

Testimony in Court

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This paper is an attempt to lift the veil on a little publicised subject which is important to all Public Analysts and indeed to all chemists who may be called upon to give evidence, not only regarding their own professional work, but also as witnesses in road accidents and other events in which they may have been involved.

"I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth." This, with minor variations, is the oath a witness is expected to take when entering the witness box and before beginning to give evidence. During the speaking of these words the witness holds a copy of the New Testament in his right hand.

An agnostic or atheist may attest instead of taking the above form of oath, or, if one is a member of the Jewish faith, the Old Testament is used, whilst a Moslem may use the Koran although either Old or New Testaments may be used if the Koran is not available, as Abraham is the father of the Moslems as well as of the Jews and a Moslem regards Christ as one of their prophets.

Sitting in Court recently I heard the Oath administered with a variation, which was "The evidence I shall give in this and succeeding cases shall be the Truth etc." Enquiry showed that the reason for this was the desire of the Clerk of the Court to shorten a number of cases where the same witness, or witnesses, appeared in several of these cases.

The penalty for perjury or bearing false witness, *i.e.* not sticking to the truth, may be imprisonment after due trial but one must not forget the punishment accorded to Ruth Pierce of Devizes in 1753¹ when she and two other market women agreed to buy a sack of corn. Payment was short and Ruth insisted that she had paid her share and "she wished she might drop dead if she had not." Whereupon she fell down dead and the money rolled out of her hand. The agreed verdict at the subsequent inquest was "from the visitation of the Great and Almighty God she was struck dead with a lie in her mouth."

When entering the witness box it is as well to check that the volume offered by the Court Usher is indeed a Testament as it is not unknown for a black book of convenient size to be offered when the correct volume has been mislaid. This could be the notebook of a police officer and of course should be rejected as an oath is valueless unless taken on the correct volume.

In the course of his work, a Public Analyst may be called upon to give evidence in a number of Courts of different degrees, from a Magistrate's Court to an Assize or Crown Court and even a High Court or Appeal Court with the odd visit to a Coroner's Court thrown in. This reflects the various facets of the work he is called upon to undertake. If he is also a consultant then attendance

at other places where an oath is necessary, such as a Tribunal or Public Enquiry or even the House of Lords may occur.

Having taken the oath, the witness is now called upon to commence his evidence. What is evidence? One answer is obvious. The shorter Oxford English Dictionary in its definitions has a distinct legal bias; to make evident, to demonstrate, to prove; to relate as a witness, to manifest. This, however, does not clarify the position for the person who has never given evidence or for the person who is learning, as there appear to be no courses of instruction open for the forensic chemist to learn how to be a witness and give evidence, only the hard way of trial and much error.

An attempt is, therefore, made here to explain some of the *desiderata* of a good witness and good evidence.

At present, I understand, the rules of evidence are being reviewed; the rules of evidence in civil cases have been referred to the Law Reform Committee under the Lord Chancellor and, for Criminal Cases, they have been referred to the Criminal Law Revision Committee under the Home Secretary.

However, the main reason for rules of evidence is to

(a) confine the issue, and

(b) assist the Court (and jury if present) to arrive at the truth.

The first essential is that all of the facts shall be presented to the Court in the most authentic form possible and in turn the Court is entitled to the very best evidence that can be obtained. This is usually done by calling witnesses who have seen the events or investigated the facts which are thus within their personal knowledge. The correctness of this knowledge may be tested by questions put on behalf of all the parties, and if necessary by the Magistrates or by the Judge himself.

Witnesses may bring with them books or documents or objects which may be produced in Court and may serve to explain or clarify their evidence. An analyst, be he Public Analyst or forensic scientist, should always have his working notebook available and he may quote from it and be cross examined on it. In other words, the witness is entitled to refresh his memory from his laboratory notebooks but Counsel or the solicitor for the other side is then entitled to see them and use them for the purpose of cross-examination.

The Public Analyst is in a special position in that it is enacted by the Food & Drugs Act 1955 that a certificate of analysis given by him may be produced in Court and used as evidence. The importance of interpretation of the results of analyses made and tests carried out upon a sample is of the utmost importance but is not within the ambit of this paper and is properly a part of training and experience, the latter point being imposed upon any special experience the analyst may have in framing a certificate. This is covered by Section 110 of the Act and presumes that the Public Analyst will not be called to give evidence but if he is called the Court must be satisfied as to his analysis and opinion. The fact that many of the analyses were undertaken by assistants does not make it necessary to call the assistants as it is realised by the Court that the

analyst cannot undertake all of the work on all of the samples received in his laboratory and this is covered by introducing the words "or under my direction" following the analyst's statement that he has analysed the sample, in the certificate.

Chemical evidence is governed by the same rules as other evidence but it does deal with chemical facts and deductions and, unlike non-expert witnesses, the analyst is allowed to give his opinion; thus the chemist states his facts and also the deductions he has drawn from them; then he may state any opinions he has formed resulting from these facts and deductions. These opinions may help resolve doubts when the various practical results are insufficient to establish fact or certainty, the opinion given in a particular case being backed by drawing upon experience gained in similar cases, the greater the number of these then the more valuable is the opinion. There may be several possibilities regarding the solution (and hence the opinion) and the one selected should fit most of the facts. As the analyst may not be called upon to appear it is essential that he should have the closest touch with the solicitor conducting the case so as to ensure correct use is made of his findings and their significance.

The expert witness should prepare a "proof" of evidence and this should be thoroughly discussed with the solicitor and Counsel (if necessary). This "proof" should commence with the full names of the witness followed by his qualifications, and this includes a short statement on his working experience on the matters in question as well as any expert working knowledge he may have on the subject in general.

It is likewise important to state one's limitations. There is no shame in this—it is honest and may even be modest as a distinguished specialist may disclaim knowledge outside his own field while the young newly qualified graduate may say that he is perfectly competent and experienced to conduct the analyses but he has not the knowledge or experience to speak authoritatively on their application to the case in question.

The evidence must be set out in non-technical language and if technical terms are necessary then clear explanations should be given. In a particular High Court case dealing in the pollution of a river the various terms used were explained to the Judge and took about three hours. The actual results of examinations of many samples were then given and cross-examination and re-examination occupied only about one hour. If this preparation had not been made it is possible that it might have been necessary to give evidence over two working days.

Statements made should be in chronological order and all evidence for proving the case must be furnished, *i.e.* no links in the chain should be omitted. It must be remembered that, generally, one is presumed innocent until proved guilty, hence it is essential that the expert must set his work out clearly so as to be readily understood by the lay mind, whilst exhibits in the form of samples, derivatives and other materials isolated in support of the evidence should all be clearly labelled, must be available and must be submitted at the right time.

The expert should go over his work thoroughly and endeavour to anticipate

the questions he will be asked in cross-examination. He must know his work and be familiar with the limitations of a particular process which he has used in arriving at his results so that if he claims the accuracy is 0.5 per cent. then he must stick to this and not be lured into saying it is 1.0 per cent. or greater as the witness box is not the place for working out hypotheses.

Following the examination-in-chief, cross-examination by the opposition takes place and the witness's interpretation and statement of the significance of his results and opinions are challenged. A challenge is quite fair but may be made aggressively or abusively and the challenge is thus a means of enabling the expert to justify his ability. Questions designed to this end are presented and it may be necessary to make an admission of error. This is best done frankly but should be qualified by the necessary explanation. Thus the question as to whether he tested the cigarette end for saliva will produce the answer "No", and this question should have been anticipated so the reason may be given why the tests were not done as the cigarette end had been exposed to rain which would vitiate the tests.

Cross-examining Counsel may ask the witness if there is an alternative theory and propose this. It may well be attractive and one may have to admit this but at the conclusion of cross-examination it is perfectly in order to say that this is of course a qualified reply and the witness believes in the explanation or theory first proposed as it fits the facts found by him more accurately.

An interesting ploy occasionally used to test the status and knowledge of the expert is for cross-examining Counsel to ask the witness suddenly, "Do you know that red-backed American (or French or Dutch) book on the subject?" One may easily fall into this trap especially if there is such a work but this must be resisted and a suitable reply made such as "I am familiar with Leach's work but that is bound in green, or perhaps you were thinking of Winton?" The expert, like any other witness, is not supposed to ask questions from the witness box but it is possible to reply to a question in a qualified way so that further information is made available.

During cross-examination a watch has to be maintained about the introduction of new material or questions which have not been forecast during the preparation of the case, so that advice may be given, should it be necessary, on the points raised, to one's own side. If necessary it may be essential, before the close of the case, for the solicitor or Counsel to secure a short adjournment while the new material is evaluated.

On points raised during cross-examination it may be necessary to be re-examined and questions are now asked in order to explain any answers previously given which may have been damaging or may have been ambiguous or even not clearly understood. After this one is not usually subject to further cross-examination.

Little use of text books is permitted in Court, particularly in criminal cases; although there is somewhat more latitude in civil cases, in general books are not accepted as evidence and the author must be called. However, questions are frequently worked in about books and if it is true the witness can reply "I

know this subject and from my knowledge of it I say that such and such is a correct statement of fact." Again, referring to a book and a statement in it one should say "I know this as part of my general knowledge" rather than "I know this because it is in such and such a book".

Familiarity with text books is part of any professional man's training and we all have our favourite books; thus if a passage from such a book is put to a witness during cross-examination he (the witness) will be familiar with the reputation and standing of the book. If he disagrees with the opinions then he may say so, especially if they do not bear on the case in question or have been taken out of context.

During his sojourn in the witness box, the witness must not allow himself to be rattled and must remain calm, even if, as may unfortunately happen sometimes, the greatest doubt is cast upon his veracity. There may even be interruptions from the body of the Court which may be interesting and amusing but the witness must remain imperturbable. An example of an interruption both interesting and amusing occurred many years ago at an inquest on a fair-ground attendant who had died after drinking a quantity of sulphuric acid. After the chemical evidence to this effect the wife of the deceased called the witness a liar as her husband had died from battery acid!

These few words have been put together partly as the result of experience and partly from various sources^{2,3,4} in an effort to publicise an important part of our profession which is frequently overlooked.

References

1. Inquest Record to be seen in the Museum, Long Street, Devizes, Wilts.
2. Liversidge, I. F., "Adulteration & Analysis of Foods and Drugs", Churchill, London, 1932.
3. Jago, W., "Forensic Chemistry and Chemical Evidence", Stevens and Haynes, London, 1909.
4. O'Keefe, "Bells Sale of Foods & Drugs", 14th Edition, Butterworth & Co., London, 1968.