



**barrell**  
TREE CONSULTANCY

Extreme consulting; is being an expert witness for you?

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In this third article of a four-part series on professionalism, Jeremy Barrell ([www.barrelltreecare.co.uk](http://www.barrelltreecare.co.uk)) explores the demands of the pinnacle of professional practice – acting as an expert witness. Many fools claim to be experts, but the cold reality of standing in a hostile court with some of the finest minds doing their best to pick your credibility apart, word by word, is a different world from the comfort of your warm, cosy office amongst friends. There are certainly easier ways of earning a living, which begs two obvious questions;

is the punishment worth it and do you have what it takes to get to the top? 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!



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### UK tree consultancy is not in good shape

At all levels, UK tree consultants are struggling to meet minimum standards of professional behaviour and presentation. We know this from a number of sources. Since 2006, there have been five written court judgments in cases dealing with personal injuries arising from tree failures, *Poll v Bartholomew* (2006), *Corker v Wilson* (2006), *Atkins v Scott* (2008), *Selwyn-Smith v Gompels* (2009) and *Micklewright v Surrey County Council* (2010) ([www.aie.org.uk](http://www.aie.org.uk)). In three of these cases, the judges were highly critical of tree experts, citing reasons such as allowing interference from instructing solicitors, duty to the court being compromised, inconsistency of opinion, acting as an advocate and straying beyond the expert role. Indeed, a sorry catalogue of bungles that should concern all who value the reputation and credibility of our profession.

One step down from this top-end failure, I suspect that we all know from experience that the general standard of arboricultural report writing, in both technical content and practical presentation, is found wanting to say the least. On a daily basis, tree officers and other allied planning professionals are struggling to work with tree reports that are long, confusing, complicated, inaccurate, misleading, inconsistent, unreliable, incomprehensible, unusable, ineffective, dull, boring and disengaging! In effect, arboriculture is an industry evolving into a profession, and the poor

practices we see are the inevitable products of such a transition. There is clearly a lot to do and getting the basics right at the bottom is an essential prerequisite for a successful transition to the top.

### Thinking of acting as an expert witness?

In the previous article, I advocated that the 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 practically attainable or just hopeless aspirations? My experience is that there is no simple recipe for making the grade; instead, success seems to be very much 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, you need to start early – at least 20 years before you plan to appear is ideal! There is no substitute for having done the time; the very best have been around a long time and done a lot of things, and will draw on all that experience to deliver their finely

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crafted reports and court appearances. Here are a few pointers that have helped me improve my skills:

- Qualifications and experience:** An essential and irrefutable cornerstone for providing solid 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 I have little doubt that the cream of our future experts are out there today climbing around in trees. 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 are often eloquent and articulate, and frequently turn up as entry-level experts. However, as they progress higher up the food chain, 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 an unfortunate 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 to avoid being compromised 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 witness 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 to be so burdensome and unnecessary at the time 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

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enthusiasm for it, then it may be best to avoid this career path!

- 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.
- Public speaking:** Thankfully, for the majority of us who are not natural public speakers, this is a skill that can be learnt and developed, with many simple tricks that can make a huge difference to the calibre of presentation and how stressful it is to deliver. It is an essential skill for all experts and it will have to be mastered by all those with high
- ambition.** If it is an anxiety, then look for help from professionals, 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.
- Reputation:** One of the mainstays of any successful expert is an impeccable reputation, with no blots on their record. However, judges will not hold back on criticising experts, if they have not complied with appropriate standards of behaviour, and this can have a devastating career impact. 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 potentially career-ending consequences.
- Consistency of opinion:** Whenever providing advice, there is always likely to be subtle pressures on experts to be as helpful as possible to their clients; it's human nature. Clients can

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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 to these pressures, 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 cross-examining counsel 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 an expert witness.

### Writing the report

The way individuals write is a personal preference and what helps one may do quite the reverse for others! Legal reports are complex and require 100% focused attention; any distractions can have very serious consequences, so dipping in and out for a few hours at a time does not work very well for me. Once I start, that is all I do; almost every available minute is spent thinking about the issues, from

waking in the morning to sleep at night! As a general rule, I write 8–10 reports a year, each one takes 3–5 full days to write and can run up to 60–80 pages with appendices. In terms of content, I found it was a mistake to analyse case law in my reports and I don't do it anymore; judges don't seem to like it and it makes sense to leave it to the lawyers. On a practical level, there are a series of reference documents that regularly crop up, ranging from various Civil Procedure Rules and other expert protocols, to technical publications such as the HSE SIM on managing risk and various highway references. I have them all printed and bound into a reference booklet that I keep by my side all the time I am writing.

There are many simple 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. Be warned; these may seem obvious, but they are the commonest points of failure, so ignore them at your peril. Here are a few other aspects that may be worth considering:

- **Negotiation reports:** This is a dark concept that is rarely talked about, but I see it frequently. 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



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thoroughly tested and examined is if the case actually gets to court and, as I explain below, that 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.

- **Technical referencing:** It is tempting to subscribe to the idea that the more technical references an expert uses, the better the argument or the more robust is 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 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 this is done. 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. I once took a chainsaw into the High Court to demonstrate how frightening it would have been for a road protestor who fell from a tree during a confrontation. It was tricky to get through security, but it made the point very well, although we lost the case! Creative and innovative explanations of complex issues can be the difference between winning and losing, and can elevate an expert's reputation from average to exceptional.

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### Your day in court

Appearing in court is a rare event and written judgments even more so. 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. Over the last five years, I have been in court six times, so it is about one a year! If you are lucky enough to ever get there, then here are a few tips on how to make the most of the opportunity:

- **Courtroom awareness:** It is almost a reflex action to look at, and answer to, the person who asks a question, but that must be suppressed 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 never engage with cross-examining counsel, will always answer directly to the judge, will always pause while a judge is writing and always 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 or these courtesies are lacking, 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 and engage 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 has been known for some time now that effective communication is highly influenced by body language, i.e. what you see and what you hear makes a much stronger impression than the actual meaning 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





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dominate the impact on proceedings. Whether we understand 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 are 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 could seriously undermine an expert's impartiality, and hand the initiative to the opposition. One of the best tips for doing this is never to engage with the questioner and always direct answers to the judge.
- **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 is 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

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only way to succeed is to be meticulously honest; never try to argue 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 a barrister, an instructing solicitor and possibly experts from other disciplines. An overriding duty to the court does not preclude them from supporting the team effort, and the most effective experts will do this, where there is no conflict. A great way to help your barrister is to take detailed notes of all the examination and testimony, including accurate quotes of key statements, where possible. Although most cases are recorded on tape, that detail is not available for barristers to prepare their summing up at the end of the case, and they do not have the capacity 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* 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 ([www.aie.org.uk](http://www.aie.org.uk)), which is an extreme test of expert competence. Even by the time the case was over, both experts had no idea this would happen; there is no warning! When it does, 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, and should never be forgotten.

There are no secrets here; this is all common sense. The problem is trying to remember so many small things when bigger distractions dominate. Supreme experts will balance all these considerations in the heat of the moment, using the poise of their experience. Such moments are rare indeed and, when one comes along, there is usually only one chance to get it right!



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**Future article**

**The standard of the duty of care relating to trees:** 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 how much management is enough in the context of recent court cases and emerging best practice for tree inspections.