



## **Exploring the Law**

*Witness and Evidence*

### **Opening sequence:**

"The truth, the whole truth and nothing but...How does the defendant plead? Not guilty! Members of the jury, please turn to page 221, file 8 at tab 6 of Doctor Clarke's report on methods of measuring inter-cranial pressure. Guilty!"

### **Gary Slapper:**

Hello, I'm Gary Slapper, Professor of Law at the Open University, and with me is Frances Gibb, Legal Editor of the Times. Law Courts are immensely important parts of society, because they're the places where we resolve all our criminal and civil disputes. How well suited the people who act in these places are to the jobs that they're supposed to perform is a very important question.

Frances, how well do you think jurors and expert witnesses are suited to the tasks they perform?

### **Frances Gibb:**

Well Gary, it's a very interesting question. I personally do think they're well suited. But it's a subject that has come up a lot lately and I think the reason is that there's been a spotlight shone on the role of experts. And a series of high profile cases where experts have been found wanting and following on from that, I think people have then thought, right there's something wrong with experts there, they're getting it wrong. But what about jurors? Can they actually understand what the experts are telling them?

And there's been some evidence that jurors have difficulties in understanding experts. I'm thinking of one case recently where these two issues came to a head, and two jurors came forward and actually complained about the trial process. And raised questions about the running of the case by experts. And in a way, that has highlighted it.

### **Gary Slapper:**

Mmm. I suppose there is an inherent difficulty isn't there in a court process that relies so much on experts that contradiction being that on the one hand you need people who are so narrowly expert, or so clever or have got possession of such really specialist knowledge that no one else really knows about this, and that their declarations on these matters are going to help determine a case.

At the same time as trying to make it plain enough in ordinary language for jurors or other people in the court to understand. That seems to me to be quite a challenge for the law courts.

### **Frances Gibb:**

Yes, it's a challenge. My own view is that it's incredibly important that however complex the case and this debate has been raised over fraud trials as well as child battering cases involving scientific evidence. However complex the case the expert mustn't keep it in the realm of expertise.

So the whole the whole challenge if you like for the court and the expert is to demystify and make that accessible, whether it be to a jury or to the judge as sometimes it's only a judge in these cases.

So that it actually can be understood. I mean the dangerous thing would be for the whole thing to be taken into the role of expertise when no one can actually understand what's going on and nobody understands the decision ever being made.

**Gary Slapper:**

Yes, Lord Devlin at once described the jury as a miniature parliament, noting that there's something with a jury trial very democratic, demotic about the way that justice works. Because for exactly the point you're making. If someone has got some information that they think would turn the case one way or another but it's just so fearsomely complicated that no ordinary people can understand it, that in itself is probably a good reason for *not* letting the case hinge on that point. And that there is both, Einstein and Mrs Thatcher, Lady Thatcher both used to say that, if an idea can't be reduced to something simple enough for ordinary people to understand it is probably not a good idea in the first place.

**Frances Gibb:**

The trouble is with the increasing complexity of cases it give ammunition for people who worry about the jury anyway to say, well I think in certain kinds of cases, fraud is the obvious one, because this debate has come up and up again over recent years. Where we should have specialists only sitting on the case.

They also draw ammunition from research and there has been some, although research has not been much allowed on juries. But there was some recently, which showed that never mind experts but two thirds of jurors didn't understand what the judges told them about the law. So when they retired to the jury room, they don't actually know what they're meant to be doing.

I mean I personally don't think the answer to that is say, right well we won't have jurors there in those cases, we'll have a panel of experts, that raises another whole series of problems.

But, it is ammunition used by some who, I mean I'm just thinking of Louis Blom-Cooper who is a well-known QC, and he has long had doubts about the jury system and he describes them as a recipe for incompetence and bias.

As against that there's Winston Churchill who describes them as the supreme protection for ordinary individuals against the state. So it's those two positions.

**Gary Slapper:**

Yes, it's a very neatly counter posed set of ideas. It thinks Blom-Cooper also in one of those debates said that in favour of experts and against the jury. You wouldn't want your freedom or your civil status to be determined by non experts any more than you'd want your appendix taken out by a butcher.

You need experts to do this and, I'd agree with you, I think it's a rather patronising idea in a way. And sometimes there are good cases I think to illustrate that the experts, which - particularly the ones who are so fated and you know, applauded as being the real experts turn out to be completely wrong. And they often turn out to be completely wrong by a sort of common sensical intervention, that shows that, ordinary people or lesser people than great experts have as much right to be part of the proceedings as anyone else.

And one case that comes to mind would be the unfortunate case of Sir Roy Meadow, the paediatrician and expert who gave evidence in several cases which led to women being convicted of killing their children. And in one, I think, notorious utterance he said that the chances of their being two cot deaths within the same family were one in 73 million. Which entirely, ignored the possibility that through genetic predisposition it would be very much more likely that if a woman who had a child predisposed to one cot death would, would have another one in the same family.

And people untrained in paediatric medicine and in statistics would be able to see that, and yet so much before these cases were overturned, the convictions were overturned, swung on the evidence of someone who was a world expert.

**Frances Gibb:**

Yes, I mean I think, I think it's very difficult isn't it? The, weight you give to expert evidence. Because quite obviously the experts are going to carry more than a lay person in court. And when they get it wrong the damage that they do is going to be so much the greater as a result. And in that case it was absolutely catastrophic.

I think experts have to be, you - obviously you have to have the counterbalancing expert on the other side in that case. Maybe there should have been someone, it's easy with hindsight to, a statistician or whatever. To pull it apart.

But I think experts have to be really rigorously trained. I mean they have to be trained in the way they present their evidence, they have to be trained not to be hired guns, which I think they aren't actually so much now, pushing a cause. But just to say the facts as they find them, albeit what the facts that can be challenged by the other side.

**Gary Slapper:**

I think people looking back on our age in 500 years time will probably be puzzled by how loose a system it was. I think a good case, when you think of this case but it strikes me as interesting and probably one of good instruction about the English legal system. It's a case called Flicker, from 1999 and someone was caught in a car with 3 tyres, and the police officers asked for an explanation and, and no good one was given, and the fellow was eventually prosecuted for attempting to handle stolen goods. They couldn't actually conclusively prove that the tyres were stolen, they were just 3 random tyres.

And everything looked a bit suspicious, suspicious enough for the prosecution to be launched and for him to end up before a jury in a crown court. And after the jury had retired, they passed a note back to the judge that said, one of us is an expert in tyres and he's telling us that the digits I think it was zero, 8, 8 on the tyre mean that that tyre was manufactured in August 1998.

Now according to the defendant's testimony, these tyres, which were in his house at that month. And if what he says is true then he's innocent. But if what our tyre expert says is true then they were just manufactured then, they couldn't possibly have been in his front living room.

**Frances Gibb:**

No.

**Gary Slapper:**

Are we allowed to take that into account. And it went to the court of appeal and the court of appeal eventually said no you, you can't take that into account. And the reason is it might be very reliable evidence but in the round and looking across the rules of justice it would be wrong to convict someone on the basis of evidence which the other side hasn't had an opportunity to test and probe and contradict in court.

So it might be absolutely perfectly good evidence. Unfortunately if it was in this case and the prosecution's case was not as good as it could have been. But we must play things strictly according to the rules.

**Frances Gibb:**

To the rules.

**Gary Slapper:**

That are going to produce the best way of, of dealing with things.

**Frances Gibb:**

Yes.

**Gary Slapper:**

It raises interesting questions it seems to me about then the dividing line between what jurors who are there because of their social, individual you know, knowledge and what they know about life. The cut off point between what you are allowed to bring by way of your knowledge as a human being and what you aren't allowed to bring.

**Frances Gibb:**

No.

**Gary Slapper:**

Because it roams into the area of expertise, yeah.

**Frances Gibb:**

I think it's very, very difficult. I mean it's really an artificial thing. I think the internet presents all kinds of challenges for the jury. And the jury system and the court system. And the internet is here and I think recent research by chuh, Dr Cheryl Thomas show that even though judges exhort juries not to, of course they're going to. And it's unrealistic to expect them not to. And I think the best thing is to perhaps acknowledge that they're going to but highlight the dangers of it, in the way that they do about newspapers.

Don't talk about the case, don't rely on newspaper reports. They are going to probably do it. But just highlight the dangers. I think the internet does present a whole new dimension. Which hasn't really been addressed.

I mean another aspect of it is that Lord Chief Justice, it's slightly off the point we're on, but the Lord Chief Justice is on the internet, was, said he was very worried about the internet generation because not for that reason that they research a case when they're sitting as a juror. But that as jurors he said, they've got no attention span.

**Gary Slapper:**

[LAUGHS]

**Frances Gibb:**

So he said, they're not really used to listening to oral evidence. And after about 5 minutes they're probably not concentrating. So he said you know, how are we going to address that?

**Gary Slapper:**

Yeah, no, that's a very interesting point and I agree with it in some ways and disagree in another. I think it, I know exactly what you know is meant by that. And here all sorts of things by way of both entertainment and instruction are given in smaller capsules than they used to be than over time that the concentration span of people begins to diminish.

On the other hand I think there is something that counterbalances that and that the generation or the social group that he's talking about is also used much more than previous ones to what

we would probably describe as multi-tasking, where you see people in front of the internet and they are on, Facebook and they're also on email and they have a mobile phone buzzing texts to the both, and they're listening to music at the same time. Their mind is operating simultaneously and it is a multi-functional way, as opposed to someone a hundred years ago who is sitting in a plain room reading one book

**Frances Gibb:**

Yes, yeah.

**Gary Slapper:**

So it does, it exercises the mind in different ways. And I think also being able to be alert to you know like for example on the, on the computer screen, to be alert to things changing quickly. To have developed facility for reading and taking in information from different parts of a screen or a split screen, on more than one location, is a concentration enhancing function as well. So you hope that it went some way to -

**Frances Gibb:**

Goes, both ways yes.

**Gary Slapper:**

Yeah, both ways yeah.

**Frances Gibb:**

Counts both ways.

**Gary Slapper:**

Thank you so much Frances.

Closing Announcement: This is a podcast from the Open University Business School Law Programme. For more information go to [www.open.ac.uk/law](http://www.open.ac.uk/law).