

# **The Making of Expert Witness: The Valuers' Perspective**

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## **Abstract**

This paper examines the role of the expert witness in the process of justice administration. As the saying goes, not all 'experts' make good 'expert witness' as there is more to being an 'expert witness' than there is to being an 'expert'. That is, being an 'expert witness' does not necessarily connote that the witness is an expert in giving evidence but rather in the matter his evidence is about. In other words, to become an 'expert witness' in reality, a Valuer requires additional attributes outside what is traditionally available to him in his academic training and professional tutelage. Among others, he would need to acquaint himself with court procedure and the court standards for expert witness; he requires instruction on how to put together his proof of evidence and deposition, how to marshal his points and conduct himself including his limitations while in the witness box. Presently, neither the academic nor the professional examination syllabuses for the training of Valuers in Nigeria make adequate provisions for these additional instructions. This study is a modest contribution aimed at bridging this gap. The paper further examines the paradigm shift that is currently unfolding globally in expert witnessing and testimony; while it offers suggestions on how Nigerian Valuers can improve on their performance in this increasingly popular area of their vocation. The author has drawn largely on his vast experience as expert witness spanning over two decades and has brought him before different judges on matters ranging from rent disputes to compensation for oil spillage at both the Federal and State High Courts in several states. Beside adequate personal preparation by Valuers, the paper recommends systemic changes including appropriate sanctions, legislations, mandatory professional standards and specialization to enhance Valuers' performance, forestall willful abuses and eliminate observed lapses.

**Key words:** admissibility, expert testimony, expert witness, probative value, valuer

## Introduction

Expert witness has been a vital part of adversarial litigation process and will evidently remain so and most probably in greater dimension given the increasing complexity of modern day life. In law, distinction is usually made between a 'lay' witness and an 'expert' witness. A 'lay' witness is generally a witness of fact only. In its commonest form, his evidence consists simply of imparting knowledge of past events which he has perceived with his own physical senses of sight, and hearing. That is, a lay witness tries to put, as far as possible, the judge or jury in the position of having been present at the place and time which the fact deposed to occurred. This is as far as a lay witness can go. In other words, a "lay" witness cannot purport to proffer opinion on the cause or effect of what has happened. This is the basic rule!

An 'expert witness', on the other hand, is a person who is especially skilled in the field in which he is giving evidence. In which case, an expert witness is only necessary if the nature of the evidence, scientific or other technical information required is outside the experience and daily common knowledge of the trial judge of fact (Egesima V. Ezekiel Onuziuke, 2002). While the expert witness must confine himself to facts and happenings within his personal knowledge, training and experience; by virtue of his professional training and/or experience, he is permitted, and indeed encouraged, unlike a lay witness, to include in his evidence the opinion he has formed and the conclusion he has drawn (Bryan, 1971). Beside this, an expert witness is

subject to the same rules as a lay witness; the basic rule being that a witness, lay or expert, must be objective and tell the court "the truth and the whole truth" irrespective of how the truth affects the party engaging him.

An expert witness is also forbidden to argue at all. His duty is to assist the trier of fact in an impartial and independent manner. He is simply to speak the truth in obedience to his oath, first as to the facts and secondly as to the objective conclusions he has derived from them. His allegiance is primarily to the court and, secondarily to his profession, and not at all to the person engaging him. In *Kemp Properties (UK) V Dentsply Research and Development Corporation* (1991), the Court of Appeal (England) held thus:

*"It is sad feature of litigation that expert witnesses, particularly in valuation cases, instead of giving evidence of their actual views as to the true position, enter into the arena and, as advocates, put forward the maximum or minimum figure as best suited their side's interests. If experts do this then they must not be surprised if their views carry little weight with the judge".*

Whether or not a formal credential is required to qualify as expert witness depends largely upon the field of expertise in question. If the area of expertise is one which has become the province of academic or technical study, such as medicine, psychiatry, real estate valuation, engineering or biochemistry, then a person without formal qualifications will rarely be accepted as being an expert. Outside this, qualifications will be less significant. That is, a person may be regarded as an expert

in a particular field even where his knowledge in this field was acquired without systematic tutoring provided that he has, in the opinion of the court, had sufficient practice in the particular field of knowledge as a professional or as an amateur, to make his opinion reliable. This was the position in the English case (R.V., Sliverloch (1896) where it was ruled that a solicitor who has acquired knowledge in handwriting as an amateur could be treated as expert in that field. Section 68 (1) of the Evidence Act, 2011 provides that:

*“When the Court has to form an opinion on a point of law, customary law or custom, or of science or art, or as to identify of hand writing or conducting finger impressions, the opinions upon that point of persons specially skilled in such foreign law, customary law or custom, or science or art, or in questions to identify handwriting or finger impressions, are admissible”.*

Section 68(2) provides that *“Persons so specially skilled as mentioned in subsection (1) of this section are called experts”.*

Whether or not, a witness can be regarded as an expert is therefore a question of fact for the court to decide (ANPP & Anor V. Alhaji Saidu Nasamu Usman (2008) and Access Bank Plc. V. TRILO Nigeria (2013).

The court is not bound to accept or act upon the opinion of an expert especially where such opinion contradicts common sense and the usage of mankind (Elija Okoh v. The State (1971). However, where the expert evidence is unchallenged and uncontradicted by any other evidence, the court is bound to accept such expert evidence and act on it (R. v. Matheson

(1958); Seismograph Service (Nig) Ltd v. Akpororo (1974); West Minister Deciding (Nig) Ltd & Anor v. Ogun Oyibo & Ors (1992). In Sowemimo & Ors. V. State (2004), the Court asked “Is this Court or any Court bound by the evidence of PW4 (an expert witness); to which Court also answered in the negative. However, in Ngige V. Obi (2006), it was held that a Court is entitled to accept the evidence of an expert if is credible, particularly if it is not controverted or challenged and the expert demonstrates his skills...”

Where there is a conflict in the opinions of expert witnesses, it is the duty of court to come to a conclusion by resolving such conflict and can do so by rejecting the opinion of one or other such experts. (John Wilberforce Bamiro v. S.C.O.A (1941); Ozigbo v. Police (1976).

### **The Valuer as an Expert Witness**

'Valuer' in this paper refers to professional real estate valuer (officially referred to in Nigeria as “Estate Surveyor and Valuer” and in many other jurisdictions as “Appraiser”). To qualify and practice as a registered or licensed Valuer in Nigeria today requires that a person goes through a formal training in a university or polytechnic that runs B.Sc. or HND program in Estate Management, respectively. On graduation, a B.Sc. degree holder serves a mandatory apprenticeship of a minimum of two years duration in an approved Estate Surveying and Valuation firm as a probationer. He or she must then proceed to sit for and pass the test of professional competence (TPC) which comprises the

writing of a dissertation on an approved topic which must be successfully defended in an oral interview. A Higher National Diploma (HND) holder is expected, in addition, to pass a Professional Qualifying Examination (PQE3). Alternatively, a person without any prior training in estate management can go through multi-stage professional examination organized by the Nigerian Institution of Estate Surveyors and Valuers. The process of being licensed as professional Valuer in Nigeria is therefore rigorous and thorough. Cap III, Laws of Federation of Nigeria otherwise known as Decree 24 of 1975, formally makes the valuation of proprietary interest in property the exclusive preserve of professional real estate Valuers (Estate Surveyors and Valuers).

Beside the regular courts, Valuers can appear as expert witness in quasi-judicial proceedings such as the Rent Control Tribunal, Valuation Courts, Assessment Appeal Tribunal, Arbitration Panel, Land Use and Allocation Committee, Administrative enquires etc. Valuers can be engaged as sole expert or in conjunction with the testimony of other experts, such as environmentalist, geologists, land surveyors, and engineers. This study considers the requirements for Valuers acting as expert witness under two broad headings: 'pre-trial' and 'giving of evidence'; that is, before and during court trial.

### **Pre-trial role of the Valuer**

Generally, in a civil action, after the service of the writ, the "pleadings" begins. "Pleadings" are statements in writing served alternately by one party on the other, stating the contentions and containing such

information as his opponent needs to prepare his case in reply. "Pleading", among other things, contains facts and also an indication of the specific item of evidence by which facts are to be proved. Evidence of facts not mentioned on the pleadings may not be entertained at the hearing as held in *Okoko V. Dakolo* (2006):

*"It was correct in law for the learned trial Judge to hold that the Defendants' evidence on the unpleaded facts ought to be discountenanced as it is inadmissible".*

Courts/tribunal may specifically demand the submission of certain documents relating to the evidence to be given by the expert witness and that copies be served upon the other parties. A typical example is the expert's written testimony which, for the Valuer may include valuation reports, inventory of plant and machinery, schedule of dilapidation and/or prices etc. and any subsequent replies which are exchanged in advance of the hearing. The purpose of these 'interlocutory' proceedings are to ensure that neither party is taken by surprise by a contention of his opponent, and that each party has ample time to prepare his case as held in *Cyanamid Company V. Vitality Pharmaceuticals Ltd.* (1991):

*"the purpose of pleading is to give the other side at the earliest opportunity, the case the other side is to meet".*

### **Proof of Evidence**

A proof of evidence is a written statement prepared by a witness in advance of the hearing, for the information of the

advocate who is to call him, of what he intends to say. The proof should contain the whole of the substance of intended evidence, first the facts and then the opinions founded on them. Report submitted in evidence must abide by the individual professional code of conduct, among others.

For adequate preparation of his proof of evidence, the Valuer may need to inspect, and re-inspect the subject property, undertake extensive tape measurements, and carry out a great deal of relevant market and industry studies. The property which is the subject of expert evidence must be more thoroughly inspected and preparation of a proof carried out more painstakingly than would have been done in ordinary valuation jobs. Some details that may seem inconsequential during inspection might enable the Valuer to give an answer under cross-examination which would impress the court/ tribunal with the thoroughness of the Valuer's approach and the keenness of his observations. Details that may be required include factors that bear directly or indirectly on value including the physical attributes as well as the neighborhood and locational characteristics. The Valuer must give his reasons for every conclusion in anticipation of its being challenged in cross-examination. Valuers, like counsel, must therefore generally approach their job always mindful that a trial may invariably ensue.

The first paragraph of the proof should give the witness full name and address, his qualifications and experience. This should include the professional body or bodies he belongs to, his status in such bodies, for how long he has been in practice and in what

capacities, his clientele, etc. In Nigeria, the types of information to be disclosed in the curriculum vitae are not yet codified; the detail therefore remains the exclusive preserve of the expert. For a guide, the Valuer should ensure that his or her resume are sufficiently detailed and current but without any misrepresentations.

The valuation report should state clearly the purpose and objective of the valuation; contain adequate description of the object of valuation; purpose and scope of the valuation, the effective valuation date, basis of value and methodology; the date and extent of inspection, and any assumptions and limiting conditions upon which his opinion of value is predicated.

Facts are to be stated first before opinion and inferences. Facts are generally of three types. First is the historic facts which, in a case of compulsory acquisition, would include reference to the enabling law such as the Land Use Act of 1978, Oil Pipeline Act (Cap 145) of 1956, or the Petroleum Act of 1969 (As Amended), the gazette where the acquisition was published with date; the date the acquisition notice was served etc. After the historic facts come the descriptive facts such as the location of the property; construction and accommodation details, neighborhood characteristics including offsite facilities etc. The third set of facts are the non-descriptive which may include the tenure, price paid, data on comparable, assumptions and contingent conditions etc. The report should also demonstrate a transparent process of reasoning which shows that the opinion expressed is wholly or substantially based on

specialized knowledge as applied to the facts (assumed or observed); state whether other experts were consulted, at what stage in the process, what information was shared, and how did the information shared affect the view expressed.

Valuation is a profession; as such, the Valuer is also expected to carry out his work within the ambit of the practice standards and ethics prescribed by the relevant professional body(s). The fact remains that the courts have always looked up to the published standards of professional bodies for judgment guidelines. While failure to comply with these standards does not necessarily constitute a breach of the laws as they are not legislative enactments, the courts have always put these standards into consideration especially in liability cases such as negligence, breach of contract, and fraud (Shampton, Waller & Waller, 1998). For instance, the current Valuation Standards and Guidance Notes (2006) of the Nigerian Institution of Estate Surveyors and Valuers' provides, among others, that a valuation report should:

- provide an explanation of the analytical process undertaken in carrying out the valuation and present meaningful information used in the analysis; ensure that the estimate of value is based on data and circumstances appropriate to the assignment;
- ensure that the estimate of value is undertaken using appropriate methods and methodologies;
- provide sufficient information to permit those who read and rely on the

report to fully understand its idea, reasoning, analysis, and conclusions;

- describe the scope/extent of the work undertaken and the extent to which the property was inspected;
- state any assumptions and limiting conditions upon which the valuation is based; and
- fully and completely explain the valuation bases/approaches applied and the reasons for their applications and conclusions.

The valuation report must therefore be prepared with these ethical and professional responsibilities in mind.

Finally, proof should be prepared with care and should be brief and lucid. The report should be well structured, well written, well presented; and should be free of grammatical, punctuation, spelling, and mathematical errors. It should be prepared with due regards to objectivity and professionalism. If need be, a lawyer should be involved in finalizing the experts report to ensure that the report is couched in admissible form. The paragraph should be numbered, and the contents of each paragraph be described in a side-note in the margin. It should be preferably written in the first person. For example, "I have carried out necessary inspection and survey of the property and therefore have the pleasure to report as follows", rather than "The witness has carried out necessary inspection and survey of the property and therefore has the pleasure to report as follows".

Every exhibit whether it be a map, photographs or other documents, must be

identified by a letter or a number, or a combination of both. Maps, plans, schedules of comparable, costs, photographs etc. must be made as simple as possible, clearly annotated and distinctly labeled. Photographs must bear on their face a short description and the date they were taken. Exhibits generally must be relevant to the opinion or inferences of the witness.

### Giving evidence

All of the aforementioned pre-trial duties of the Valuer are but preparation for the most important aspect of his role as expert witness which is the giving of his evidence. The manner in which the evidence is given can win or lose a case for the party who engages the expert. The weight that the court accords the opinion of an expert witness invariably depends on a number of factors principal among which are the formal qualification of the witness; the practical experience gained in the field of expertise; the extent to which he has researched or tested the topic under consideration; the extent of his preparation for the giving of his evidence; his familiarity with the facts of the particular case; and his manner of giving evidence.

Valuers engaged as expert witness ought to be familiar with the usual court proceedings. The procedure before arbitrators and other quasi-judicial tribunal is essentially similar to that of the regular courts which is as follows:

- a. Opening address by advocate for the claimant/plaintiff
- b. Examination of witnesses for the claimant/plaintiff
  - i Examination – in – chief by the counsel to the claimant/plaintiff
  - ii Cross – examination by the counsel to the respondent/defendants
  - iii Re-examination by the counsel to the claimant/plaintiff
- c. Opening address by the counsel to the respondent/defendant
- d. Examination of witnesses for the respondent/defendant  
(Each witness in turn undergoes three examinations as above)
- e. Respondents/defendant's advocate summaries and makes his submission
- f. Claimant's/plaintiffs advocate make his submission and then conclude.

Ordinarily, the judge will thereafter deliver his judgment, although he may 'reserve' his judgment for a later date.

In court proceedings all witnesses are examined under oath or they may alternatively 'affirm'. In tribunals, oath or affirmation is often discretionary. For example, Section 30(c) of the Lagos State Tenement Rates Edict (No. 10) of 1989 provides that "Assessment Appeal Tribunal may administer oath and affirmation", while the Lagos State Rent Control Tribunal provides that the tribunal "shall have power to examine witness on oath....." S 8(3).

In the witness box, the Valuer is questioned first by his own client's counsel. This is the examination-in-chief. The advocate is not permitted to ask 'leading question' i.e. "any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question" (Section 221

Evidence Act, 2011 Section 221 (1). Specifically, Section 221(2) provides that "leading questions shall not be asked in examination-in-chief, or in re-examination, except with the permission of the Court". The only exception is in the introductory matters where the counsel asks about the expert's resume.

Examination-in-chief often begins with the advocate asking the witness his name, qualification and experience, among others. This is necessary to establish his competence as an expert witness. "An expert must present before the court his qualifications before giving his testimony" (Ado Kofar Wambaid & Anor v. Kano N.A (1965); Kenneth Idugbe v. Dennis Eseh (1996); Azu V. State (1993). The expert needs to give his qualification and experience as fully as possible but without exaggeration. The Valuer would then proceed with the facts of the case: historic, descriptive and non-descriptive and then come to his analysis, comparable, method of valuation and his valuation opinion. His counsel may lead him to comment on certain areas of his proof such as figures, basis and method of valuation, comparable, opinion, etc.

The credibility of the expert witness is linked to his persuasion which largely depends on his knowledge, confidence, and integrity. Judges/ tribunals are most adept at weighing up knowledge and integrity very high. The expert witness should therefore seek to protect his personal and professional integrity. While personal integrity may be hard to assess, professional integrity comes over loud and clear. The Judge may find the opinions of even a highly qualified expert to be unpersuasive

when the expert is not sufficiently familiar with the specific facts of the case. The Valuer should be knowledgeable about the facts related to the valuation subject. For instance, he should understand the valuation analyses; should be familiar with the relevant market; know how to perform the calculations in the valuation; able to explain why he or she selected the information that formed the basis of expert opinion; and include schedules and exhibits documenting all of the quantitative valuation analyses performed.

The Valuer should be careful to explain the valuation process and justify the figure adopted for the variable. It might be helpful to make available such supporting document as 'schedule of comparable', 'schedule of costs' etc. The extent to which it is necessary to explain a calculation depends on the court or how the tribunal is constituted. A lay tribunal needs to have the details more carefully and slowly explained than expert tribunal. Generally, the greater the detail, the better. The Valuer witness should allow the tribunal to tell him if he is overdoing it.

Examination-in-chief of a witness would impress the court/tribunal if the answers of the witness flow naturally and not that (or seems that) it is being forced out of his mouth by his advocate. To this end the Valuer should always discuss with his counsel beforehand the manner in which the counsel intends to take him through his proof. The conduct of such mock-examination is likely to assist the expert in responding to questions in a calm, intelligent and professional manner to the admiration of the court regardless of the intimidation by the opposing counsel. The

Valuer should try to deal with the questions posed to him verbatim. Good memory is of great advantage here. Though he may read from his report, he should do so sparingly. He may refer to document plans, maps, and other such materials. He may also cite from reference books, professional papers, journals, magazines, etc. and thereby demonstrate that his views are shared by other eminent persons in his profession.

The Valuer must be quick to recognize any weak spots in his client's case and be prepared to acknowledge it, draw his counsel's attention to it; and take the earliest opportunity to bring it to the open and deal with it as appropriate. A real or apparent weakness in the case that is not mentioned in chief but revealed for the first time in cross-examination by the opposing counsel would most likely have a negative effect on the

#### **Valuers integrity and evidence.**

The expert witness should maintain good posture, remember to look at the Judge (but not stare) when testifying, and not look at the attorney for answers. He should speak as loud as the circumstance demands without the court or tribunal requesting him repeatedly to do so. He should be prepared to employ powerful speech; a narrative style of testimony; and avoid hypercorrect speech.

In addition to verbal communication, studies have shown that non-verbal cues such as facial expressions, eye contact, bodily gestures, and posture, and vocal cues, reveal a witness's emotions that may impact the way judges perceive witness's credibility. For instance, studies have shown that witnesses

who maintain eye contact with the Judge are perceived as more credible. On the other hand, speakers or witness who end their sentences with a rise in pitch may communicate uncertainty and be perceived as less credible than speakers who avoid doing so. The import of such findings is that expert witnesses are well advised to attend to their nonverbal communication cues.

The expert should be mindful that after giving his evidence in chief he will be cross-examined by counsel for the opposing side. Counsel should put the witness through a practice cross-examination so the witness will know the type of questions likely to be asked of him by opposing counsel and can be ready to deal with them.

Cross-examination has been described as the most effective means of eliciting and testing truth. In cross-examination the advocate is permitted to ask leading questions. Section 221(4) of the Evidence Act, 2011 provides that "leading question may be asked in cross examination". He may not harass the witness, although he may come very close to doing so in cases where he believes that the witness is lying and must therefore be discredited (Miller, 1982). If opposing counsel feels the witness's evidence is damaging to his case, he will try to discredit him by challenging his qualifications; his previous experience, integrity, validity of evidence, or sincerity of purposes; the correctness or accuracy of the basic facts on which the expert's opinions are based so as to show that the witness's evidence is unreliable. Section 223 of the Evidence Act, 2011 suggests that in cross-examination, questions may be asked which tend:

- a. To test the accuracy, veracity or credibility of the evidence;
- b. To discover who the witness is and what is his position in life;
- c. To shake the credibility of the witness by injuring his character.

Thus, the opposing counsel may ask such irritating question as “You are a paid witness, employed to mislead this honorable court”, “Your report shows lack of experience and competence. Your claim as an expert witness is suspect”, and so on. His goal is to reduce the expert witness's standing in the eye of the court/tribunal and thus take 'weight' out of his evidence. The Valuer witness must convince himself that it is the job of the opposing counsel to probe and test his evidence by the most searching of questions.

He should therefore not regard opposing counsel as hostile or take him for an enemy. Instead of becoming irritated by the opposing counsel and using cutting remarks which tend to lower his own integrity; the expert witness should be calm, deferent, courteous, firm and with a good focus on the truth. He should concentrate on facts and leave the 'weight' of his evidence to the court/tribunal (Miller, 1982). A common fault in cross-examination is the temptation to answer at too great length. As much as possible the answer should be short. A simple 'Yes', 'No', 'That is not my opinion', 'I have not said that', 'That is not my persuasion', will be sufficient in most cases. Slang and abbreviations should be avoided (Rees, 1994). The Valuer must confine himself to the matter in which he is especially skilled. He should

therefore recognize his professional limitations and admit them. For instance, no matter the experience of the Valuer, it does not make him a lawyer, or a structural engineer or a quantity surveyor (Bryan 1971). He must therefore resist the invitation by the opposing counsel to express opinion outside the field of his expertise. The International Valuation Standards Committee (IVSC) to which the Nigerian Institution of Estate Surveyors and Valuers is affiliated provides, among others, that valuations should be prepared by an individual or firm having the appropriate technical skill, experience and knowledge of the subject of the valuation, the market in which it trades and the purpose of the valuation. For complex or large multi-asset valuations, it is acceptable for the Valuer to seek assistance from specialists in certain aspects of the overall assignment (IVSC, 2011). With particular reference to valuation of contaminated property, this requirement for competence as it relates to Valuers is aptly provided in the Guide Note 8 of the American Appraisal Institute as follows:

*“typical appraiser (Valuer) is not technically qualified to detect contamination or the presence of hazardous substances. It has therefore become an accepted practice in the market place to hire a trained and experienced professional to conduct an environmental investigation as to the type of contamination affecting the property, the damage done, the level of cleanup required, the appropriate method of that cleanup, potential environmental risks and the costs”.*

In a content analysis of valuation

reports on compensation for oil spillage prepared by Valuers in the Niger Delta area of Nigeria, Babawale (2013) noted that virtually all the reports were prepared on presupposition and questionable evidences largely because the Valuers failed to seek the assistance of specialists in certain areas of this highly technical aspect of the Valuer's vocation. The study found that only a paltry 27% included or reflected the inputs of any technical specialists. That is, in virtually all the valuation reports, the Valuers purportedly assessed the impact and cost implications of oil spillage on the eco-system, vegetation, microbes, aquatic lives, and human health without the input of relevant technical specialists - Marine Biologists, Soil Scientists, Health and Safety experts, and Micro Biologists. It is these specialists that ought to have undertaken scientific investigations that would help to ascertain the degree of pollution; loss of aquatic lives; loss of economic trees, crops; predict possible recovery period and remediation actions and their cost implications. For instance, the health implications of oil spills should have been described, quantified and translated to monetary figure by a qualified medical practitioner via a medical report which should have been attached. It is from the results of such studies/investigations with their cost implications, that the Valuer should have extracted relevant information for necessary calculation and value estimates, for instance. In the absence of such scientific reports/inputs, the Valuer's estimates could only be baseless, speculative and superfluous. Whatever opinion or conclusions were based on such

estimates would ordinarily remain suspect and unreliable.

Re-examination arises only out of cross-examination and is conducted by the advocate to the plaintiff or claimant. The main purpose of re-examination is to enable a witness to enlarge upon an analogous answer extracted from him in his cross-examination. Thus, if his evidence in chief remains unshaken by cross-examination, it is unlikely that the plaintiff/claimant advocate will request for re-examination.

#### **Admissibility of evidence**

The courts in various common law jurisdictions have historically recognized the unique nature and limitations of expert testimony, and have set clear rules and exceptions governing the admissibility of expert evidence. The weight or relevance given to the expert testimony is often determined by what is referred to as "voir dire" or "qualifying the expert," a process used to determine the competence of an expert witness to act as an expert, during the course of the trial process upon judgment. Admissibility of expert evidence has to do with whether the evidence is relevant; whether the expert has specialized knowledge based on training, study or experience; and whether the opinion sought to be relied upon has been shown to be wholly or substantially based on the specialized knowledge.

Admissibility of a piece of evidence is one thing, its cogency or weight or probative value is another (Onamade, 2002). That is, oral or documentary evidence, may not have any probative value or any weight at all, though

admissible (Yusuf V. State (2013) and Rapheal Udeze & ors. v. Paul Chidebe & ors (1990). The general rule, according to Section 83 (3) of the Evidence Act 2011, is that statements are not admissible if made by persons 'interested'. The word "interested" in its ordinary etymological meaning refers to either financial interest or natural interest in the outcome of proceedings. However, the question has to be considered in each particular statement tendered as evidence under the Act in the light of the particular circumstances of the case relating to that statement.

Having admitted an evidence therefore, the court goes further to consider what weight to attach to it in the light of the issues in contention. In estimating the weight, to be attached, Section 83 (3) of the Evidence Act provides that, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts. Court may therefore not attach much weight to the opinions of an expert if the factual basis of such opinions is not produced before it. For example, where Valuer fails to provide evidences upon which his valuation report is based, the opinion of such a Valuer may be discountenanced: (Uwa Printer Ltd. V. Investment Trust Ltd. (1988); West Minister Dredging (Nigeria) Ltd. Anor v. Ogun Oyibo & Ors. (1992). This was the case

in Bayo Banjo v. Alli Jamal (unreported, 1970) involving conflicting opinions of two experts in respect of the value of the same property. The first expert with high academic qualifications and several years of experience testified and gave the value of the property as £2,500. He however did not give the basis of his valuation. The second expert, with equally high academic and professional qualifications and years of experience, testified on the value of the same property which he said was over £9,000. But in addition to his testimony, the second expert provided the data he used to arrive at his valuation. The learned trial judge rejected the opinion of the first expert witness while he accepted that of the second witness.

The nature of admissible evidence with respect to valuations was also discussed in an English case English Exporters v. Edonwall (1973). The essence of the court decision in this particular case is that, a Valuer may give his opinion of value and, in forming his opinion, he may take into account all information from all sources especially comparable. The closer a comparable is in terms of location, type, age, size, and date of transaction to the subject property, the more useful it is and the greater the weight the bench is likely to put on it. Witness can rely on comparable if he himself carried out the transaction or if the transaction is carried out under his supervision. Valuer witness can also rely on transactions which have been agreed between the parties or which have been proved by another witness. Valuers cannot, however, rely on transactions of which he has been informed (whether orally or by letter) or which they have read in the press. Advertised sale prices as in the daily or weekly Newspaper or

Magazine like 'the Castle' or 'Guardian Newspaper' is particularly open to objection; as they are merely asking prices (Rees 1994). The expert witness may however draw inferences or conclusions from documents which are of the type generally relied upon by experts in the particular field in forming opinions or inferences upon the subject, though he may not be a party to its preparation e.g. maps, survey plans, bill of quantities etc.

### **Paradigm shift**

Expert evidence has lately been the subject of extensive enquiry and debates in a number of jurisdictions. In particular, expert witnesses had been identified as a major source of complexity, delay and high cost in civil proceedings; due, in part, to the parties calling multiple experts. More worrisome is the widespread belief that expert witnesses are overly partisan and fail to provide the court with a neutral or independent opinion that they are called to provide. In some cases, this phenomenon referred to as 'adversarial bias', is serious enough to amount to professional misconduct. Such misconduct may involve experts giving evidence about matters outside the area of their expertise or deliberately falsifying their evidence. An empirical study carried out by the Australian Institute of Judicial Administration which surveyed all 478 Australian judges rated bias as the most serious problem with expert evidence with the failure to prove the bases of expert opinion as the next most serious. In a similar survey of U.S. attorneys and judges conducted by the Federal Judicial Centre, it was also found that adversarial bias was the single most important

problem with expert evidence in US Courts (Kafta et al., 2002). The phenomenon is particular giving the US courts concern as evidenced from decided cases. For example, in *Finkelstein v. Liberty Digital Inc.* (2005), the judge highlighted the burden imposed on the court by bias expert Valuers as follows:

*“men and women who purport to be applying sound, academically-validated valuation techniques come to this court and, through the neutral application of their expertise to the facts, come to widely disparate results, even when applying the same methodology. These starkly contrasting presentations have, given the duties required of this court, imposed upon trial judges the responsibility to forge a responsible valuation from what is often ridiculously biased 'expert input.'”*

The phenomenon (adversarial bias) has led, in a number of jurisdictions, to the introduction of a new framework for the judicial control of expert evidence aimed at checkmating expert witnesses and minimizing costs, delay and adversarial bias, among others. Arnold and Soriano (2013) observed that the rules governing the use of expert evidence in the UK, Australia, Canada, and to a lesser degree, in the United States have changed considerably in the last two decades. The genesis for recent reform dates back to 1996 when Lord Woolf, then Master of the Rolls in the UK, published his seminal report *Access to Justice (the “Woolf Report”)*. Lord Woolf's mandate was to review aspects of the civil justice system and outline recommendations to improve it. He noted that

the civil justice system in the UK was slow and expensive, and he identified the proliferation of expert evidence as a contributing factor. On adversarial bias, Woolf's report commented as follows:

*“Expert witness used to be genuinely independent experts; men of outstanding eminence in their fields. Today they are in practice hired guns. There is a new brand of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients”.*

The Woolf report (1996) has spawned reform of expert evidence throughout the common law world, though the reaction has not been uniform. A number of jurisdictions have adopted measures aimed at addressing or controlling perceived excesses and expenses of expert evidence. These include:

- limiting the number of expert witnesses to be called,
- appointing single joint experts (that is, one expert appointed jointly by the parties, sometimes referred to as the 'parties' single joint expert') or court-appointed experts,
- permitting experts to give evidence concurrently in a panel format (often referred to as 'concurrent evidence' or 'hot-tubbing'), or in a particular order,
- introducing a code of conduct to be observed by experts,
- formalizing processes for instructing experts and presenting experts' reports,
- requiring disclosure of fee

arrangements,

- imposing sanctions on experts for misconduct,
- developing training programs for expert witnesses.

While debate continues on whether increased codification would bring about significant change in the conduct of experts, courts are encouraged to be more vigilant in their role as 'gatekeeper' vis-à-vis the requirement for the expert to be independent and objective.

In the Supreme Court of Canada decision of *R. v. J. L.J.*, [2000], it was held that:

*“The court has emphasized that the trial judge should take seriously the role of 'gatekeeper'. The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.”*

Prior to the recent trend towards increased codification, the courts in Canada, the United States, Australia and the United Kingdom established somewhat consistent common law on the role of expert witness (Arnold and Soriano, 2013). In the United States, for instance, the conduct of expert witness is often assessed with reference to what is known as the “Daubert Standard”, a sort of litmus test regarding the admissibility of expert witness testimony. For a testimony or evidence to be relevant and reliable, the Daubert case, in addition to instructing the

Court to act as gatekeeper, set forth the following minimum conditions, often referred to as “Daubert factors”:

- whether a theory and/or technique (e.g. valuation theory or methodology) has been tested;
- whether a theory and/or technique has been subject to peer review and/or has been published;
- the known or potential error rate of a technique, and the existence and maintenance of standards for use of that technique; and
- whether the theory or technique is well accepted within the “relevant scientific community.

In *Kumho Tire Co. v. Carmichael* (1999), the US Supreme Court extended the Daubert's factors to cover all expert testimony, whether they are based on science, technology, skill and experience or not. It was also held that the Daubert's factors is a non-exhaustive list; thus giving the trial judge 'considerable leeway' in assessing the reliability of an expert opinion.

## Conclusion

Expert evidence has been, and remains, an important part of the litigation process. Cases that go to trial today involve the testimony of expert witnesses to an extent never before seen in the judicial system. This is hardly a surprising development. Given our increasingly sophisticated modern technological society, the type of cases being brought to court increasingly involve

questions of science, engineering, economics, medicine, actuarial science etc. As the number of legal matters requiring the assistance of experts has continued to increase, the court would continue to rely on the assistance of expert witnesses in certain areas as a vital part of the machinery of justice.

Apprehension concerning expert witness is widespread and growing. Misdemeanors often cited by judges against expert witness include flaw in methodology, lack of professional standards, lack of court experience, assumptions that do not appear reasonable, conclusions and/or assumptions not supported by evidence at trial, results that do not appear reasonable based on common sense, lack of objectivity and expert's report or testimony is poorly explained and/or too technical for the lay person (Troster, 2005). Justice Stuart Morris (2005) describes these problems from a judicial perspective thus:

*“Judges harbour a strong anxiety about the use of expert evidence in court, which can be explained in several ways. Questions have been raised about levels of competence, lack of training and accreditation of so-called experts. Expert evidence may also unduly prolong litigation without significantly assisting the trier of fact, leading to a higher cost of litigation. And an over-reliance on expert evidence may shift the burden of responsibility from the bench to the witness box”.*

From personal interviews and published articles, Troster (2005) gathered that the key causes of the above problems include expert Valuer's low expectation of the

report ending up in Court; allegiance to the client and/or influence by the client; inadequate time and resources for the expert's preparation; unreasonable or conflicting expectations of the expert; selection of 'wrong' expert for the case; purporting to offer opinion outside their field of expertise; lack of Court experience (the expert); expert underestimates level of scrutiny to which report will be subjected.

### **Recommendation**

The quality of the expert testimony is inextricably linked with training, yet in most jurisdictions expert training has remained largely voluntary and unregulated. It is therefore recommended that standards and training leading to specialization should be created and implemented. The expectations from expert witnesses are presently set out only by case law. It is believed that if the requirements are codified with appropriate sanctions, it is possible that some of the present lapses would be avoided. The Nigerian Institution of Estate Surveyors and Valuers should provide both training and professional standards for Valuers acting as expert witness. Expert witnessing should also have its own faculty as already accorded other specialist areas of the profession with appropriate specialist designation. In addition, older Valuers who have had experience in giving expert evidence should always take the younger ones along to courts/tribunals etc. to enable them receive firsthand experience. The junior Valuer should also be used to prepare expert reports and deposition in the same way

solicitors prepare a case for his advocate. Peer networks (for peer reviews and recommendations); clarifying roles and expectations with counsel and client; meeting other side, and refusing assignments, are other plausible measures.

#### **1. Final word!**

The primary duty of the Valuer engaged as expert witness is to be truthful as to fact, honest as to opinion and complete as to coverage of relevant matters. His evidence must be independent, objective and unbiased. Successful expert testimony mandates a thorough understanding of the requirements of the court, a commitment to high ethical and professional standards, clear and concise communication, and thorough, well-supported analysis. Anecdotal and empirical evidences suggest that if the Valuer painstakingly carry out necessary inspections and studies, if he prepares himself and his report adequately and logically marshal his points; if his facts are untainted with exaggeration; if he is honest in his opinion; if he keeps strictly to his role as an unbiased witness and confines himself to his area of expertise; he would be an expert witness in truth and indeed. Additional systemic changes are also required to enhance Valuers' performance and forestall abuse. These include appropriate sanctions, legislations, mandatory professional standards and specialization.

This paper has been written with the Valuers particularly in mind, but the principles highlighted, the flaws and pitfalls identified as well as the improvement proffered are

applicable to expert witnesses in other fields - Architects, Town planners, Builders, Engineers, Medical personnel, Accountants etc.

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