and arrogance, which is an extreme disregard of other perspectives. Experience breeds confidence, which is why having done what you are talking about is so important. Cross-examining counsel will attack opposing experts from all sides; it is debilitating and demoralising to be continually ground down, but that is the nature of being an expert witness. Confidence is born from a thorough analysis and understanding of the issues, and spending time in advance to work on this detail often proves a wise investment when the day in court finally arrives.
- **Passion:** Enthusiastic people that care about their work can be more of an exception than the rule, but it makes a big difference. Passion, in moderation, can have a very positive effect, and even the most cautious judges are likely to be more receptive to an expert's opinion if they detect a caring attitude and a deep-held belief in the reasoning. If it is just a job and that is all it ever will be, then
- **being an expert witness is probably not for you.**
- **Calmness:** Effective experts will remain calm at all times and never be provoked into emotional or uncontrolled outbursts. Cross-examining counsel will always try to engage an expert directly and stir up as much emotion as they can. One of the prime objectives for an expert is to provide balanced and well-reasoned opinions that are free from emotional bias. Any display of poor emotional control when under pressure can undermine an expert's objectivity, and hand the initiative to the opposition. Experienced experts will avoid direct engagement with the questioner and direct answers to the judge or jury.
- **Honesty and integrity:** A tough challenge for expert witnesses is to build up and maintain a positive perception of honesty. Courtrooms are inherently confrontational and, although an expert's duty is to be above the advocacy, it can be an uphill struggle because they are perceived to be part of a team (supporting either defendant or claimant) that has precisely the opposite duty, i.e. to advocate one position or the other. The conflicts are very real and the only way to succeed is to be meticulously honest; avoid arguing a lost point and always concede immediately if you are proved wrong. Easy to say and psychologically hard to do, but the odds are you will end up more damaged if you persist in trying to fight a lost cause.
- **Supporting your team:** Although bound by the professional constraints of independence, impartiality, etc, an expert is still part of a team, which would normally include counsel, an instructing solicitor and possibly experts from other disciplines. An overriding duty to the court does not preclude supporting the team effort, and the most effective experts will do this, where there is no conflict. A great way to help your





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counsel is to take detailed notes of all the examination and testimony, including accurate quotes of key statements, where possible. Although most cases are sound recorded, that detail is not available for counsel to sum up at the end of the case, and they do not have time to write down every detail as they examine each witness. Taking long and accurate notes is tough to do, especially if the case runs for days, but it can pay big, big dividends to have an accurate record of who said what and when.

### **THE AFTERMATH!**

In consultancy at any level, it is a fundamental truth that anything put down in writing could turn up and be referenced in future proceedings. That is a very powerful reason to be meticulously careful with anything written, from formal documents in hard copy to informal, even personal, emails. One careless word taken in the wrong context, as they usually are, can have far-reaching consequences for both careers and reputations. An extreme example of such an event is the *Poll v Bartholomew* case, where despite objections from both experts, a third party forced the publication of all the papers in the case, including the court transcripts.

Every word that each expert wrote and said at the trial are available for public review, which is an extreme test of expert competence. In that instance, even when the case finished, both experts had no idea this would happen; there is no warning! When it does happen, it is too late to go back and check or amend; it is beyond your control and you have to live by every single word you spoke and wrote. The potential for full public disclosure is ever-present for any document at any time in an expert's career, a point that should never be forgotten.

Although there is certainly a lot to think about, there are no obvious secrets to becoming a successful expert witness. Indeed, careful consideration of many small things can often add up to a big result and so consistent attention to detail is very important. The difficulty when in court is trying to remember all those little points when bigger distractions dominate. Supreme experts will balance all these considerations in the heat of the moment, using the poise of their experience to deliver the perfect performance. Such moments are rare indeed and, when one comes along, there is usually only one chance to get it right!

### **Future articles**

**Tree risk management; a decision-making frame work for duty holders and advising arborists:** When a tree failure results in harm, the courts will be focused on the duty of care and whether it was met by the duty holder. Jeremy will discuss the English perspective on how much management is enough in the context of recent court cases and describe a strategic decision-making framework for duty holders. On a practical level, he will review a common anxiety among inspecting arborists, i.e. the worry that a tree they have inspected will fail when the wind blows. His view is that the last decade in tree management has seen a focus on complication, with an emphasis on theory at the expense of practical common sense. The sleep-tight protocol is a new take on old methods, with special consideration for the security of the inspecting arborist after a tree failure has occurred.



Jeremy Barrell has worked with trees all his life, building up a modest contracting business in the early 1980s and 1990s before concentrating on full-time consultancy in 1995. From those humble beginnings, Barrell Tree Consultancy ([www.barrelltreecare.co.uk](http://www.barrelltreecare.co.uk)) now has six consultants advising on planning and legal issues throughout the UK.