

Pouzdanost stručnjaka u utvrđivanju činjenica u sudskom postupku

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Problem razvoja specijalizovanog znanja postaje sve značajniji u savremenoj pravnoj praksi, usled istaknute uloge koju stručnjaci imaju u sudskim postupcima. Suočena s tim izazovom, pravna teorija nastoji da odgovori na pitanje o prirodi odnosa koji se uspostavlja između sudije i eksperata pozvanih da pruže svoje stručno znanje o predmetu odlučivanja. Ovaj rad daje pregled različitih teorijskih pristupa koji analiziraju kada stručnjak zaslužuje poverenje pravnog autoriteta. Cilj teksta je da ponudi odgovor na dva ključna pitanja: kada lice poseduje odgovarajuće znanje da bi bilo smatrano stručnjakom i u kojoj meri oslanjanje na eksperta utiče na sudijsku odluku.

The Reliability of Experts in Judicial Fact-Finding*

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The problem of the development of specialized knowledge is becoming increasingly relevant in legal practice, because of the significant role played by experts in judicial trials. Faced with this problem, legal theory has tried to answer the question about the relationship that is established between the judge and the experts who are summoned in the trials to provide their own knowledge about the matter of the judgement. This article provides an overview of the different theories which have analyzed when an expert deserves the trust of the legal authority. This essay aims to answer two questions: when does a person possess the necessary knowledge to be considered an expert and to what extent does reliance on the expert influence the judge's decision.

* This essay is a revised and expanded version of the article “*Quale fiducia? Riflessioni circa l'affidabilità degli esperti*” which is being published in the journal “*Collana Quaderni della Facoltà di Giurisprudenza di Trento – edizioni Editoriale Scientifica*”.

1. INTRODUCTION

In recent years, there has been a constant increase in the relevance of expert knowledge in judicial fact-finding. Indeed, the use of technical and scientific expertise in trials and investigations continues to grow. This highlights the need to consider how courts incorporate the information provided by experts into their reasoning, given that such information is not directly accessible to factfinders. As suggested by Harold L. Korn (1966, 1080), in this context, the legal system faces the challenge of keeping up with the rapid pace of scientific progress.

The trend just outlined generates a number of issues that have long attracted the attention of legal theory and warrant careful analysis.

On one hand, the availability of advanced and sophisticated knowledge makes fact-finding more precise and reliable. Today, judges have access to a vast array of technological tools that enable them to reconstruct facts with greater accuracy. Whereas in the past one could only rely on traditional forensic evidence – such as handwriting, firearms, bullet, toolmark and fingerprint identification – the evolution of science now allows the use of more advanced and, therefore, more reliable tools. Consider, for example, new forensic technologies such as DNA typing, biometric scanning, and electronic location tracking¹. Although these new forensic technologies undoubtedly offer an unprecedented degree of certainty and reliability, this does not make them less troublesome.

On the other hand, in fact, it is becoming increasingly evident that such specialized knowledge is not equally accessible to all members of society. As previously noted, knowledge is becoming more specialized and the division of cognitive labor between experts and legal decision-makers increases (see Philip Kitcher 1990, 5–22). This means that fewer people possess the expertise required to understand the underlying mechanisms of a certain phenomenon. Consequently, relevant knowledge in trials often resides within an increasingly narrow circle of individuals, commonly referred to as *experts*. This highlights the growing importance of the role of non-legal experts in the application of legal rules.

This essay seeks to understand when an expert deserves the trust of legal authorities and how this trust influences the authorities' behavior and their final decision.

The issue of expert reliability will be addressed by answering two questions. First (§2), who can be defined as an expert? In other words, which characteristics must a person possess to be considered an expert and, therefore, trustworthy?

¹ For more about new forensic sciences see Erin Murphy 2007, 721–789. The author faces the challenge of rewrite the taxonomy of forensics sciences, illustrating their characteristics and pointing out the problems and the risks associated to their improper use.

Then (§3), to what extent does the judge's reliance on the expert should influence her decision?

2. ON WHAT IT TAKES TO BE AN EXPERT

As mentioned above, the first question one is confronted with when discussing experts' reliability, is how to define an expert. Although this question may seem trivial, it has long been a difficult issue for legal theory, which still seem unable to provide an unambiguous answer. This concept is clearly expressed by Christian Quast and Markus Seidel (2018, 1–2) who state: “however, despite the pervasive use of experts not only in scientific practices and the increasing interest in the conceptual and epistemological issues concerning expertise, the philosophical discussion about experts and expertise must be said to be still in fledgling stages”.

The first way to identify a person as an expert is based on her reputation. The so-called *reputational expert* is someone who, in a specific cognitive domain, is considered to have superior knowledge compared to laypeople. Being a reputational expert means inspiring a great amount of trust within the community.

Trust is, therefore, a fundamental characteristic of the relationship between judges and experts, as it plays a fundamental role regarding both the epistemic and procedural aspects of fact-finding.

Judges are often unable to personally verify whether a statement relevant to the case is true or false and, therefore must rely on an expert who, in the reputational model, is chosen because of her reputation. As Alessandro Pizzorno (2006, 243) says “reputation essentially denotes credibility”. In this model, reliability depends on the origin of the testimony rather than its content.

For instance, reliability may be determined by the expert's adherence to the shared values of the scientific community of reference. Alternatively, trust may stem from their celebrity status, which can make an expert appear authoritative even to those who are unable to judge her expertise. According to Andrea Rubin (2020, 25–42), reputation differs from visibility because the latter is determined not by the group to which the expert belongs, but by the judgement of laypeople.

The risk of the reputational theory lies in the possibility that an individual is considered an expert solely due to her reputation, regardless of her actual expertise. This concept is clearly expressed by Alvin Goldman (2001, 91) who says that “a reputational expert is someone widely believed to be an expert (in the objective sense), whether or not he really is one”.

This may lead legal decision-maker to defer judgement to the authority identified by reputation, passively accepting what the expert says. As John Hardwig

(1985, 343) says “the conclusion that it is sometimes irrational to think for one-self – that rationality sometimes consists in deferring to epistemic authority and, consequently, in passively and uncritically accepting what we are given to believe – will strike those wedded to epistemic individualism as odd and unacceptable, for it undermines their paradigm of rationality. To others, it may seem too obvious for such belaboring. But in either case, I submit, we should recast our epistemologies and our accounts of rationality to make them congruent with this important fact of modern life”.

For these reasons, reputation is no longer considered an acceptable criterion for identifying forensic experts and, consequently, the reputational theory is not usually incorporated into current legal systems. Nevertheless, it is important to mention it, because analyzing it provides insight into the evolution of the concept of expertise.

Having rejected the idea that reputation is the key element that distinguishes an expert from a layperson, the epistemological debate has shifted to identifying experts through *comparison*. Therefore, someone can be considered an expert if she possesses a superior level of skills or knowledges compared to laypeople in a certain domain, and according to Quast (2018, 12) “is competent enough to reliably and creditably fulfill difficult service-activities accurately for which she is particularly responsible”.

According to this view that is prevalent in current epistemology (Goldman 2018, 4) someone is considered an expert if they are better than others at ascertaining the truth of factual assertions in a specific cognitive domain, while simultaneously avoiding errors.

Consequently, this comparative identification of experts allows for a more objective assessment of an individual competence than mere reputation. Indeed, using this benchmark, an expert can be recognized even if her knowledge and expertise are not widely known to the public.

In summary, we define someone as an expert regardless her reputation among third parties because her reliability depends exclusively on the information she possesses.

However, merely possessing more knowledge than others is not a sufficient condition for qualifying someone as an expert. If this were the only characteristic required to identify someone as an expert, there would be a risk of falling again into a reputational view, in which expertise is based solely on others’ perceptions of superiority. Both theories, in fact, depend on external evaluations of individual expertise. The key difference between the comparative and the reputational theories is that the former focuses on actual knowledge, while the latter relies solely on public perception. Moreover, it would be extremely difficult – if not impossible – to determine whether someone truly possesses more knowledge than others. The challenge in applying the comparative theory stems from the fact that “more

knowledge” is not a measurable factor. Expertise cannot always be directly observed or easily compared, especially in highly specialized fields. It is not enough to claim that one person has more knowledge than another; the real challenge lies in assessing the relevance and applicability of that knowledge within specific contexts. As Michael Polanyi (1967, 4) states “we can know more than we can tell”.

For these reasons, the legal theory has expanded the comparative approach and introduced some correctives to improve it². To be identified as an expert in a specific cognitive domain, an individual must hold a very high number of true beliefs within that domain. Michel Croce (2019a, 5), discussing Goldman’s theories, states that “the notion of an expert requires a minimum threshold of true beliefs in D below which someone should not be considered expert, no matter if they are better informed on D than most people in their (or other) communities”. In other words, the expert must achieve a certain non-comparative threshold of truth. Moreover, within the same domain, the expert must have more true beliefs (or higher beliefs) and fewer false beliefs than laypeople. Goldman (2001, 91) clearly explains this concept: “as a first pass, experts in given domain (the E-domain) have more beliefs (or high degrees of belief) in true propositions and/or fewer beliefs in false propositions within that domain than most people do (or better: than the vast majority of people do). According to this proposal, expertise is largely a comparative matter”.

Being an expert means not only possessing a substantial amount of true information or more true than false information in a certain domain, but also being able to correctly apply that knowledge to address new questions that may arise within that domain. As Goldman (2001, 92) writes: “expertise features a propensity element as well as an element of actual attainment”.

Based on these considerations, both jurisprudence and case law in Italy have developed objective and subjective criteria for identifying experts.

On one hand, objective criteria refer to the quality of the experts’ scientific evidence, rather than to their personal qualifications or expertise. These criteria assess the scientific value of the evidence provided by the experts, including the breadth, rigorousness and objectivity of the research, its recognition within the scientific community, and the extent of the debate it has generated within the scientific field. Since the focus of this paper is on the expert’s qualification, it is appropriate to mention these criteria briefly, without going into further detail, as they are not the focus of this examination.

On the other hand, subjective criteria directly aim to evaluate an individual’s personal characteristics, ensuring that a true expert is selected for the case. The first judgement that established these criteria in Italy was the so-called Cozzini

2 The theories that will be exposed are by A. I. Goldman (2001, 91) that defines cognitive expertise in *veritistic terms*, i.e. related to truth.

judgement, pronounced by the Italian Supreme Court on 17 September 2010³. This judgement established that the subjective criteria for qualifying someone as an expert essentially consist of the personal qualities that the expert must possess. Examples of these criteria include the identity of the expert, i.e. what distinguishes that person from anyone else; the authority of the expert (see for example Croce 2019b; Linda Zagzebski 2012) i.e. the qualities recognized by others, and the independence and autonomy of the person in the management of the research⁴ (see especially Carlizzi, Tuzet 2018, 85–122; Carlizzi 2017, 27–47).

3. RELIABILITY OR DEFERENCE?

Having outlined the characteristics that a person must possess to be considered an expert; it is now possible to address the second question: under what conditions can an expert be considered trustworthy?

A person is considered an expert for the reasons stated above and, as such, participates in the trial to provide her knowledge. Consequently, what relationship should be established between the expert and the judge? Or rather: how should judges evaluate the expert's testimony and how significantly does this testimony influence legal decision-making?

The main question is whether fact finders should be educated by an expert or should simply defer to one (see Allen, Miller 1993). This question has often been investigated in legal theory and is still an open question as it lacks an unambiguous answer. For example, Damiano Canale (2021, 509–543) raises this question regarding the issue of the opacity of law. This phenomenon occurs when a legal authority determines the meaning of a normative text based on an expert's opinion, without fully understanding the content of the law it is applying. In this context, opacity depends not only on the complexity of the law, but also on the lack of proper interaction between the two parties, which can undermine the transparency and legitimacy of the final decision. In this sense, judges should be familiar with the inferential rules of the sciences, just as experts should be familiar with legal language.

Other authors who have addressed this issue are Ronald Allen and Joseph Miller (1993, 1131), whose theories I will refer to in the following.

According to the educational model, judges must be trained so that they can understand both the experts' words and the methodological accuracy of their argu-

3 Cassazione Penale, sezione IV, 17. September 2010, sentenza n. 43786.

4 The original Italian text of the Cozzini judgement is: "Infine, dal punto di vista del giudice, che risolve casi ed esamina conflitti aspri, è di preminente rilievo l'identità, l'autorità indiscussa, l'indipendenza del soggetto che gestisce la ricerca, e le finalità per le quali si muove".

ments. Thus, the education of judges implies the acquisition of a background of knowledges to understand the arguments presented by experts, avoiding the risk of relying on an authority solely because of its status. As suggested by Allen (2013, 53) “if the central aspiration of trials is to be achieved, the parties must educate the fact finder in all instances. [...] Making all witnesses, including what are now called expert witnesses explain their testimony will largely eliminate this problem because false propositions resist comprehensible explanations”.

In this so-called *educational model*, the Court should learn from the experts and understand the inferential rules they use. Only if the Court understands the theory applied by the expert, it will be able to decide appropriately.

Although this model has long been accepted in jurisprudence, today it is increasingly inapplicable due to the before mentioned growing division of cognitive labor. As knowledge becomes more specialized, each expert focuses on increasingly technical aspects, making it impossible for the Court to be fully educated on every relevant topic. The growing complexity of specialized knowledge means that relying on expert testimony is more reasonable than expecting judges to be educated on every technical detail. The risk of this model is that it could lead to an intolerable raising of the evidentiary standard, making it difficult for the Court to effectively evaluate the expert’s testimony.

One fundamental characteristic of the relationship between the judge and the expert is trust, which often holds greater epistemological significance than the information provided by the experts themselves. Trust is a fundamental element of knowledge and is generally defined as “the confidence in or reliance on some quality or attribute of a person or thing, or the truth of a statement”. This definition, provided by Anthony Giddens (1990, 30), highlights the connection between trust and reliance on the qualities of an individual. In the context of the relationship between an expert and a layperson, trust is an epistemological mechanism that allows laypeople to access knowledge that they cannot personally verify. Laypeople trust experts because they possess knowledges that enables them to solve complex problems through mechanisms that are beyond the reach of laypeople. In other words, trust in expert knowledge necessarily depends on society’s trust in experts. As Hardwig (1991, 694) points out, “in an important sense, then, trust is often epistemologically even more basic than empirical data or logical arguments: the data and the argument are available only through trust. If the metaphor of foundation is still useful, the trustworthiness of members of epistemic communities is the ultimate foundation for much of our knowledge”.

From this perspective, obtaining information relies on the trust that established between the expert and the judge.

This second model, which is based on trust, is known as the *deferential model*. A system based on trust leads to an inevitable deference that judges or jurors exhibit towards those experts who have passed a certain credibility threshold.

As Robert Pierson (1994, 398) states: “all of us defer to the authority of experts”; however, some clarifications are necessary, as reliance on an expert can manifest in two different attitudes in the judge, as clearly exposed by Michele Ubertone (2022a).

On one hand, the judge may use the testimony of an expert simply out of trust. In this case, the judge adopts an approach known as *epistemic deference*. This reflects the situation described earlier: the judge trusts the expert due to her credibility and expertise.

Here, deference entails accepting another’s view as correct solely based on trust. According to Allen (2013, 50) “here ‘to defer’ means to adopt someone else’s views as correct, not because you understand and agree, but because you are simply delegating that decision to someone else”.

Thus, it is crucial to understand when a person is genuinely an expert, as only those who has crossed a specific credibility threshold can foster this level of trust in judges.

This reliance is both inevitable and physiological, as judges require experts to make specialized knowledge accessible that would otherwise be incomprehensible to them. It is, in fact, an attitude directly linked to the judge’s scientific incompetence and the consequent need for help from an epistemic authority. As Ubertone (2022b, 242) says “deference in this sense is a necessary consequence of the recognition of any expert as such”.

On the other hand, deference may become problematic if the judge not only relies on experts, but also defers to them the definition of the terms used both in the testimony and in the legal texts.

In legal theory, this phenomenon is known as *semantic deference*. Ubertone (2022b, 261) defines it as “the phenomenon whereby a non-expert uses an expert as a means to identify the reference of certain concepts or words”. Essentially, lay people defer to experts to elucidate the meanings and proper usage of specific technical terms that belong to the specific lexicon of a science but are also used by ordinary speakers. For example, Diego Marconi (2012, 273) names some words that have a deferential use e.g. ‘*acid*’, or ‘*insect*’ as they are used by both ordinary speakers and scientists.

This phenomenon can be described as a *division of linguistic labor* and follows the previously mentioned division of cognitive labor. Indeed, the more epistemic dependence on experts grows, the more terms acquire this dual function.

Marconi (2012, 274) identifies episodes of semantic deference when:

- “1. Ordinary, non-expert speakers know that the word W has an expert usage that may differ from their own,
2. They believe that such expert use is the correct one,
3. They assume that their own use of W is consistent with the experts’,
4. However, they are prepared to amend it if it is shown to be inconsistent with the expert’s use.

When all of 1–4 hold, we say that word W is used deferentially by ordinary speakers”.

Having defined semantic deference, it is essential to return to our earlier discussion. While epistemic deference is an unavoidable feature of the expert-judge relationship based on trust, in the opposite, semantic deference is pathological.

This attitude can lead judges to lose control over fact-finding, not because judges must understand every underlying reason for expert testimony – which would be unreasonable given their lay status – but because they must understand the meaning of what the expert articulates regarding the legal fact.

This understanding is the only way for judges to maintain control over of the legal decision-making process and avoid basing their decisions solely on expert testimony.

If the terms used by the expert are incomprehensible to the judges, they will struggle to justify the ruling (See Ubertone 2022a, 258)⁵.

Consequently, the judgement may end up following the expert’s assertions, thus replacing the judge’s opinion. This situation must be avoided, as only the judge has the authority and power to adjudicate. And to do so effectively, judges must comprehend the rational for preferring one expert’s reconstruction over the another’s.

5 M. Ubertone 2022a, 258. Here is the text in original language: “È irragionevole richiedere ai giudici di conoscere sempre nel dettaglio le ragioni che portano l’esperto a dire che un determinato fatto si è verificato o che una determinata proposizione è vera. Ma è indispensabile esigere che i giudici comprendano il significato delle proposizioni che descrivono il fatto giuridicamente rilevante che in virtù della deposizione dell’esperto considereranno avvenuto. Se il giudice è semanticamente deferente nell’uso dei termini con cui per il tramite dell’esperto descrive il fatto concreto, non disporrà delle risorse concettuali necessarie per sussumere in modo autonomo il fatto nella norma da applicare. Delegando all’esperto il compito di determinare il riferimento di concetti chiave, il giudice perde il controllo sulla rilevanza giuridica del fatto provato. Se il riferimento dei termini utilizzati dall’esperto gli è incomprensibile, non sarà in grado di motivare la decisione dal punto di vista giuridico. In questo modo, la deferenza semantica del giudice rischia di far fuoriuscire importanti questioni di diritto dal circuito di legittimazione e controllo in cui dovrebbero essere trattate”.

4. CONCLUSION

In this essay, I have analyzed the problematic aspects of the relationship between judge and experts.

This issue is becoming increasingly significant due to the specialization of knowledge. In fact, I examined the phenomenon of cognitive labor division, which is making scientific knowledge largely inaccessible to laypeople. As a natural consequence, judges are increasingly relying on those who master this knowledge.

Only individuals with a comprehensive set of skills and knowledge — what is referred to as expertise — can be qualified experts.

In this paper, I first sought to identify who can be deemed an expert. The selection of a truly competent authority is crucial for the system to function effectively, as it establishes trust in the expert. To illustrate this, in Section 2, I discussed various theories that the doctrine has developed to identify an expert. First, I have analyzed the reputational theory, which selects an expert based on their reputation as an authority within a scientific community. Then, I have addressed the comparative theory and its corrections that are developed by legal theory to select not only a person who is more expert than another in a certain cognitive domain, but also to select someone who is genuinely an expert within that domain. Lastly, I referenced the criteria established in Italian case law for making this selection.

Secondly, in Section 3, I focused on the relationship between the judge and the selected expert. I explored the different approaches and models that have been developed to classify this relationship, distinguishing between the concepts of reliability and deference. Furthermore, I have classified deference into physiological (epistemic deference) and pathological (semantic deference) attitudes, explaining why the latter attitude should be avoided.

For all the reasons outlined in this essay, it is increasingly important to select a genuinely expert individual who can instill the necessary trust in the judging authority. In this context, a true expert must not be chosen because of her reputation within the scientific community, but rather according to her specialization and ability to provide objective opinions. The trust placed in an expert must result from a comprehensive assessment of qualifications, including also her methodological rigor and impartiality. This trust is essential, as it forms the basis upon which the expert's reliance on the testimony is built. Without it, the judge's ability to make informed and fair decisions could be seriously compromised.

Simultaneously, judges should be encouraged to retain their understanding of the underlying reasons behind the experts' opinion. This means that, while relying on the expertise of specialists, judges must be able to understand the logical and methodological path that leads to the experts' conclusions. This is the only way in

which judges can maintain their decision-making authority and avoid undue influence from experts. If judges do not maintain a critical perspective and an in-depth understanding of the expert's opinion, they risk losing their independence, thereby delegating the responsibility of judgment and compromising the legitimacy and effectiveness of the decision-making process.

In conclusion, I opine that judges may not yet be fully aware of the risk associated with semantic deference and the substantial difference this attitude has compared to epistemic deference or simple reliance. Only by providing judges with adequate tools to recognize these differences, can they identify them and avoid passive attitudes regarding expert opinion.

In essence, this is the only way for judges to retain their authority and act as the ultimate *peritus peritorum* in the judgement process.

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