Sophistry or justice: are the two mutually exclusive?

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A fool may ask more questions in an hour than a wise
man can answer in seven years
—English proverb

As all who attend court as experts under the English system of law are aware, the outcome of a case may not necessarily be predicted from the apparent merit of the scientific and forensic issues. The adversarial system involving argument and attack by prosecution and defense may result in significant weight being attached to what a witness may consider to be relatively minor aspects of a case, sometimes at the expense of more important information. This occurs because the system is geared to test not only the facts of the case but also the ability and credibility of witnesses. However, is this the most effective way to deal with complex medicolegal issues?

Questions by lawyers are not only aimed at determining the opinion of a witness, but are also designed to either support or diminish their credibility in the eyes of a judge, or more often a jury. A witness may have to endure significant criticism of his or her expertise, and is often the target of quite sophisticated and prolonged interrogation. Questions may be asked which are designed to test one's memory of events or of the literature, and complicated questions constructed to confuse are not uncommon. Several double negatives may completely obscure the nature of a question until the answer is subsequently dissected in minute detail. Questions may also be asked that are unanswerable, for example, on the exact timing of an injury or event. The

inability of a witness to provide an adequate response to such a question is then taken as an example of the deficiency of the expertise of the witness, rather than revealing the flawed basis of the question. Responses to complex questions and analyses of complicated scenarios are often expected to be provided almost instantly. Theatrical performances on the part of lawyers ranging from apparent surprise at an answer from a witness, to a momentary, well-timed puzzled pause, may suggest to the jury that the witness is simply not to be trusted or believed.

Thus, the quality of proffered expert evidence may depend not only on the evidence itself, but also on the ability of a witness to think quickly on his or her feet. Rational and well-reasoned opinions are sometimes expected in the face of verbal subterfuge and a barrage of sometimes quite aggressive questions that may interfere with the witness expressing a clear opinion. In these situations debating skills and presentation, rather than expertise and knowledge, are being tested. The situation lends itself to performance and personality outweighing fact, not to mention the need for considerable stamina on the part of a witness who may have to remain alert and functional after being questioned for several days.

The questions to ask are whether this system is an appropriate way to evaluate and present medical opinions, and whether witness credibility should be predicated on an ability to withstand hours of intensive interrogation? If a surgeon was performing a delicate operation few would consider it reasonable or advisable to have him or her distracted by complex questions during the procedure. Complicated questioning could interfere with the formulation of the best opinion and approach to the situation being dealt with, and thus result in a suboptimal outcome. It is clear that the ability to work through problems

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encountered at surgery and in medical practice is generally enhanced by a quiet and calm atmosphere.

Thus, given the situation in other areas of medicine why should an experienced professional's analysis of complex issues in the courts be different; i.e., subject to a process that might obscure or confuse the salient features, if not in the mind of the witness, then certainly in the minds of jury members? How could justice be served by a system that sometimes does not facilitate the ability of experts to explain their position clearly and rationally and that on occasion tries to make them take a position that they are not comfortable with?

As for the expectation of a rapid response to a variety of possible scenarios—is this reasonable? Most patients who consult doctors would prefer to deal with a physician who takes some time to examine their situation and the possibilities, rather than providing an instant assessment. Few would feel comfortable with a doctor in clinical practice who authoritatively proffered an opinion after only a few minutes deliberation, and yet experts are continually being asked to do this in court.

It seems illogical to assume that an ability to debate issues or to answer questions quickly under duress equates with intellectual credibility. Significant academic works are usually not formulated during stressful interaction—rather they evolve slowly as each aspect of a problem is evaluated. Pre-trial conferences and panel discussions are certainly useful methods that may help with this process by teasing out contentious issues and enabling areas of agreement and disagreement to be established among experts, rather than relying on their ability to define their positions in the theater of court. The technique of “hot tubbing” whereby experts give evidence at the same time in court, is a way of providing experts with a forum to consult and question each other. This has been found to be

quite effective in clarifying contested evidence and in focusing on precise areas of disagreement. Perhaps, there should be more consideration given to other models of justice, such as in civil jurisdictions, which allow courts to seek considered opinions based on the evaluation of evidence by a group of experts using established literature and collective experience.

Unfortunately, while most experts' intention is to assist the court, physicians often feel that the adversarial system may not facilitate this, by allowing a witness to be undermined and potentially misrepresented and confused. Medicine is full of gray areas and this is no more so than with medicolegal matters. The complexity of issues often requires even more considered and well-thought out opinions, with as much consultation as possible with colleagues, so that the best possible evaluations can be provided to the courts. Failure to do this may have extremely far reaching and dire consequences [1]. While experience in court assists greatly in dealing with the gauntlet of legal interrogation, the underlying problems remain. In court when the focus of an honestly derived and quite reasonable opinion is being obscured and potentially lost, one often looks over to the jury and wonders whether the system is really serving justice and the rights of the victim and the accused in the best way, or is instead perpetuating less than optimal processes by relying too heavily on sophistry.

Reference

1. Byard RW. Unexpected infant death: lessons from the Sally Clark case. *Med J Aust.* 2004;181:52–4.