

		RSD Internal Guidance		RIG-2006-04	
Obtaining an expert witness					
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Summary		The purpose of this note is to inform inspectors of how to decide whether specialist assistance is required and the actions they need to take when engaging an expert witness. The guidance applies equally to England, Wales and Scotland.			
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Subsequent consultation (reviews only)		August 2011: Rupert Lown; James Mack, ORR Safety Enforcement Team January 2013: Ruth Luxford, Chris Simms Legal Safety Enforcement Team; April 2016: Chloe Barton, Alice Jones Legal Advisers Team.			

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Introduction

1. An inspector may feel the need for expert assistance in two situations: to assist with the technical aspects of an investigation and/or to give expert evidence in court.

2. Due to the technical complexity of many health and safety prosecutions, expert witnesses are instructed more frequently than in other cases. However, in many instances, the use of an expert has not always been strictly necessary in fact, they can sometimes add unnecessary complexity to a relatively straightforward case. (Remember, if we instruct an expert, the defence is likely to instruct two).

3. A judgement in the Scottish Supreme Court handed down in 2016 considered carefully the role of the expert witness and questioned the need for one.

<https://www.supremecourt.uk/cases/docs/uksc-2014-0247-judgment.pdf>

4. The court summarised the role of an expert as follows:

In our view four matters fall to be addressed in the use of expert evidence. They are (i) the admissibility of such evidence, (ii) the responsibility of a party's legal team to make sure that the expert keeps to his or her role of giving the court useful information, (iii) the court's policing of the performance of the expert's duties, and (iv) economy in litigation.

5. So before making the decision to instruct an expert, you need to be very clear why an expert report is needed:

- what is the investigation about and what do you believe caused the accident e.g. lack of practical safeguards, sighting distance, failure to isolate live conductors, or management failings e.g. training, supervision, risk assessment;
- why do you need specialist assistance for example to examine and assess a piece of machinery that malfunctioned;
- what point(s) will you need to prove e.g. that the accident would not have happened if proper safeguards had been in place or that the accident was foreseeable;
- is evidence of the extent of risk needed, e.g. exposure to hazardous substances;
- have you already got evidence that covers these points or are there holes in your investigation that need filling;
- what are the potential defences to the breaches you have identified and how can you counter these;
- could the case be proved without an expert i.e. do the exhibits and witness statements already clearly show what happened and why;
- where there are no clear industry standards, what would reasonably practicable precautions have looked like in this instance?

Note: if the expert is only going to explain the vast quantities of evidence into simple terms that the court can understand, then he/she is not needed. That is the role of the prosecution team.

6. More detailed guidance on the role of an expert and their responsibilities are laid out in HSE guidance that should be read in conjunction with this RGD.

http://www.hse.gov.uk/enforce/enforcementguidesc/expert/expert.htm#_Instructing_an_expert

Detail

7. There are two different types of experts to consider: **specialist inspectors** and **Independent experts**

8. **ORR Specialist inspectors** might be involved in an investigation either as part of the investigation team (albeit with specialist knowledge) or as an independent expert witness. The specialist knowledge of inspectors involved in an investigation may allow them to be treated as an expert witness in the event of a prosecution. The courts have held that the fact that an expert may be employed by one of the parties to litigation, or the investigating authority i.e. ORR, would not debar him/her from giving expert evidence.

9. However, the roles of investigator and independent expert witness are usually mutually exclusive, and a specialist inspector will rarely be appointed as an independent expert if s/he is directly involved in the investigation.

10. The first consideration should be whether we have the necessary expertise amongst ORR's many specialist inspectors before engaging an external independent expert.

11. Where other expertise is required, our first consideration is generally to instruct an **independent expert** from the wide range of HSE specialists and then HSL. Our Memorandum of Understanding with HSE explains how we will share expertise. [Memorandum of understanding between the Health and Safety Executive \(HSE\) and ORR pdf icon PDF, 3,348 Kb](#)

12. Independent experts will normally not have been involved in, and must remain independent of, the investigation. His/her role is to assist the court on matters where their ordinary, everyday experience does not enable them to adequately consider the issues in the case.

13. For example, an independent expert might comment on the evidence found during the investigation about precautions that were in place at the time of the accident, and explain why these did not meet the usual good practice - introducing published guidance or professional standards. They may also give their opinion of explanations that have been provided by the defendant in witness statements or written submissions.

14. An expert witness will need to show the court that they have the requisite expertise and experience for dealing with the particular area they are asked to comment about. For example:

- do they have any specialist qualifications in this area?
- have they worked in that particular area for a significant amount of time?
- have they given evidence as an expert in this area, or other area before?

15. The duties of expert witnesses have been emphasised at training courses; Part 19 of the Criminal Procedure Rules 2015.

<http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-19.pdf>

16. The latest revision of the Criminal Procedure Rules in 2015 introduced an explicit duty on the expert to comply with directions made by the Court and to inform the Court of any

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significant failure, including by another, to take any step required by such directions. Compliance with Court directions and providing information to the experts in order to allow them to comply with directions remains of the utmost importance.

17. In addition, ORR follows [CPS guidance](#) see Annex 1 http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/disclosure_manual_chapter_36/ to ensure that experts working with ORR enable us to comply with our duties in respect of disclosure.

18. The completion of the Expert's Declaration Form by our experts will provide us with confidence that experts are aware of, and are complying with, their obligations.

19. Unlike other witnesses, expert witnesses are allowed to provide opinion – as opposed to only factual – evidence in certain areas. Therefore, their expertise – as well as their credibility – may be an issue in the case.

20. The CPS has provided further guidance to its Prosecution Team and its experts on how to comply with disclosure obligations; ORR will follow this guidance to ensure we also comply with our disclosure obligations.

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Action

22. Inspectors should continue to follow the guidance given in the HSE Enforcement Guide, **and:**
23. Those **engaging** an expert witness need to:
- a. ensure that the 'questions upon which an opinion is sought' are clearly recorded.
 - b. include in all instructions a reminder of experts' obligations as to the contents of an expert report contained in Part 33.3 of the CrPR;
 - c. provide the CPS guidance booklet (Annex 2) to any expert instructed, instructing them to:
 - return the completed Expert Witness's Self-Certificate before carrying out any work on behalf of ORR; and
 - ensure the declaration is included in any statement/report;
 - ensure the Expert's Index of Unused Material is completed and returned with any statement/report;
 - d. provide the expert with a copy of The Academy of Experts' Expert's Declaration Form and instruct the expert to read and sign the declaration, inserting it at the end of their report;
 - e. Complete a PNC check for all experts instructed
 - f. Refer to RMT if:
 - An expert does not complete the Self-Certificate or Expert Declaration Form;
 - The Declaration Form is not provided with any expert statement or report;
 - The Index of Unused Material is not returned with a statement/report.

ANNEX 1

GUIDANCE BOOKLET FOR EXPERTS

This Guidance booklet can be accessed at

http://www.cps.gov.uk/legal/assets/uploads/files/Guidance_for_Experts_-_2010_edition.pdf.

