Opinion evidence

18

Key Issues

- When and why should experts be allowed to give expert opinion evidence on facts in issue?
- When and why should non-experts be allowed to give non-expert opinion evidence on facts in issue?
- What are the dangers of allowing experts to give expert opinion evidence?
- What safeguards can be used against such dangers?
- What duties to the court should an expert witness have?
- If two or more parties to litigation wish to submit expert evidence on an issue, when should the court direct that the evidence on the issue be given by a single joint expert?
- Why should the parties disclose their expert opinion evidence before the trial?

As a general rule, opinion evidence is inadmissible: a witness may only speak of facts which he personally perceived, not of inferences drawn from those facts. To this general rule there are two exceptions: (i) an appropriately qualified expert may state his opinion on a matter calling for the expertise which he possesses; and (ii) a non-expert witness may state his opinion on a matter not calling for any particular expertise as a way of conveying the facts which he personally perceived. There are two main reasons for the general rule. First, it has been said that, whereas any fact that a witness can prove is relevant, his opinion is not.[1] The opinion of a non-expert has no probative value in relation to a subject calling for expertise and is usually insufficiently relevant to a subject not calling for any particular expertise. Secondly, the general rule prevents witnesses from usurping the role of the tribunal of fact. The tribunal of fact, although free to reject any opinions proffered, might be tempted simply to accept those opinions rather than draw its own inferences from the facts of the case.

The first exception assumes that a distinction can easily be drawn between a person who gives evidence of expert opinion as opposed to evidence of fact, but that is not always so.[2] The exception stems from an acknowledgment that in some cases the tribunal of fact, in the absence of opinion evidence, may be unable properly to reach a conclusion. Expert opinion evidence is admitted because the drawing of certain inferences calls for an expertise which the tribunal of fact simply does not possess. This rationale is essentially flawed: if the tribunal of fact lacks the relevant expertise, it will often be unlikely to be able to evaluate the cogency or reliability of the expert evidence.[3] In any event, and as already noted, there is a danger that the tribunal of fact may blindly defer to the opinion given. The danger is particularly acute in the case of opinions expressed by expert witnesses, whose dogmatic views, on subjects in respect of which scientific knowledge may be limited or incomplete, may occasion miscarriages of justice. Following the successful appeal of Angela Cannings in the 'cot death' case of *R v Cannings*,[4] the Attorney General announced a review of 258 convictions relating to homicide or infanticide of a baby under 2 years old by a parent, and a similar review in civil cases was ordered by the Children's Minister. The risks of miscarriage of justice are increased by the current absence of any scheme of compulsory accreditation or registration for expert witnesses and any scheme of mandatory practical training for judges and practitioners in understanding expert evidence and in assessing its likely reliability.[5]

The duties and responsibilities of the expert are governed, in criminal litigation, by Part 33 of the Criminal Procedure Rules 2005, and in civil litigation by CPR rule 35, as supplemented by a Protocol for the Instruction of Experts to Give Evidence in Civil Claims, designed to help experts and those instructing them in all cases where the CPR apply.

The second non-expert exception stems from a recognition that the fundamental assumption upon which the general rule is based, that it is possible to distinguish between fact and

[1] Per Goddard LJ in *Hollington v Hewthorn & Co Ltd* [1943] KB 587 at 595, CA.

[2] The distinction is of considerable procedural significance, especially in civil cases, where expert witnesses are subject to strict case management compared to witnesses of fact: see D Dwyer, 'The effect of the fact/opinion distinction on CPR r.35.2: *Kirkman v Euro Oxide Corporation; Gall v Chief Constable of the West Midlands*' (2008) 12 *E&P* 141. See also *Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd* [2008] All ER (D) 04 (Oct), TCC: in construction litigation, if an engineer, being an expert in his field, is called as a witness of *fact*, he may also give expert opinion reasonably related to the facts within his knowledge.

[3] See P Roberts and A Zuckerman, *Criminal Evidence* (Oxford, 2004) at 294–5.

[4] [2004] 1 WLR 2607, CA, Ch 8.

[5] For an analysis of the need for forensic science training, and specific recommendations, see the House of Commons Science and Technology Committee, *Forensic Science on Trial*, HC 96-I 2005.

opinion, is false.[6] The words of a witness testifying as to perceived facts are always coloured, to some extent, by his opinion as to what he perceived. The separation of an inference or value judgment from the facts on which it is based is often extremely difficult and sometimes impossible. In criminal proceedings, for example, a witness may identify the accused as the culprit, saying, 'He is the man I saw.' It is evidence of opinion, not fact. The witness means: 'He so resembles the man I saw that I am prepared to say that they are one and the same.' He could confine himself to a description of the man he saw and leave it to the jury to decide whether the description fits the accused. In cases of this kind, the opinion expressed conveys the facts perceived. The witness, in such cases, is allowed to give his evidence in his own way which is often, although not invariably, the most natural and comprehensible way in which to convey to the tribunal of fact the facts as he perceived them.

Expert opinion evidence[7]

Matters calling for expertise

Examples

The opinion evidence of an expert is only admissible on a matter calling for expertise. The field of expertise is large and ever-expanding.[8] It embraces subjects as diverse as accident investigation and driver behaviour,[9] the age of a person,[10] ballistics, battered women's syndrome,[11] blood tests, breath tests, blood-alcohol levels and back-calculations thereof,[12] ear-print identification,[13] facial mapping[14] or facial identification by video superimposition,[15] fingerprint identification, voice identification,[16] DNA or genetic fingerprinting,[17] indented

[6] 'In a sense all testimony to matter of fact is opinion evidence; ie it is a conclusion formed from phenomena and mental impressions': Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston, 1898) 524.

[7] This section of the chapter concerns expert *evidence*. Civil actions without a jury in the High Court may be tried by a judge sitting with assessors. The function of assessors, who are principally used in the Admiralty Court in cases concerning collisions between vessels, is to assist the judge on matters of fact calling for specialized knowledge: see s 70 of the Supreme Court Act 1981, s 63 of the County Courts Act 1984, and CPR r 35.15.

[8] *The Expert Witness Directory 2006* claims coverage of over 1,800 specialisms.

[9] See *R v Dudley* [2004] All ER (D) 374 (Nov).

[10] *R (I) v Secretary of State for the Home Department* [2005] EWHC 1025 (Admin) and *N (a child) (residence order), Re* [2006] EWHC 1189 (Fam).

[11] See *R v Hobson* [1998] 1 Cr App R 31, CA.

[12] Ie calculation of the amount of alcohol eliminated in the period between driving and providing a specimen in order to show that a person's alcohol level was above the prescribed limit at the time of driving. See *Gumbley v Cunningham* [1989] 1 All ER 5, HL.

[13] *R v Dallagher* [2003] 1 Cr App R 195, C; *R v Kempster* (*No 2*) [2008] 2 Cr App R 256, CA.

[14] *R v Stockwell* (1993) 97 Cr App R 260, CA. It is open to the jury in a criminal trial to convict on the basis of such expert evidence: *R v Mitchell* [2005] All ER (D) 182 (Mar).

[15] *R v Clarke* [1995] 2 Cr App R 425, CA.

[16] *R v Robb* (1991) 93 Cr App R 161, CA.

[17] For a basic description of the method by which DNA profiling is carried out, see *R v Gordon* [1995] 1 Cr App R 290 at 293–4, CA. The technique may be used not only to identify criminal suspects but also to decide questions of pedigree. In evaluating DNA evidence, use should not be made of Bayes Theorem, or any similar statistical method of analysis, because it plunges the jury into inappropriate and unnecessary realms of theory and complexity: *R v Adams* [1996] 2 Cr App R 467, CA. As to the procedure to be adopted when DNA evidence is introduced, see *R v Doheny and Adams* [1997] 1 Cr App R 369, CA. See also Mike Redmayne, 'The DNA Database: Civil Liberty and Evidentiary Issues' [1995] *Crim LR* 437 and C Jowett, 'Sittin' in the Dock with the Bayes' (2001) *NLJ* 201. For the controversy about the use of Low Copy Number DNA analysis, following the concerns expressed in *R v Hoey* [2007] NICC 49, see C Foster, 'Untwining the strands' (2008) *NLJ* 157 and S Burns, 'Low copy DNA on trial' [2008] *NLJ* 919.

impressions left on one document as a result of writing on another,[18] insanity, lip reading,[19] Sudden Infant Death Syndrome (SIDS),[20] the genuineness of works of art, and the state of public opinion.[21] Frequently recurring examples of matters upon which expert evidence is admissible include medical, scientific, architectural, engineering, and technological issues and questions relating to standards of professional competence, market values, customary terms of contracts, and the existence of professional and trade practices. Handwriting may be proved either by a non-expert familiar with the handwriting in question[22] or by a qualified expert, but an expert should be called in criminal cases tried by jury when, pursuant to section 8 of the Criminal Procedure Act 1865, disputed handwriting is compared with a specimen sample of handwriting proved to the satisfaction of the court to be genuine.[23] Expert opinion is admissible on questions of a literary or artistic nature, for example in relation to the defence of 'public good' under section 4 of the Obscene Publications Act 1959, which provides that:

> (1) A person shall not be convicted of an offence ... if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.
> (2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground.

A final example, calling for special attention, is a point of foreign law, which, as we have seen in Chapter 2, is a question of fact to be decided on the evidence by the judge. Foreign law is usually proved by the evidence, including opinion evidence, of an expert[24] who may refer to foreign statutes, decisions, and textbooks.[25] If the evidence of the experts conflicts, the judge is bound to look at the sources of knowledge from which the experts have drawn, in order to decide between the conflicting testimony.[26] However, he is not at liberty to conduct his own

[18] The impressions may be detected by the use of Electrostatic Detection Apparatus (ESDA). ESDA has been useful not only in dating documents and determining the origin of anonymous communications, but also in showing whether pages were written in sequence and whether there were subsequent additions to the contents: see *R v Wellington* [1991] Crim LR 543, CA and generally Audrey Giles, 'Good Impressions' (1991) *NLJ* 605.

[19] *R v Luttrell* [2004] 2 Cr App R 520, CA.

[20] See *R v Cannings* [2004] 1 WLR 2607, CA, Ch 8.

[21] Eg on the issue of reputation in passing-off actions. See *Sodastream Ltd v Thorn Cascade Co Ltd* [1982] RPC 459 and *Lego Systems A/S v Lego M Lemelstrich Ltd* [1983] FSR 155. Cf *Reckitt & Colman Products v Borden Inc (No 2)* [1987] FSR 407.

[22] *Doe d Mudd v Suckermore* (1837) 5 Ad&El 703.

[23] *R v Harden* [1963] 1 QB 8, CCA: see generally Ch 9.

[24] An exception exists in the case of the construction of provisions of foreign legislation admitted in evidence under the Evidence (Colonial Statutes) Act 1907: see the authorities cited in *Jasiewicz v Jasiewicz* [1962] 1 WLR 1426. Under s 1 of the 1907 Act, copies of Acts, ordinances, and statutes passed by the legislature of any part of Her Majesty's dominions exclusive of the UK and of orders, regulations, and other instruments issued or made under the authority of any such Act, ordinance, or statute, if purporting to be printed by the government printer of the possession shall be received in evidence by all courts in the UK without proof that copies were so printed. See also s 6 of the Colonial Laws Validity Act 1865. The British Law Ascertainment Act 1859 permits English courts to state a case on a point of foreign law for the opinion of a superior court in another part of Her Majesty's dominions. The opinion pronounced is admissible in evidence on the point of foreign law in question. See also the Foreign Law Ascertainment Act 1861.

[25] It may also be proved by the witness statement of an expert (if admissible) or by a statement of agreed facts pursuant to s 10 of the Criminal Justice Act 1967: *R v Ofori (No 2)* (1993) 99 Cr App R 223, CA.

[26] Per Lord Langdale MR in *Nelson (Earl) v Lord Bridport* (1845) 8 Beav 527 at 537 and per Scarman J in *Re Fuld's Estate (No 3), Hartley v Fuld* [1968] P 675 at 700–3.

research into those sources and to rely on material not adduced in evidence in order to reject the expert evidence.[27]

At common law, the consequence of treating foreign law as a question of fact is that where there has been an English decision on a particular point of foreign law and the same point subsequently arises again, it must be decided afresh on new expert evidence.[28] This remains the position where a point of foreign law arises in English criminal proceedings. The position in civil proceedings, however, has now been altered by section 4 of the Civil Evidence Act 1972 (the 1972 Act). Section 4(2)(a) of that Act provides that a previous determination by an English court of superior status, whether civil or criminal, on a point of foreign law shall, if reported in citable form,[29] be admissible in evidence in civil proceedings. Section 4(2)(b) provides that except where there are two or more previous determinations which are in conflict, the foreign law on the point in question shall be taken to be as previously determined unless the contrary is proved.[30] Subsection (2)(b) raises a presumption that the earlier decision is correct. However, the court which has to consider the question for a second time decides for itself what weight to attach to the previous decision and, although it is desirable to reach consistent conclusions, the subsection is not to be construed as laying down a general rule that the presumption can only be displaced by particularly cogent evidence.[31]

Matters within the experience and knowledge of the tribunal of fact

Where the triers of fact can form their own opinion without the assistance of an expert, the matter in question being within their own experience and knowledge, the opinion evidence of an expert is inadmissible because unnecessary.[32] Thus leave should not be granted to call a professor of psychology or other medical evidence to demonstrate the likely deterioration of the memory of an ordinary witness.[33] On the other hand, although a witness's ability to remember events will ordinarily be well within the experience of jurors, in rare cases in which a witness gives evidence of an event said to have occurred during 'the period of childhood amnesia', which extends to the age of about seven, and the evidence is very detailed and contains a number of details that are extraneous to the central feature of the event, an appropriately qualified expert may give evidence that it should be treated with caution and may be unreliable because recall of events during that period will be fragmented, disjointed, and idiosyncratic rather than a detailed

[27] Per Lord Chelmsford in *Duchess Di Sora v Phillipps* (1863) 10 HL Cas 624 at 640 and per Purchas LJ in *Bumper Development Corpn Ltd v Metropolitan Police Comr* [1991] 4 All ER 638 at 643–6, CA.

[28] *M'Cormick v Garnett* (1854) 23 LJ Ch 777.

[29] Ie where the report, if the question had been as to the law of England and Wales, could have been cited as an authority in legal proceedings in England and Wales: s 4(5).

[30] Notice of intention to rely on the previous determination must be given to the other parties: s 4(3) and CPR r 33.7.

[31] *Phoenix Marine Inc v China Ocean Shipping Co* [1999] 1 Lloyd's Rep 682, QBD.

[32] Per Lawton LJ in *R v Turner* [1975] QB 834 at 841. In some cases, however, a jury may properly receive assistance on a matter within their own experience and knowledge on the basis that the witness has had more time and better facilities to consider the matter than it would be practicable to afford to them. Such a witness, in reality a non-expert, may be regarded as 'sufficiently expert ad hoc': see *R v Howe* [1982] 1 NZLR 618 at 627. Thus in *R v Clare and Peach* [1995] 2 Cr App R 333, CA an officer who had viewed a video-recording about 40 times, examining it in slow motion, frame by frame, was permitted to give evidence as to whether persons on the recording were the accused. However, research suggests that the accuracy of identification is not significantly enhanced by repeated replay: Bruce et al 'Face Recognition in Poor Quality Video Evidence from Security Surveillance' (1999) 10 *Psychological Science* 243. See also Munday, 'Videotape Evidence and the Advent of the Expert Ad Hoc' (1995) 159 *JP* 547.

[33] *R v Browning* [1995] Crim LR 227, CA.

narrative account.[34] Similarly, expert evidence may be admitted as to the dangers of evidence produced by hypnotherapy, not to express an opinion on the witness's truthfulness, but to criticize the techniques of the hypnotherapist and express an opinion about the danger that *if* the witness's recollection was falsely engendered, the witness would regard it as genuine memory.[35]

Expert evidence is inadmissible on the question whether an unidentified person shown in a photograph is under the age of 16.[36] It is also inadmissible on a trial for posting packets containing indecent articles, on the ordinary meaning of the words 'indecent or obscene'.[37] Similarly, in the ordinary case, the issue of obscenity in prosecutions under the Obscene Publications Act 1959 falls to be tried without the assistance of expert evidence.[38] *DPP v A & B C Chewing Gum Ltd*,[39] was not an 'ordinary case', but 'a very special case'[40] which should be regarded as 'highly exceptional and confined to its own circumstances'.[41] The accused was charged with publishing for gain obscene battle cards which were sold together with packets of bubble gum. The Divisional Court held that the magistrates had improperly refused to admit the evidence of experts in child psychiatry concerning the likely effect of the cards on children. Lord Parker CJ was of the opinion that, whereas expert opinion evidence as to whether a publication tends to deprave or corrupt may be unnecessary when considering its effect on an adult, it was admissible when considering its effect on children of various ages from five upwards because then 'any jury and any justices need all the help they can get'.

The distinction between matters calling for expertise and matters within the experience and knowledge of the jury is also illustrated by cases concerning a person's mental state. As we shall see, many of the decisions reflect the view that expertise is only called for in the case of a person suffering from a mental illness, a view which, it is submitted, is unnecessarily inflexible. As Farquharson LJ observed in *R v Strudwick*:[42]

> The law is in a state of development in this area. There may well be other mental conditions about which a jury might require expert assistance in order to understand and evaluate their effect on the issues in a case.

Expert psychiatric evidence is a practical necessity in order to establish insanity[43] or diminished responsibility.[44] In *R v Smith*[45] the accused was convicted of murder by stabbing. His

[34] *R v H (JR) (Childhood Amnesia)* [2006] 1 Cr App R 195, CA. The ambit of the decision should not be widened and care should be taken in the case of a narrative which has become 'polished' simply as a part of the process of the police questioning a witness and then drafting his statement: *R v S; R v W* [2007] 2 All ER 974, CA.

[35] *R v Clark* [2006] EWCA Crim 231.

[36] *R v Land* [1998] 1 Cr App R 301, CA.

[37] *R v Stamford* [1972] 2 QB 391.

[38] *R v Anderson* [1972] 1 QB 304 per Lord Widgery CJ at 313. Cf *R v Skirving; R v Grossman* [1985] 2 All ER 705, where the jury needed expert evidence on the characteristics of cocaine and the different effects of the various methods of ingesting the drug on the user and abuser in order to decide whether a book had a tendency to deprave and corrupt.

[39] [1968] 1 QB 159.

[40] Per Ashworth J in *R v Stamford* [1972] 2 QB 391, CA at 397.

[41] Per Lord Widgery CJ in *R v Anderson* [1972] 1 QB 304 at 313. See also the doubts expressed about the case by Lord Dilhorne in *DPP v Jordan* [1977] AC 699, HL at 722.

[42] (1993) 99 Cr App R 326, CA at 332.

[43] See s 1(1) of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, below.

[44] See *R v Byrne* [1960] 2 QB 396 at 402, applied in *R v Dix* (1981) 74 Cr App R 306, CA. See also *R v Chan-Fook* [1994] 2 All ER 552, CA, applied in *R v Morris* [1998] 1 Cr App R 386, CA: where psychiatric injury is relied on as the basis for a charge of assault occasioning actual bodily harm and is not admitted by the defence, the Crown should call expert evidence.

[45] [1979] 1 WLR 1445, CA.

defence was automatism while asleep. The Court of Appeal held that psychiatric evidence adduced by the prosecution as to whether the evidence of the accused was consistent with his defence had been properly admitted, the type of automatism in question not being within the realm of the ordinary juryman's experience. Concerning the defence of duress by threats, expert medical evidence is admissible for the purposes of the subjective (but not the objective) test, provided that the mental condition or abnormality in question is relevant and its effects are outside the knowledge and experience of laymen.[46] However, according to *R v Walker*[47] psychiatric evidence may be admissible to show that an accused was suffering from some mental illness, mental impairment, or recognized psychiatric condition, provided persons generally suffering from such a condition might be more susceptible to pressure and threats, and thus to assist the jury in deciding whether a reasonable person suffering from such a condition might have been impelled to act as the accused did, but evidence is not admissible that an accused who was not suffering from such an illness, impairment or condition, was especially timid, suggestible or vulnerable to pressure and threats.

Except where the accused comes into the class of mental defective or is afflicted by some medical condition affecting his mental state, expert medical or psychiatric evidence is not admissible on the question of *mens rea*.[48] In *R v Wood*,[49] W, charged with murder, raised the partial defence under section 4 of the Homicide Act 1957 of unsuccessful execution of a suicide pact. Once the killing was proved, the questions were whether there was such a pact and whether W was acting in pursuance thereof and had the settled intention of dying in pursuance thereof. It was held that psychiatric evidence that W had a personality which to some extent was abnormal and liable to give way to excesses of behaviour under stress had been properly excluded, the matter not being outside the ordinary experience of the average juror. Similarly, in *R v Masih*,[50] in which the appellant, who was convicted of rape, suffered from no psychiatric illness but had an intelligence quotient of only 72, just above the level of subnormality, it was held that on the question of whether he knew that the complainant was not consenting or was reckless as to whether she consented or not, expert psychiatric evidence about his state of mind, intelligence, and ability to appreciate the situation had been properly excluded. The Court of Appeal held that, generally speaking, if an accused comes into the class of mental defective, with an IQ of 69 or below, then insofar as that defectiveness is relevant to an issue, expert evidence may be admitted, provided that it is confined to an assessment of the accused's IQ and an explanation of any relevant abnormal characteristics, to enlighten the jury on a matter that is abnormal and *ex hypothesi* outside their experience; but where an accused is within the scale of normality, albeit at the lower end, as the appellant was, expert evidence should generally be excluded.[51]

[46] *R v Hegarty* [1994] Crim LR 353, CA. See also *R v Horne* [1994] Crim LR 584, CA; and cf *R v Hurst* [1995] 1 Cr App R 82, CA.

[47] [2003] All ER (D) 64 (Jun).

[48] *R v Chard* (1971) 56 Cr App R 268, CA. See also *R v Reynolds* [1989] Crim LR 220, CA and, in the case of adolescents, *R v Coles* [1995] 1 Cr App R 157, CA.

[49] [1990] Crim LR 264, CA.

[50] [1986] Crim LR 395, CA. See also *R v Hall* (1987) 86 Cr App R 159, CA and *R v Henry* [2006] 1 Cr App R 118, CA and contrast *Schultz v R* [1982] WAR 171 (Supreme Court of Western Australia). In *R v Lupien* (1970) 9 DLR (3d) 1 (Supreme Court of Canada) it was held that psychiatric evidence is admissible to show a person's lack of capacity to form intent.

[51] However, as Hodgson J stated in *R v Silcott* [1987] Crim LR 765 (see [1988] Crim LR 293): 'To draw a strict line at 69/70 does seem somewhat artificial.' For a critical analysis of the notion that there is a clear line dividing normality

In *R v Toner*,[52] a case of attempted murder in which a doctor gave evidence that T may have been suffering from a minor hypoglycaemic state caused by eating after a 41-day fast, it was held that the defence should have been permitted to cross-examine him as to whether the effect of such an attack could have negatived T's special intent to kill and to cause serious bodily harm. The Court of Appeal could see no distinction between such medical evidence and medical evidence as to the effect of a drug on intent: both matters were outside the ordinary experience of jurors. Similarly in *R v Huckerby*[53] it was held that evidence that the accused was suffering from post-traumatic stress disorder, a recognized mental condition with which the jury would not be expected to be familiar, was admissible because relevant to an essential issue bearing upon his guilt or innocence, namely whether it caused him to panic and cooperate with criminals in circumstances where he would otherwise not have done so.

Expert evidence is generally inadmissible on the issue of a witness's credibility.[54] In *Re S (a child) (adoption: psychological evidence)*,[55] an appeal against a care order, the judge at first instance had relied on the results of a personality questionnaire, including a 'Lie-Scale' measuring the mother's willingness to distort her responses in order to create a good impression. Allowing the appeal, it was held that the results of personality or psychometric tests should only rarely have any place in such cases because it is for judges to decide questions of credibility.

In its consultation paper *Convicting Rapists and Protecting Victims—Justice for Victims of Rape* (2006), the Government proposed that prosecutors should be able to present general expert evidence about the psychological impact of sexual offences upon victims. This impact is not necessarily within the understanding of the average juror and expert evidence is capable of dispelling popular myths and misconceptions and explaining behaviour which might otherwise be thought to be puzzling, including, for example, delay in making a complaint.[56] The Government's proposal has, in the light of the responses to the consultation paper, been replaced by a proposal to provide information packs or videos for jurors or to give them special warnings. The original proposal, however, reflected an assumption that expert evidence concerning the behavioural symptoms typical of victims of sexual abuse is currently not admissible because it relates to their credibility. The assumption is erroneous, it is submitted, because such evidence, if general in nature and if it does not include an opinion on the credibility of the victim, simply provides the tribunal of fact with relevant information by which it may better evaluate the witness's evidence.[57]

---

and subnormality, see R D Mackay, 'Excluding Expert Evidence: a tale of ordinary folk and common experience' [1991] *Crim LR* 800.

[52] (1991) 93 Cr App R 382, CA.

[53] [2004] EWCA Crim 3251, [2004] All ER (D) 364 (Dec).

[54] See *R v Henry* [2006] 1 Cr App R 118, CA (the credibility of the accused) and *R v Joyce* [2005] NTS 21 (the credibility of a prosecution witness) and cf *R v S* [2006] EWCA Crim 2389, Ch 7.

[55] [2004] EWCA Civ 1029, [2004] All ER (D) 593 (Jul). As to credibility, see also *R v Robinson* [1994] 3 All ER 346, CA and, in the case of children, *G v DPP* [1997] 2 All ER 755 at 759–60, CA.

[56] For a comparative review of the admissibility of expert evidence to explain delay, see Lewis, 'Expert evidence of delay in complaint in childhood sexual abuse prosecutions' (2006) 10 *E&P* 157.

[57] But see the response to the consultation by the Council of Circuit Judges: '…general expert evidence that cannot focus on the credibility of the individual case would be of limited real value'. For an examination of some of the credibility barriers confronting victims of sexual offences, the use of expert witness testimony in the USA, and the potential admissibility of such evidence in England and Wales, see Ellison, 'Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases' (2005) 9 *E&P* 239. See also Dempsey, *The Use of Expert Testimony in the Prosecution of Domestic Violence* (CPS London, 2004).

Expert evidence is generally inadmissible to establish that an accused was likely to have been provoked. In *R v Turner*[58] the accused was convicted of murder by battering a girl 15 times with a hammer. His defence was provocation, that he was deeply in love with the girl, who, he thought, was pregnant by him, and that he had struck her when she told him with a grin that while he had been in prison she had been sleeping with other men, that she could make money in this way, and that the child she was carrying was not his. The accused appealed on the ground that the trial judge had refused to admit psychiatric evidence on the issues of credibility and provocation. The psychiatrist intended to say, inter alia, that the accused had a deep emotional relationship with the girl which was likely to have caused an explosive release of blind rage when she confessed her infidelity to him and that, subsequent to the killing, he had behaved like someone suffering from profound grief. The Court of Appeal held that the jury needed no expert assistance in deciding either what reliance they could put upon the accused's evidence or the likelihood of his having been provoked, a matter which was well within ordinary human experience.[59] *R v Turner* is not easily reconciled with the earlier decision of the Privy Council in *Lowery v R*.[60] L and K were charged with murder, the circumstances being such that one or both of them must have committed the offence. There was no apparent motive for the murder. The Privy Council held that the trial judge had properly permitted K to call a psychologist to give evidence that L was aggressive, lacking in self-control, and more likely to have committed the offence than K. However, even if evidence of L's disposition was properly admissible,[61] it is unclear why it was given by an expert. In *R v Turner* Lawton LJ said:[62]

> We adjudge *Lowery v R* to have been decided on its special facts. We do not consider that it is an authority for the proposition that in all cases psychologists and psychiatrists can be called to prove the probability of the accused's veracity.[63]

Lowery v R was relied upon by the House of Lords in *R v Randall*[64] as a precedent for the proposition that in appropriate cases the propensity to violence of an accused may be relevant to the issues between the prosecution and the co-accused tendering such evidence, but the House expressly declined to explore any doubts about the admissibility of *expert* evidence on propensity.[65]

The expert evidence of a psychiatrist or psychologist is admissible on the issue of the reliability or truth of a confession.[66] It has been said that such evidence will not be admissible before the jury on the issue of the truth of a confession made by an accused who, although he may have an abnormal personality, does not suffer from mental illness and is not below normal intelligence.[67] This is misleading because the evidence admissible is not confined to evidence

[58] [1975] QB 834.

[59] See also per Lord Simon in *R v Camplin* [1978] AC 705, HL at 727.

[60] [1974] AC 85.

[61] See Ch 17.

[62] [1975] QB 834, CA at 842.

[63] See also *Toohey v Metropolitan Police Comr* [1965] AC 595, HL; *R v MacKenney* [2004] 2 Cr App R 32, CA; and *R v Robinson* [1994] 3 All ER 346 (all in Ch 7); *R v Bracewell* (1978) 68 Cr App R 44; and *R v Rimmer and Beech* [1983] Crim LR 250, CA.

[64] [2004] 1 All ER 467, HL.

[65] See Per Lord Steyn at [30].

[66] See *R v Walker* [1998] Crim LR 211, CA and *R v Ward* [1993] 1 WLR 619, CA.

[67] *R v Weightman* (1990) 92 Cr App R 291, CA.

of personality disorders so severe as properly to be categorized as mental disorders. The test is not whether the abnormality fits into a recognized category such as anti-social personality disorder. That is neither necessary nor sufficient. There are two requirements. First, the abnormal disorder must be of the type which might render the confession unreliable, and in this respect there must be a very significant deviation from the norm. Secondly, there should be a history pre-dating the making of the confession, based not solely on what the accused says, which points to or explains the abnormality. When such evidence is admitted at trial, the jury should be directed that they are not obliged to accept it, but may consider it as throwing light on the personality of the accused and bringing to their attention aspects of it of which they might otherwise have been unaware.[68] The evidence of a psychologist is also admissible to show the likely unreliability of a confession made by someone not suffering from any abnormal disorder if it is a 'coerced compliant confession', that is a confession brought about by fatigue and inability to control what is happening, which may induce a vulnerable individual to experience a growing desire to give up resisting the suggestions put to him so that eventually he is overwhelmed by the need to achieve the immediate goal of ending the interrogation.[69]

Expert witnesses

Expertise

A witness is competent to give expert evidence only if, in the opinion of the judge, he is properly qualified in the subject calling for expertise.[70] In rare cases it will be necessary to hold a *voir dire* to decide whether a purported expert should be allowed to give evidence, but in the vast majority of cases the judge will be able to make the decision on the basis of written material. The judge, during the trial, also has the power, should the need arise, to remove a witness's 'expert' status and limit his evidence to factual matters.[71]

An expert may have acquired his expertise through study, training, or experience. Thus an engineer who understands the construction of harbours, the causes of their destruction and how remedied, may express his opinion on whether an embankment caused the decay of a harbour;[72] a police officer with qualifications and experience in accident investigation may give expert opinion evidence on how a road accident occurred;[73] and someone with no medical qualifications but with experience and knowledge of drug abuse through charitable work, drug projects, and personal research may give expert opinion evidence as to what quantities of ecstasy are consistent with personal use and how users acquire an increasing tolerance of the drug.[74] On the other hand, a medical orderly experienced in the treatment of cuts is not

[68] *R v O'Brien* [2000] Crim LR 676, CA, applied in *R v Smith* [2003] EWCA Crim 927, [2003] All ER (D) 28 (Apr).

[69] *R v Blackburn* [2005] 2 Cr App R 440, CA.

[70] But see s 1(1) of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991: a jury shall not acquit on the ground of insanity except on the evidence of two or more registered doctors, at least one of whom is approved by the Secretary of State as having appropriate expertise. An expert, if competent to testify, is also compellable, even where having inadvertently advised both parties, he is loath to appear on behalf of one of them: *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380, CA.

[71] *R v G* [2004] 2 Cr App R 638, CA.

[72] *Folkes v Chadd* (1782) 3 Doug KB 157.

[73] *R v Oakley* (1979) 70 Cr App R 7, CA; *R v Murphy* [1980] QB 434, CA. Cf *Hinds v London Transport Executive* [1979] RTR 103, CA. See also *R v Hodges* [2003] 2 Cr App R 247, CA, below. See also, *sed quaere*, *R v Somers* [1963] 1 WLR 1306, CCA.

[74] *R v Ibrahima* [2005] Crim LR 887, CA. Cf *R v Edwards* [2001] EWCA Crim 2185, below.

sufficiently qualified to express an opinion on whether a cut to the forehead was caused by a blunt instrument or a head-butt.[75] There is no requirement that the witness should have acquired his expertise professionally or in the course of his business. Thus in *R v Silverlock*[76] the Court for Crown Cases Reserved held that a solicitor who had studied handwriting for 10 years, mostly as an amateur, had properly been allowed to give his opinion as to whether certain disputed handwriting was that of the accused.

Many of the cases concern the competence of a witness to give expert opinion evidence on a point of foreign law. A person has been held to be suitably qualified for these purposes if he is a practitioner in the foreign jurisdiction in question,[77] a former practitioner,[78] a person who has not practised in the jurisdiction but is qualified to do so,[79] or a person who has acquired the appropriate expertise other than by practice, whether by academic study,[80] as an embassy official,[81] or in the course of some non-legal profession or business such as banking[82] or trading.[83] Although at common law there is authority that a practitioner in the jurisdiction in question should *always* be called,[84] in civil proceedings section 4(1) of the 1972 Act now declares that:

> a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, irrespective of whether he has acted or is entitled to act as a legal practitioner there.

Independence

As we shall see, the role of an expert witness is special because he owes a duty to the court which he must discharge notwithstanding the interest of the party calling him.[85] A conflict of interest does not automatically disqualify an expert, because the key question is whether his evidence is independent, but if the conflict is material or significant, which is a question for the court and not the parties, the evidence should be excluded or ignored, and therefore a party who wishes to call an expert with a potential conflict of interests of any kind should disclose the details to the other party and to the court at the earliest possible opportunity.[86] In *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No 3)*[87] the expert was a good friend of the defendant on whose behalf he was called. The expert said that his personal sympathies were engaged to a greater degree than would probably be normal with an expert witness. It was held that this admission rendered the evidence unacceptable on grounds of policy: that

[75] *R v Inch* (1989) 91 Cr App R 51, C-MAC.

[76] [1894] 2 QB 766.

[77] *Baron de Bode's Case* (1845) 8 QB 208.

[78] *Re Duke of Wellington, Glentanar v Wellington* [1947] Ch 506.

[79] *Barford v Barford and McLeod* [1918] P 140.

[80] *Brailey v Rhodesia Consolidated Ltd* [1910] 2 Ch 95 (Reader in Roman-Dutch Law to the Council of Legal Education).

[81] *Dost Aly Khan's Goods* (1880) 6 PD 6.

[82] *de Beéche v South American Stores* [1935] AC 148, HL; *Ajami v Comptroller of Customs* [1954] 1 WLR 1405, PC.

[83] *Vander Donckt v Thellusson* (1849) 8 CB 812.

[84] *Bristow v Sequeville* (1850) 5 Exch 275.

[85] See per Cresswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68.

[86] *Toth v Jarman* [2006] EWCA Civ 1028.

[87] [2001] 1 WLR 2337, Ch D.

justice must be seen to be done as well as done. While accepting that there was no statutory or other authority expressly excluding the expert evidence of a friend of one of the parties, it was held that where there is a relationship between them which a reasonable observer might think was capable of affecting the views of the expert so as to make him unduly favourable to the party calling him, his evidence should not be admitted, however unbiased his conclusions might probably be.[88] However, it has also been held that an employee of a party can be an independent expert, provided that the party can demonstrate that the employee has not only the relevant experience but also an awareness of his overriding duty, as an expert witness, to the court.[89] Similarly, in the case of an expert who is an employee of a third party, it has been held that an acknowledged risk of a subliminal but not conscious bias or lack of objectivity goes to weight and not admissibility.[90]

Reliability

On a number of occasions, English judges have cited with approval the test for the admissibility of expert evidence as propounded in *R v Bonython*[91] where, in addition to the issues of whether the subject matter of the opinion calls for expertise and whether the witness has the requisite expertise, reference is also made to 'whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court'. However, English law, with notable exceptions, shows a general reluctance to apply any such condition of admissibility, which is curious given the obvious dangers, especially in criminal trials, of allowing the tribunal of fact to rely on 'expert' testimony of questionable reliability.[92]

R v Gilfoyle,[93] one of the exceptions, was a murder trial in which the only other possible explanation for the death was suicide. The Court of Appeal refused to hear the fresh evidence of a psychologist who had carried out a 'psychological autopsy' of the deceased. One of the reasons given for this conclusion was that the expert had identified no criteria by reference to which the court could test the quality of his opinions: there was no database comparing real and questionable suicides and there was no substantial body of academic writing approving his methodology. Another reason was the Canadian and United States authority pointing against the admission of such evidence. The court was of the view that the English approach accorded with the guiding principle in the United States, as stated in *Frye v United States*,[94] and to the effect that expert evidence based on novel or developing scientific techniques that are not generally accepted by the scientific community should be excluded. In fact, the test in *Frye* is no longer the guiding principle in the United States. In *Daubert v Merrell Dow Pharmaceuticals*[95]

[88] The decision has since been doubted: see *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002] 1 WLR 272, Ch D at [33].

[89] *Field v Leeds City Council* [2001] CPLR 129.

[90] *R v Stubbs* [2006] EWCA Crim 2312, CA at [59].

[91] (1984) 38 SASR 45.

[92] See generally M Redmayne, *Expert Evidence and Criminal Justice* (Oxford, 2001), ch 5, WE O'Brian Jr, 'Court scrutiny of expert evidence: Recent decisions highlight the tensions' (2003) 7 *E&P* 172 and the report of the House of Commons Science and Technology Committee, *Forensic Science on Trial*, HC 96–1 2005, which recommends the establishment of a Forensic Science Advisory Council to develop a gate-keeping test for expert evidence.

[93] [2001] 2 Cr App R 57, CA.

[94] 293 F 1013 (DC Cir, 1923).

[95] 509 US 579 (1993).

the Supreme Court held that in federal courts the test had been superseded by rule 702 of the Federal Rules of Evidence 1975; that the courts must ensure the reliability, as well as the relevance, of scientific evidence before admitting it; and that reliability is to be determined having regard to a number of factors, including whether the technique can be and has been tested, whether it has been the subject of publication and peer review, its error rate, and whether it is generally accepted.

In *R v Dallagher*,[96] where identity was in issue, evidence was received from two experts who had examined ear prints. The expertise of ear print comparison is in its relative infancy, and after the trial it emerged that other forensic scientists had misgivings about the extent to which ear print evidence alone can, in the present state of knowledge, safely be used to identify a suspect. It was held that the expert evidence had been properly admitted, but the appeal was allowed and a retrial ordered on the basis that the fresh evidence, if given at trial, might reasonably have affected the approach of the jury to the identification evidence of the experts and thus affected their decision to convict.[97] In reaching its decision that the expert evidence had been properly admitted, the court appeared to accept that the English approach is analogous to that to be found in rule 702 of the Federal Rules of Evidence and also referred to *Daubert*. However, it had no regard to the factors listed in that case, none of which, if considered, would have supported the case for admission. Instead, it simply approved a passage from *Cross and Tapper on Evidence*[98] which, after a reference to the *Frye* approach, states:

> The better, and now more widely accepted, view is that so long as a field is sufficiently well-established to pass the ordinary tests of relevance and reliability, then no enhanced test for admissibility should be applied, but the weight of the evidence should be established by the same adversarial forensic techniques applicable elsewhere.

The same passage was also approved in *R v Luttrell*[99] where the court, while accepting that the reliability of expert evidence can be relevant to the issue of admissibility, rejected the argument that lip-reading evidence as to what was said by someone talking on a CCTV recording should not be admitted unless it could be seen to be reliable because the methods used were sufficiently explained to be tested in cross-examination and so to be verifiable or falsifiable.

The dangers of this relaxed approach are highlighted by the decisions in *R v Robb*[100] and *R v O'Doherty*.[101] In *R v Robb* a lecturer in phonetics was held to be well qualified by his academic training and practical experience to express an opinion as to the identity of a voice, notwithstanding that his auditory technique, which was to pay close attention to voice quality, pitch, and pronunciation, was not generally respected by other experts in the field because it was not supplemented and verified by acoustic analysis based on physical measurements of resonance, frequency, etc. In *R v O'Doherty* the prosecution expert at the trial gave evidence based on the same technique as the expert in *R v Robb*. On appeal the Court of Appeal for Northern Ireland received fresh expert evidence to the effect that auditory techniques, unless supplemented and verified by acoustic analysis, were an unreliable basis of speaker identification, and that, based on an acoustic analysis, the voice on the tape was not that of the

[96] [2003] 1 Cr App R 195, CA.
[97] See also *R v Kempster* (*No 2*) [2008] 2 Cr App R 256, CA.
[98] 9th edn, London, 1999, 523.
[99] [2004] 2 Cr App R 520, CA.
[100] (1991) 93 Cr App R 161, CA.
[101] [2003] 1 Cr App R 77, CA (NI).

accused. Allowing the appeal, the court observed that since *R v Robb*, 'time has moved on'. It was held that in the present state of scientific knowledge, no prosecution should be brought in Northern Ireland in which one of the planks is voice identification given by an expert which is solely confined to auditory analysis. There should also be expert evidence of acoustic analysis.[102] However, in *R v Flynn*[103] it has since been stated, but without any specific amplification, that it is 'neither possible nor desirable' to go as far as the Northern Ireland Court of Appeal in this respect.

Reliability tests of the kind set out in *Frye* and *Daubert* raise additional and complex questions and issues: whether particular scientific techniques have been generally accepted;[104] identification of the scientific community by which there may have been such general acceptance, which could be a community reflecting a broad or narrow field of expertise; whether scientific techniques may be reliable even if not, or not yet, accepted by a scientific community;[105] and whether reliance on general acceptance by a scientific community amounts to a usurpation of the role of the trial judge.[106] The Law Commission, in its consultation paper on the admissibility of expert evidence in criminal proceedings,[107] proposes that there should be an explicit 'gate-keeping' role for the trial judge involving a determination whether the proffered evidence is sufficiently reliable to be admitted. It is proposed that it is for the party wishing to rely on the expert evidence, whether the prosecution or the accused, to show that it is sufficiently reliable. The test would be whether the evidence is predicated on sound principles, techniques, and assumptions that have been properly applied to the facts of the case and is supported by those principles, techniques, and assumptions as applied to the facts of the case. It is also proposed that in deciding the issue, the court should have regard to guidelines such as, in the case of scientific expert evidence, whether the principles etc have been properly tested, the margin of error associated with their application, and whether they are regarded as sound in the scientific community.[108] The Commission also sought views on another possible development in which it saw merit, namely that a judge, in determining the question of sufficient reliability in cases in which the evidence or field is particularly difficult, should be permitted to call upon an independent expert assessor for assistance or guidance. The Commission envisages such an assessor being called upon only exceptionally, but cases of difficulty are probably much more common than the Commission presupposes.[109]

In the context of medical expert evidence on the cause of injury or death, particular caution is needed where the scientific knowledge is or may be incomplete and also where the expert opinion evidence is not relied upon as additional material in support of a prosecution, but

[102] The court made three exceptions to its general statement: where the voices of a known group are being listened to and the issue is which voice has spoken which words, or where there are rare characteristics which render a speaker identifiable, or the issue relates to the accent or dialect of the speaker.

[103] [2008] 2 Cr App R 266, CA at 281.

[104] See the pre-publication summary of the report of the US National Academy of Sciences, available on its website: see Pattenden, Noticeboard, (2009) 13 *E&P* 252.

[105] See, eg, the concern expressed in *R v Hoey* [2007] NICC 49 about the absence of validation guidelines for LCN DNA tests compared to the 'normal' SGM+ DNA tests.

[106] A Roberts, 'Drawing on Expertise: Legal Decision-making and the Reception of Expert Evidence' [2008] *Crim LR* 443 at 455–7.

[107] Consultation Paper No 190 (2009), <http://www.lawcom.gov.uk/1155.htm>.

[108] For critical commentary, see A Roberts, 'Rejecting General Acceptance, Confounding the Gate-keeper: the Law Commission and Expert Evidence' [2009] *Crim LR* 551.

[109] See A Roberts, [2008] *Crim LR* 443 at 460.

is fundamental to it.[110] In *R v Cannings*[111] Judge LJ, delivering the judgment of the Court of Appeal, said:

> Experts in many fields will acknowledge the possibility that later research may undermine the accepted wisdom of today. 'Never say never' is a phrase which we have heard in many different contexts from expert witnesses. That does not normally provide a basis for rejecting the expert evidence, or indeed for conjuring up fanciful doubts about the possible impact of later research.

However, the court went on to say that in the case of two or more sudden unexplained infant deaths in the same family, in many important respects we are still at the frontiers of knowledge. It was held that, for the time being, where a full investigation is followed by a serious disagreement between reputable experts about the cause of death and a body of such expert opinion concludes that natural causes cannot be excluded as a reasonable and not a fanciful possibility, the prosecution of a parent or parents for murder should not be started or continued in the absence of additional cogent evidence extraneous to the expert evidence and tending to support the conclusion of deliberate harm.[112]

R v Cannings was distinguished in *R v Kai-Whitewind*.[113] K-W was convicted of the murder of her infant son. She had had difficulty bonding with the child and there was evidence that shortly after he was born she had felt like killing the child. The child died while in her sole care. On the day of his death, she had sought medical advice after the child had developed a spontaneous nosebleed, an extremely rare occurrence in the case of an infant. Post-mortem examinations revealed new and old blood in the lungs. According to the prosecution experts, this was consistent with two distinct episodes of upper airway obstruction, but the views of the defence experts were that death by natural causes was more probable than unnatural death or that the cause of death was unascertained. The appeal against conviction was dismissed. It was held that *R v Cannings* concerned inferences based upon coincidence, or the unlikelihood of two or more infant deaths in the same family, or one death where another child or other children in the family had suffered from unexplained 'Apparent Life Threatening Events'. There was essentially no evidence beyond the inferences based upon coincidence which the prosecution experts were prepared to draw but as to which other reputable experts in the same specialist field took a different view. Hence the need for additional cogent evidence. It did not follow from this that whenever there was a conflict between expert witnesses, the case for the prosecution had to fail unless the conviction was justified by evidence independent of the expert witnesses. In the instant case there was a single death, it was not suggested that any inference should be drawn against the accused from any previous incident involving any of her children, and the evidence about the child's condition found on the post-mortem examination was evidence of fact and precisely the kind of material which was sought and could not be found in *R v Cannings*. The dispute between experts about the interpretation of the findings at the post-mortem did not extinguish the findings themselves, and the jury had been entitled to evaluate the expert evidence, taking account of the facts found at the post-mortem and bearing in mind in addition, for example, that they related to an infant whose mother had spoken about killing him, had made a comment about smothering another child, who might have delayed reporting his death, and who had elected not to give evidence.

[110] *R v Holdsworth* [2009] Crim LR 195, CA.
[111] [2004] 1 All ER 725 at [178].
[112] The case is considered in more detail in Ch 8.
[113] (2005) The Times, 11 May, CA.

Some commentators are troubled by the decision in *R v Kai-Whitewind* on the basis that it allows juries to convict notwithstanding that eminent experts are of the view that such a conclusion would be unjustified or even wrong.[114] However, assuming that this is not a veiled criticism of trial by jury, as the court itself observes, it would be inappropriate, whenever there is a genuine conflict of opinion between reputable experts, that the prosecution should not proceed or should be stopped, or that the evidence of the prosecution experts should be disregarded. A less radical solution would be to introduce some form of corroboration requirement, if only to direct the jury to exercise caution in the absence of any independent supporting prosecution evidence.

The duty of the expert

In civil proceedings, under CPR r 35.1, it is the duty of the expert to help the court on the matters within his expertise, a duty that overrides any obligation to the person from whom he has received instructions or by whom he is paid. In similar vein, rule 33.2 of the Criminal Procedure Rules provides that in criminal proceedings an expert has a duty to the court to help it to achieve the overriding objective by giving objective unbiased opinion on matters within his expertise, a duty that overrides any obligation from the person by whom he is instructed or paid and that includes an obligation to inform all parties and the court if his opinion changes from that contained in a report served as evidence or given in a statement under Part 24 of the Rules (disclosure of expert evidence) or Part 29 of the Rules (expert evidence in connection with special measures directions). The duty of the expert as described in these rules builds on and, to an extent, overlaps with, the descriptions of the obligations of an expert set out by Cresswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer*[115] and the guidance for experts giving evidence involving children provided by Wall J in *In re AB (Child Abuse: Expert Witnesses)*.[116] In *R v Harris*[117] it was held that these descriptions were also very relevant in criminal proceedings. Some of the factors set out by Cresswell J in *The Ikarian Reefer* were summarized in *R v Harris*[118] as follows:

1. Expert evidence presented to the court should be and be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.
3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion.
4. An expert should make it clear when a particular question or issue falls outside his expertise.

[114] See, eg, Hirst, 'Blackstone's Criminal Practice Bulletin', Issue 2, Jan 2006 at 13.
[115] [1993] 2 Lloyd's Rep 68 at 81.
[116] [1995] 1 FLR 181.
[117] [2006] 1 Cr App R 55, CA.
[118] At [271].

5. If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.
6. If, after exchange of reports, an expert witness changes his view on material matters, such changes of view should be communicated to the other side without delay and when appropriate to the court.

In *In re AB (Child Abuse: Expert Witnesses)* Wall J, referring to cases in which there is a genuine disagreement on a scientific or medical issue or where it is necessary for a party to advance a particular hypothesis to explain a given set of facts, said:[119]

> Where that occurs, the judge [in a criminal case, jury] will have to resolve the issue which is raised. Two points must be made. In my view, the expert who advances such a hypothesis owes a very heavy duty to explain to the court that what he is advancing is a hypothesis, that it is controversial (if it is) and to place before the court all material which contradicts the hypothesis. Secondly, he must make all his material available to the other experts in the case. It is the common experience of the courts that the better the experts the more limited their areas of disagreement, and in the forensic context of a contested case relating to children, the objective of the lawyers and the experts should always be to limit the ambit of disagreement on medical issues to the minimum.[120]

In *R v Harris* the court emphasized[121] that developments in scientific thinking should not be kept from the court simply because they remain at the stage of a hypothesis, but that it is of the first importance that the true status of the expert's evidence is frankly indicated to the court. In cases involving allegations of child abuse, it was said that the judge should be prepared to give directions in respect of expert evidence, taking into account the guidance to which the court had referred.

R v Puaca[122] illustrates the importance of compliance with the obligations on an expert. In that case, in which a murder conviction was quashed because the conclusions of the Crown's pathologist could not safely be relied on, it was held that it is wholly wrong for a pathologist carrying out the first post-mortem at the request of the police or the coroner to leave it to the defence to instruct a pathologist to prepare a report setting out contrary arguments.

Evidence of facts upon which an opinion is based

In many—probably most—cases, the expert will have no personal or first-hand knowledge of the facts upon which his opinion is based. For example, in *Beckwith v Sydebotham*[123] shipwrights expressed their opinion on the seaworthiness of a ship which they had not examined. In such a case, the expert should state the *assumed* facts upon which his opinion is based and examination-in-chief and cross-examination should take the form of *hypothetical* questions. The facts upon which the expert's opinion is based, sometimes referred to as 'primary facts', must be proved by admissible evidence.[124] The primary facts may be proved by calling the person with personal or first-hand knowledge of them to give direct evidence of them. Thus in *R v Mason*,[125] a murder

[119] At 192.
[120] See also CPR r 35.12 and r 33.5 of the Criminal Procedure Rules, both considered below.
[121] At [270].
[122] [2005] EWCA Crim 3001.
[123] (1807) 1 Camp 116.
[124] Per Lawton LJ in *R v Turner* [1975] QB 834 at 840, CA.
[125] (1911) 7 Cr App R 67, CCA.

trial in which a witness who had seen the deceased's body was called to describe the wounds, a surgeon, who had not seen the body, was asked whether the deceased had died from natural causes or in consequence of his wounds and whether the wounds could have been self-inflicted. Alternatively, under section 127 of the Criminal Justice Act 2003, the primary facts may be proved by the hearsay statement of the person with personal or first-hand knowledge of them, unless, on an application by a party to the proceedings, that is not in the interests of justice.[126] In some cases, the expert will have personal or first-hand knowledge of the facts in question, as when he examines an exhibit or visits the *locus in quo*, and in such a case he may testify as to both fact and opinion. In any event the expert should be asked in examination-in-chief to state the facts or assumed facts upon which his evidence is based so that the court can assess the value of his opinion.[127] 'If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless.'[128]

In criminal cases, although an expert cannot *prove* facts upon which his opinion is based but of which he has no personal or first-hand knowledge, because that would be a breach of the rule against hearsay,[129] he is entitled to rely upon such facts as a part of the process of forming an opinion and, in this sense, is not subject to the rule against hearsay in the same way as a non-expert or witness of fact. *English Exporters (London) Ltd v Eldonwall Ltd*,[130] which must now be read subject to the Civil Evidence Act 1995, provides an instructive example. In that case, landlords applied for the determination of a reasonable interim rent under the Landlord and Tenant Act 1954. Megarry J held that although a professional valuer, called as an expert witness to give his opinion as to the value of the property, could not give evidence of comparable rents of which he had no personal knowledge in order to establish those rents as matters of fact, because that would amount to inadmissible hearsay, he was entitled to express opinions that he had formed as to values even though substantial contributions to the formation of those opinions had been made by matters of which he had no first-hand knowledge but had learned about from sources such as journals, reports of auctions and other dealings, and information, relating to both particular and more general transactions, obtained from professional colleagues and others. Similarly, in *R v Bradshaw*,[131] a case of murder where the only issue at the trial was that of diminished responsibility, it was held that although doctors called by the defence could not state what the accused had told them about past symptoms as evidence of the existence of those symptoms, because that would infringe the rule against hearsay, they could give evidence of what the patient had told them in order to explain the grounds upon which they came to a conclusion with regard to his condition.[132]

[126] See Ch 10.

[127] But it seems that where an expert expresses an opinion based on primary facts derived from his use of a computer, for example the printout of a machine used by him to analyse the chemical constituents of a substance believed to be a particular drug, there is no *obligation* to produce the printout: see *R v Golizadeh* [1995] Crim LR 232, CA.

[128] Per Lawton LJ in *R v Turner* [1975] QB 834 at 840. In a case where the real factual issues between the parties will emerge with clarity only after all the factual evidence has been given, and the views of the experts will be of the greatest value if given in the light of that evidence, in the Commercial Court at least, the High Court has power to order that all the factual evidence be given by both sides before any expert evidence is received: *Bayer v Clarkson Puckle Overseas Ltd* [1989] NLJR 256, QBD.

[129] See, eg, *R v Jackson* [1996] 2 Cr App R 420, CA

[130] [1973] Ch 415. See also *Ramsay v Watson* (1961) 108 CLR 642.

[131] (1985) 82 Cr App R 79, CA.

[132] Per Lord Lane CJ, (1985) 82 Cr App R 79 at 83, citing *Cross on Evidence* (5th edn, London, 1979) 446.

Under the same doctrine, the expert may fortify his opinion by referring not only to any relevant research, tests, or experiments which he has personally carried out, whether or not expressly for the purposes of the case, but also to works of authority, learned articles, research papers, letters, and other similar material written by others and comprising part of the general body of knowledge falling within the field of expertise of the expert in question.[133] In *H v Schering Chemicals Ltd*,[134] Bingham J said:

> If an expert refers to the results of research published by a reputable authority in a reputable journal the court would, I think, ordinarily regard those results as supporting inferences fairly to be drawn from them, unless or until a different approach was shown to be proper.[135]

In *R v Abadom*[136] the accused was convicted of robbery. The prosecution case rested on evidence that he had broken a window during the robbery and that fragments of glass embedded in his shoes had come from the window. An expert gave evidence that, as a result of a personal analysis of the samples, he found that the glass from the window and the glass in the shoes bore an identical refractive index. He also gave evidence that he had consulted unpublished statistics compiled by the Home Office Central Research Establishment which showed that the refractive index in question occurred in only 4 per cent of all glass samples investigated. He then expressed the opinion that there was a very strong likelihood that the glass in the shoes came from the window. On appeal it was argued that the evidence of the Home Office statistics was inadmissible hearsay because the expert had no knowledge of the analysis on which the statistics had been based. The appeal was dismissed on the grounds that once the 'primary facts' on which an opinion is based have been proved by admissible evidence, the expert is entitled to draw on the work of others as part of the process of arriving at his conclusion. The primary facts in the instant case, that is the refractive indices of the glass from the window and the glass in the shoes, had been proved by admissible evidence (as it happened by the evidence of the expert himself on the basis of his own analysis). Accordingly the expert was entitled to refer to the Home Office statistics and this involved no infringement of the hearsay rule. Experts, it was said, should not limit themselves to drawing on material which has been published in some form: part of their experience and expertise lies in their knowledge and evaluation of unpublished material. The only proviso is that they should refer to such material in their evidence so that the cogency and probative value of their conclusions can be tested and evaluated by reference to it.[137]

R v Abadom was applied in *R v Hodges*,[138] a case of conspiracy to supply heroin, in which a very experienced drugs officer gave evidence partially deprived from what he had been told by others, including other officers, informants, and drug users, as to the usual method of supplying heroin, its purchase price in a particular place at the time, and what weight was more than

[133] *Davie v Edinburgh Magistrates* 1953 SC 34, Court of Session; *Seyfang v GD Searle & Co* [1973] QB 148 at 151. However, the court is only entitled to make use of those parts of the material which have been relied upon by the expert or upon which he has been cross-examined: see *Collier v Simpson* (1831) 5 C&P 73.

[134] [1983] 1 All ER 849.

[135] [1983] 1 All ER 849 at 853.

[136] [1983] 1 All ER 364, CA.

[137] Cf *R v Bradshaw* (1985) 82 Cr App R 79, CA, above, where it was held that if the doctors' opinions had been based entirely upon the 'hearsay' statements of the accused as to his past symptoms and the accused had elected not to testify and thus not provided any direct evidence as to such symptoms, the judge would have been justified in telling the jury that the defence case was based upon a flimsy or non-existent foundation.

[138] [2003] 2 Cr App R 247, CA.

would have been for personal use alone. The relevant primary facts were the observations of the activities of the accused, the finding of 14 grams of heroin in the possession of one of them, and the finding of other drugs paraphernalia in his house. The court distinguished *R v Edwards*.[139] In that case, the issue was whether the accused intended to supply the ecstasy tablets found in his possession or whether they were for personal consumption. Witnesses for both the prosecution and defence, neither of whom had any medical or toxicological qualification, were not allowed to give evidence, based on what they had been told by drugs users, rather than any academic materials, as to the personal consumption rates of ecstasy tablet users, and the impact of use in terms of developing tolerance or suffering serious harm. The evidence was held to have been properly excluded on the basis that the witnesses lacked the appropriate expertise to exempt their opinions from the rule against hearsay.[140]

The common law doctrine under discussion has been preserved, in criminal proceedings, by statute. Section 118(1)8 of the Criminal Justice Act 2003 preserves 'Any rule of law under which in criminal proceedings an expert witness may draw on the body of expertise relevant to his field'.

Evidence on ultimate issues

Historically, the courts have striven to prevent any witness from expressing his opinion on an ultimate issue, that is one of the very issues which the court has to determine. In *Haynes v Doman*,[141] for example, the issue being the reasonableness of a covenant in restraint of trade, Lord Lindley MR held that affidavits from persons in the trade expressing their views on the reasonableness of the clause on which the case turned were out of place and inadmissible. The justification of the rule is that insofar as such evidence might unduly influence the tribunal of fact, it prevents witnesses from usurping the function of the court: witnesses are called to testify, not to decide the case. The rule is open to criticism on a number of levels.[142] The objection of undue influence makes no allowance for cases in which the tribunal of fact is a professional judge rather than a jury, overlooks the frequency of conflicts in expert testimony, and is largely incompatible with the very justification for admitting expert evidence, that the drawing of inferences from the facts in question calls for an expertise which the tribunal of fact does not possess. However, in practice the rule is often of no more than semantic effect: the expert is allowed to express his opinion provided that the diction employed is not noticeably the same as that which will be used when the matter is subsequently considered by the court![143] Whatever its merits, in civil proceedings the rule has been abolished. Section 3(1) of the 1972 Act provides that:

> Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

Section 3(3) reads:

> In this section 'relevant matter' includes an issue in the proceedings in question.

[139] [2001] EWCA Crim 2185, [2001] All ER (D) 271 (Oct).

[140] Cf *R v Ibrahima* [2005] Crim LR 887, CA, above.

[141] [1899] 2 Ch 13, CA.

[142] See generally the 17th Report of the Law Reform Committee, *Evidence of Opinion and Expert Evidence* (Cmnd 4889) paras 266–71; 11th Report, Criminal Law Revision Committee (Cmnd 4991); and RD Jackson, 'The Ultimate Issue Rule: One Rule Too Many' [1984] *Crim LR* 75.

[143] See, eg, *Rich v Pierpont* (1862) 3 F&F 35 and per Lord Parker CJ in *DPP v A & B C Chewing Gum Ltd* [1968] 1 QB 159 at 164.

In family law cases involving suspected child abuse, expert evidence may relate to the presence and interpretation of physical, mental, behavioural, and emotional signs, but often necessarily includes a view as to the likely veracity of the child. In this context, in *Re M and R (minors)*,[144] it was held that it is 'plainly right' that 'issue' in section 3(3) *can* include an issue of credibility and that when dealing with children the court needs 'all the help it can get'.[145] In the normal case, as we have seen, expert evidence of credibility will be inadmissible because unnecessary, being a matter on which the tribunal of fact can form its own opinion unaided.

Technically, the ultimate issue rule still operates in criminal proceedings, but in relation to expert witnesses is in practice largely ignored.[146] In *R v Hookway*,[147] for example, it was recognized that expert evidence of 'facial mapping' is sufficient, by itself, to establish the identity of the accused; in *R v Mason*,[148] as we have seen, a surgeon was asked for his opinion whether a person died in consequence of his wounds and whether they could have been self-inflicted; and in *R v Holmes*[149] the Court of Criminal Appeal held that it was not improper to cross-examine a doctor called by the accused in a murder trial about whether the accused's conduct after the offence indicated that he knew the nature of the act and that it was contrary to the law of the land, both issues, of course, being central to the defence of insanity within the M'Naghten rules.[150] In *DPP v A & B C Chewing Gum Ltd*[151] Lord Parker CJ, although of the opinion that in a prosecution under the Obscene Publications Act 1959 it would be wrong to ask an expert directly whether a publication tended to deprave and corrupt, later observed that more and more inroads had been made into the rule against opinion evidence on ultimate issues:[152]

> Those who practise in the criminal courts see every day cases of experts being called on the question of diminished responsibility, and although technically the final question 'Do you think he was suffering from diminished responsibility?' is strictly inadmissible, it is allowed time and time again without any objection.

Weight

In cases in which expert opinion evidence is properly adduced, the weight to be attached to it is a matter entirely for the tribunal of fact. The duty of experts, it has been said, 'is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application

[144] [1996] 4 All ER 239, CA.

[145] [1996] 4 All ER 239 at 249.

[146] In its 11th Report, the Criminal Law Revision Committee was of the opinion that the rule probably no longer existed: para 268 (Cmnd 4991). See also per Lord Taylor CJ in *R v Stockwell* (1993) 97 Cr App R 260 at 265: the rule has become 'a matter of form rather than substance'. Contrast, *sed quaere*, *R v Jeffries* [1997] Crim LR 819, CA.

[147] [1999] Crim LR 750, CA.

[148] (1911) 7 Cr App R 67, CCA. See also *R v Smith* [1979] 1 WLR 1445, CA, above; and *R v Silcott* [1987] Crim LR 765, CC, where the educational subnormality of one accused was described by the experts as 'very likely' and 'significantly likely' to render 'unreliable' a confession allegedly made by him. See s 76(2)(b) of the Police and Criminal Evidence Act 1984, Ch 13.

[149] [1953] 1 WLR 686. Contrast *R v Wright* (1821) Russ&Ry 456.

[150] See also *R v Udenze* [2001] EWCA Crim 1381 (in a rape case, expert evidence as to the effects of alcohol on the complainant's ability to give informed consent); and *R v Hodges* [2003] 2 Cr App R 247, above (in a case of supplying drugs, expert evidence that the amount found was more than would have been for personal use alone).

[151] [1968] 1 QB 159.

[152] [1968] 1 QB 159 at 164.

of these criteria to the facts proved in evidence'.[153] Thus, in the civil context, although lay evidence should not be preferred to expert evidence without good reason,[154] it has been held that there is no principle of law preventing a judge from preferring the evidence of lay claimants whom he finds to be honest over the evidence of a jointly instructed expert with whose evidence he can find no fault.[155] Similarly, on the question whether or not a will was forged, a court may prefer the evidence of non-expert attesting witnesses to that of a handwriting expert.[156] Equally, in the criminal context, it has been held that it is incumbent on magistrates to approach expert evidence critically, even if no expert is called on the other side and to be willing to reject it if it leaves questions unanswered.[157] In Crown Court cases in which expert opinion evidence is given on an ultimate issue, the judge should make clear to the jury that they are not bound by the opinion, and that the issue is for them to decide.[158] The same applies where the evidence does not relate to an ultimate issue, but there is no inflexible requirement that the warning take any particular form.[159] It is a misdirection to tell the jury that expert evidence should be accepted if uncontradicted[160] or in the absence of reasons for rejecting it.[161] However, it has also been held to be wrong to direct a jury that they may disregard expert opinion evidence when the only evidence adduced dictates one answer.[162] In an attempt to reconcile the authorities, in *R v Sanders*,[163] a case concerning the defence of diminished responsibility, it was held that if there are no other circumstances to consider, unequivocal, uncontradicted medical evidence favourable to an accused should be accepted by a jury and they should be so directed; but where there are other circumstances to consider (including, presumably, the nature of the killing, the conduct of the accused before, at the time of and after it, and any history of mental abnormality), then the medical evidence, though unequivocal and uncontradicted, must be assessed in the light of those circumstances.

If there is conflicting expert evidence, the tribunal of fact is obviously forced to make a choice. For these purposes, no less than when deciding whether to accept the evidence of even a single expert witness, the tribunal of fact may take into account an expert's qualifications and how they were acquired, his credibility, the degree of reliability of his opinion, and the extent to which, if at all, his evidence-in-chief was based on assumed facts which do not accord with those ultimately established.

[153] Per Lord President Cooper in *Davie v Edinburgh Magistrates* 1953 SC 34 at 40, Court of Session. Thus concerning voice identification, the jury, in forming their own judgment on the opinions of the experts, are entitled to know the features of the voice to which they paid attention (*R v Robb* (1991) 93 Cr App R 161 at 166) and to hear the tapes which they analysed (*R v Bentum* (1989) 153 JP 538, CA).

[154] See *Re B (a minor)* [2000] 1 WLR 790, CA.

[155] *Armstrong v First York Ltd* (2005) The Times, 19 Jan. See also *Stevens v Simons* [1988] CLY 1161, CA.

[156] *Fuller v Strum* (2000) The Times, 14 Feb 2001.

[157] *DPP v Wynne* (2001) The Independent, 19 Feb, DC.

[158] Per Lord Taylor CJ in *R v Stockwell* (1993) 97 Cr App R 260.

[159] *R v Fitzpatrick* [1999] Crim LR 832, CA.

[160] *Davie v Edinburgh Magistrates* 1953 SC 34 at 40.

[161] Per Diplock LJ in *R v Lanfear* [1968] 2 QB 77, CA.

[162] *Anderson v R* [1972] AC 100, PC. See also *R v Matheson* [1958] 1 WLR 474, CCA: in a murder trial, if there are no facts or circumstances to displace or throw a doubt on unchallenged medical evidence of diminished responsibility, a verdict of guilty will not be in accordance with the evidence; and *R v Bailey* (1977) 66 Cr App R 31n, CCA: although juries are not bound to accept such expert medical evidence, they must act on it, and if there is nothing before them to cast doubt on it, cannot reject it. But see also *Walton v R* [1978] AC 788, PC, followed in *R v Kiszko* (1978) 68 Cr App R 62, CA.

[163] (1991) 93 Cr App R 245, CA.

Restrictions on, and disclosure of, expert evidence in civil cases

In *Access to Justice, Final Report*,[164] Lord Woolf regarded expert evidence as one of the major generators of unnecessary cost in civil litigation, operating against the principles of proportionality and access to justice. He also reiterated concerns about the lack of impartiality of experts, or what has been called 'hired gun syndrome': 'it is often quite surprising to see with what facility and to what extent, their views can be made to correspond with the wishes or the interests of the parties who call them'.[165] As one commentator has observed: 'The court hears not the most expert opinions, but those favourable to the respective parties.'[166] Lord Woolf's Final Report made a number of recommendations which formed the basis of the new rules to be found in Part 35 of the Civil Procedure Rules and its accompanying Practice Direction.[167] In the case of testifying experts, ie those who have been instructed to prepare or give expert *evidence*, in addition to imposing an overriding duty to the court,[168] they create a duty to restrict the amount of expert evidence, and introduce new requirements as to the form in which expert evidence shall be given and as to advance disclosure. They do not apply, however, to an 'advising expert', ie an expert retained by a party for the purpose of advising that party, who owes no duty to the court and whose advice, if given in contemplation of legal proceedings, will be privileged against disclosure. The use of advising experts is quite common in relation to commercial litigation.

The duty and power to restrict expert evidence

The duty to restrict expert evidence is governed by rule 35.1.

> 35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

The court's power to restrict expert evidence is governed by rule 35.4, which provides as follows:

> (1) No party may call an expert or put in evidence an expert's report without the court's permission.
> (2) When a party applies for permission under this rule he must identify—
> (a) the field in which he wishes to rely on expert evidence; and
> (b) where practicable the expert in that field on whose evidence he wishes to rely.
> (3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2).
> (4) The court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party.

Where, for no good reason, an application for permission to call an expert under rule 35.4 is not made in good time, it is unlikely to be granted if made so shortly before the trial that it would work a significant injustice to the other side.[169]

[164] HMSO (1996).

[165] Taylor, *Treatise on the Law of Evidence* (12th edn, London, 1931) 59.

[166] John Basten 'The Court Expert in Civil Trials, a Comparative Appraisal' (1977) 40 *MLR* 174.

[167] Excepting rr 35.1, 35.3, 35.7, and 35.8, Part 35 does not apply to claims which have been allocated to the small claims track: CPR r 27.2(1)e.

[168] See above.

[169] *Calenti v North Middlesex NHS Trust* (2001) LTL 10 Apr 2001, QBD.

Written reports

Under the new rules, there is a presumption—in the case of claims on the fast track, a strong presumption—that if expert evidence is permitted, it should be given by means of an expert's written report, rather than by calling the expert as a witness. Rule 35.5 provides as follows:

(1) Expert evidence is to be given in a written report unless the court directs otherwise.
(2) If a claim is on the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

The single joint expert

Rule 35.7 challenges the notion that where both parties wish to adduce expert evidence, there is a need for two experts: it permits the court to direct that the evidence should be given by a single joint expert. As we shall see, the parties themselves may agree to such a direction, which the court may then approve. Indeed, as a general rule, good practice will require a party to attempt to agree a joint expert with his opponent rather than to instruct his own expert. This practice is promoted by the pre-action protocols: see, eg, paragraph 2.11 of the Notes of Guidance in the Pre-Action Protocol for Personal Injury Claims. Of course, there is nothing in the Civil Procedure Rules to prevent a party from instructing his own expert, and this may well be thought to be appropriate in a case in which a claimant needs expert assistance in order to decide whether he has a valid claim at all. However, where a party obtains an expert's report without the approval of the court, there is a real risk that he will not recover his costs in this respect: under rule 35.4, the court may refuse permission to admit the report or call the expert, and under rule 35.7 may direct the use of a jointly instructed expert.

Rule 35.7 does not create a presumption in favour of a direction that there should be one expert only, but in many cases, such a direction will give effect to the 'overriding objective', especially in saving expense and putting the parties on an equal footing. However, much may turn on the value and complexity of the litigation: single joint experts are not commonly appointed in Commercial Court cases, and there is a greater willingness to permit two experts in multi-track cases, which are typically more complex than fast track claims. It can be wrong to appoint a single joint expert on a medical issue on which there are different schools of thought.[170] In *Peet v Mid Kent Healthcare Trust*,[171] a claim of medical negligence, it was said that whereas in the great majority of cases non-medical evidence dealing with quantum should be given by a single expert rather than by experts called on behalf of each party, it is sometimes difficult to restrict the medical evidence because of the difficult issues as to the appropriate form and standard of treatment required. In *ES v Chesterfield & North Derbyshire Royal Hospital NHS Trust*[172] the claimant alleged negligence on the part of an obstetric registrar and his consultant, the value of the claim being about £1.5 million. The claimant appealed a direction limiting the expert evidence to one expert obstetrician on each side. The Court of Appeal, having regard to both the 'overriding objective' and the terms of rule 35.1, allowed the appeal and permitted the claimant to call two expert obstetricians. Relevant factors taken into account included the value and complexity of the case and the fact that the obstetric registrar and his consultant were both able to give evidence of their actions based on their professional expertise.

[170] *Oxley v Penwarden* [2001] Lloyds Rep Med 347, CA. See also *Casey v Cartwright* [2007] 2 All ER 78, CA.
[171] [2002] 1 WLR 210, CA at [6]–[7].
[172] (2003) EWCA Civ 1284.

Rule 35.7 provides as follows:

(1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.
(2) The parties wishing to submit the expert evidence are called 'the instructing parties'.
(3) Where the instructing parties cannot agree who should be the expert, the court may—
  (a) select the expert from a list prepared or identified by the instructing parties; or
  (b) direct that the expert be selected in such other manner as the court may direct.

In most cases, it is likely that the court will expect the parties to be able to agree who the expert should be. Given the overriding duty of the expert to the court, it may be difficult for a party to object to a particular expert, even if it is known that he has previously been instructed extensively or exclusively by the firm of solicitors representing the other party, or has previously acted only on behalf of, say, defendant employers or insurance companies.

Where the court has directed that the evidence on a particular issue should be given by one expert only, but there are a number of disciplines relevant to that issue, a leading expert in the dominant discipline should be used, who should prepare the general part of the report and be responsible for annexing or incorporating the contents of any reports from experts in the other disciplines.[173]

Rule 35.8 deals with the instructions to be given to a single joint expert:

(1) Where the court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert.
(2) When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.
(3) The court may give directions about—
  (a) the payment of the expert's fees and expenses; and
  (b) any inspection, examination or experiments which the expert wishes to carry out.
(4) The court may, before an expert is instructed—
  (a) limit the amount that can be paid by way of fees and expenses to the expert; and
  (b) direct that the instructing parties pay that amount into court.
(5) Unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of the expert's fees and expenses.

In cases in which one party has exclusive access to information about the basic facts on which expert opinion will need to be based, it will be difficult if not impossible for the other party to properly instruct an expert without access to that information. Rule 35.9 therefore empowers the court to direct the one party to provide such information to the other:

> Where a party has access to information which is not reasonably available to the other party, the court may direct the party who has access to the information to—
> (a) prepare and file a document recording the information; and
> (b) serve a copy of that document on the other party.

Where the court makes such a direction, the document to be prepared should set out sufficient details of any facts, tests, or experiments which constitute the information to enable the other party to assess and understand its significance.[174]

[173] PD 35, para 6.
[174] PD 35, para 3.

Where the parties have instructed a single joint expert, it is not permissible for one party to have a conference with the expert in the absence of the other, without the latter's prior written consent. A conclusion to the contrary would be inconsistent with the concept of a jointly instructed expert owing an equal duty of openness and confidentiality to both parties.[175]

Where a court has directed that evidence on an issue be given by a single joint expert and the parties agree who the expert should be, a party who is unhappy with the expert's report will be refused permission to call a further expert unless such refusal would be unjust having regard to the 'overriding objective'.[176] The discretion may be exercised against the party if there is only a modest amount at stake and therefore it would be disproportionate to adduce further expert evidence.[177] Other relevant factors to be taken into account include the nature and importance of the issues, their number, the reasons for requiring another expert, the effect of adducing the additional evidence, and any delay likely to be caused.[178]

Under paragraph 3.14 of the Pre-Action Protocol for Personal Injury Claims, before any party instructs an expert, he should give the other party the name(s) of one or more experts whom he considers suitable to instruct. Under paragraph 3.16, the other party may object to one or more of the named experts and the first party should then instruct a mutually acceptable expert. Such an expert needs to be distinguished from a single joint expert. The latter is instructed by both parties, both are liable for his fees and both have an equal right to see his report. A mutually acceptable expert is instructed on behalf of one party, who is usually liable to pay his fees, and his report is protected by litigation privilege, unless the instructing party chooses to waive it. Thus although the Protocol encourages and promotes the voluntary disclosure of medical reports, it does not require it.[179]

Written questions to experts

In cases in which the expert evidence takes the form of a written report, whether prepared by a single joint expert or an expert instructed by a party, there will obviously be no opportunity to question him on oath in order either to clarify any part of his report or to challenge him on such matters as his methodology, the reasons for his opinion, any expert literature upon which he has relied, opposing expert opinion, and so on. For reasons of this kind, provision has been made to allow written questions to be put to the expert before the trial. A party is entitled to put such questions, if they are for the purpose only of clarification of the report; but if they are for some other purpose, they may only be asked if the court gives permission or the other party agrees. Rule 35.6 provides as follows:

(1) A party may put to—
  (a) an expert instructed by another party; or
  (b) a single joint expert appointed under rule 35.7, written questions about his report.[180]

[175] *Peet v Mid Kent Healthcare Trust* [2002] 1 WLR 210, CA.
[176] *Daniels v Walker* [2001] 1 WLR 1382, CA.
[177] Ibid.
[178] *Cosgrave v Pattison* [2001] CPLR 177, Ch D.
[179] *Carlson v Townsend* [2001] 3 All ER 663, CA. Cf *Beck v Ministry of Defence* [2004] PIQR 1, below.
[180] If the questions are sent direct, a copy of the questions should, at the same time, be sent to the other party or parties: PD 35, para 5.2.

(2) Written questions under paragraph (1)—
  (a) may be put once only;
  (b) must be put within 28 days of service of the expert's report; and
  (c) must be for the purpose only of clarification of the report; unless in any case,
    (i) the court gives permission; or
    (ii) the other party agrees.
(3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.
(4) Where—
  (a) a party has put a written question to an expert instructed by another party in accordance with this rule; and
  (b) the expert does not answer that question,
  the court may make one or both of the following orders in relation to the party who instructed the expert—
    (i) that the party may not rely on the evidence of that expert; or
    (ii) that the party may not recover the fees and expenses of that expert from any other party.

Rule 35.6(2)(c) allows a party, with the permission of the court or other party, to ask about matters not covered in the expert's report, provided that they are within his expertise, and thereby renders the expert akin to a court expert.[181] The fact that experts can be required to answer written questions normally means that there is no need for a single joint expert's evidence to be amplified or tested by cross-examination of the expert. The court has a discretion to permit such amplification or cross-examination, but this should be restricted as far as possible.[182] If, exceptionally, the expert is to be subject to cross-examination, then he should know in advance what topics are to be covered, and where fresh material is to be adduced for his consideration, this should be done in advance of the hearing.[183]

The contents of the expert's report

An expert's report must comply with the requirements set out in Practice Direction 35,[184] which provides that a report must give details of the expert's qualifications; give details of any literature or other material relied on; set out the substance of all facts and instructions given to him which are material to the opinions expressed or upon which those opinions are based; make clear which facts in the report are within his own knowledge; say who carried out any test, or experiment which he has used for the report and whether or not it was carried out under his supervision; give the qualifications of the person who carried out any such test, or experiment; where there is a range of opinion on the matters dealt with in the report, summarize it and give reasons for his own opinion; contain a summary of his conclusions; if he is not able to give his opinion without qualification, state the qualification; and state that he understands his duty to the court and has complied and will continue to comply with that duty.[185] His report must also be verified by a statement of truth.[186]

[181] *Mutch v Allen* [2001] CPLR 200, CA.
[182] *Peet v Mid Kent Healthcare Trust* [2002] 1 WLR 210, CA at [28].
[183] *Popek v National Westminster Bank plc* [2002] EWCA Civ 42.
[184] CPR r 35.10(1).
[185] PD 35, para 2.2.
[186] PD 35, para 2.3.

Under rule 35.10(2), at the end of the expert's report there must be a statement that he understands his duty to the court and has complied with it. Rule 35.10(3) and (4) provide as follows:

(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.
(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions—
(a) order disclosure of any specific document; or
(b) permit any questioning in court, other than by the party who instructed the expert,
unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.

Paragraph 4 of Practice Direction 35 states that cross-examination of the expert on the contents of his instructions will not be allowed unless the court permits it (or unless the party who gave the instructions consents to it). Paragraph 4 also states that if the court is satisfied that there are 'reasonable grounds' under rule 35.10(4)(b), then it will allow the cross-examination where it appears to be in the interests of justice to do so.

The intention behind rule 35.10(4) is to encourage the setting out fully of material instructions and facts, including, for example, witness statements provided to the experts and the previous report of another expert. However, the obligation under rule 35.10(3) is not to set out all the information and material supplied to the expert, but to disclose the 'substance of all material instructions'. Ordinarily the expert is to be trusted to comply with rule 35.10(3), and under rule 35.10(4) the party on the other side may not as a matter of course call for disclosure: there must be some concrete fact giving rise to the 'reasonable grounds' to which rule 35.10(4) refers.[187]

The requirements of PD 35 are intended to focus the mind of the expert on his responsibilities in order that litigation may progress in accordance with the overriding principles in CPR Part 1. If an expert demonstrates that he has no conception of those requirements, as when he fails to include in his report statements that he understands his duty to the court and has complied with it, and statements setting out the substance of all material instructions, then he may properly be debarred from acting as an expert witness in the case.[188] Moreover, in appropriate circumstances, the court may make a costs order against an expert who, by his evidence, has caused significant expense to be incurred, and has done so in flagrant and reckless disregard of his duties to the court.[189]

Discussions between experts

Rule 35.12 is another provision designed to save court time and reduce costs. It allows the court, at any stage, in cases in which the parties have been permitted to use competing experts, to direct a 'without prejudice'[190] discussion between the experts for the purpose of requiring them to identify the issues in the proceedings and, where possible, to reach agreement on an issue. The court may specify the issues which the experts must discuss. It may also direct that following the discussion the experts must prepare a statement for the court showing the issues on which they agreed and the issues on which they disagreed with a summary of their reasons

[187] *Lucas v Barking, Havering and Redbridge Hospitals NHS Trust* [2003] 4 All ER 720, CA.
[188] *Stevens v Gullis* [2000] 1 All ER 527, CA.
[189] *Phillips v Symes* [2005] 4 All ER 519 (Ch).
[190] See Ch 20.

for disagreeing.[191] Such a statement is not an admission and does not bind the parties, but is not privileged, even if made with an eye to assisting a mediation which, in the event, is unsuccessful.[192] However, the content of the *discussion* between the experts shall not be referred to at the trial unless the parties agree; and where the experts do agree on an issue, their agreement will not bind the parties unless they expressly agree to be bound by it.

If a party is dissatisfied with the revised opinion of his own expert following a discussion between experts, permission to call a further expert should only be granted where there is good reason to suppose that the expert modified his opinion or agreed with the expert instructed by the other side for reasons which cannot properly or fairly support his revised opinion, such as stepping outside his expertise or otherwise showing himself to be incompetent.[193]

Disclosure, non-disclosure, and inspection

Rules 35.11 and 35.13 provide as follows:

> 35.11 Where a party has disclosed an expert's report, any party may use that expert's report as evidence.
>
> ...
>
> 35.13 A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission.

Where an expert has been asked to prepare a report, the dominant purpose being to use it in relation to anticipated or pending litigation, the report will be the subject of litigation privilege.[194] Neither the 1972 Act nor the Civil Procedure Rules compel the disclosure of privileged documents. However, under rule 35.13 a party will normally only be allowed to introduce an expert report in evidence, or to call its maker, if he has disclosed the report. Although the court may give permission for the evidence to be adduced notwithstanding failure to disclose the report, it is submitted that the new cards-on-the-table approach to civil litigation, which the courts will generally expect of the parties, is such that permission will rarely be granted, and then only in very exceptional circumstances.

Rule 35.13 does not provide a power to order disclosure of drafts of experts' reports, prepared for the purpose of discussion with a party's advisers prior to the completion of the expert's final report, and protected by litigation privilege. The specific and limited exemption from privilege of the material instructions pursuant to rule 35.10(4)[195] shows that there was no intention to abrogate the privilege attaching to draft expert reports.[196] However, where a party is dissatisfied with an expert's report and seeks permission to rely on a second, substitute expert's report, permission may be conditional upon disclosure of the final report of the first expert[197] or, in cases where the first expert did not complete a final report, any draft interim report containing the substance of his opinion on the various issues in the case.[198]

[191] In heavy fraud and other complex criminal cases, a direction should generally be made requiring the experts to meet and prepare such a statement: para 3(viii), Protocol for the control and management of heavy fraud and other complex criminal cases [2005] 2 All ER 429, CA.

[192] *Aird v Prime Meridian Ltd* (2007) The Times, 14 Feb.

[193] *Stallwood v David* [2007] 1 All ER 206, QBD.

[194] See Ch 20.

[195] See above.

[196] *Jackson v Marley Davenport Ltd* (2004) The Times, 7 Oct.

[197] *Beck v Ministry of Defence* [2004] PIQR 1.

[198] Per Dyson LJ, obiter, in *Vasiliou v Hajigeorgiou* [2005] 3 All ER 17, CA.

The effect of rule 35.11 is that where a party has been given permission to use an expert and has disclosed his expert's report, then the opposing party may use it as evidence at the trial, and this remains the case even if the first party has changed his mind and no longer intends to rely upon it.

Under rule 33.6, a party intending to introduce evidence, such as a plan, photograph, or model, which forms part of expert evidence but is not contained in an expert's report, must give notice of his intention when the expert report is served on the other party, and must give the other party an opportunity to inspect it and to agree to its admission without further proof.[199]

Directions and agreed directions

When a court allocates a case to the fast track, the directions it gives for the management of the case will include directions on expert evidence. If the parties have filed agreed directions, the court may approve them. Agreed directions may include a direction that no expert evidence is required; or directions for a single joint expert, or the exchange and agreement of expert evidence and without prejudice meetings of experts.[200] There are similar provisions for cases allocated to the multi-track.[201]

Under rule 35.14, an expert may file a written request for directions to assist him in carrying out his function as an expert. This may be done without giving notice to any party, although the court, when it gives directions, may direct that a party be served with a copy of the request and the directions. Rule 35.14 provides a useful safeguard for the expert in need of further guidance as to what is being asked of him, especially in cases where to take further instructions from a party may be regarded as a breach of his overriding duty to help the court.

Restrictions on, and disclosure of, expert evidence in criminal cases

The contents of the expert's report

In criminal proceedings, the required contents of an expert's report are set out in rule 33.3 of the Criminal Procedure Rules 2005,[202] are based on the guidance given in *R v B (T)*[203] and mirror those required in civil proceedings under Practice Direction 35, which have been considered earlier in this chapter. The only material differences from the civil rules are that there is no requirement to set out any instructions given to the expert and the report must be verified not by a statement of truth but by the same declaration of truth as for a witness statement. Under rule 33.4, a party who serves on another party or on the court an expert report must at once inform the expert of that fact.

Pre-hearing discussions

Under rule 33.5 of the Criminal Procedure Rules, where more than one party wants to introduce expert evidence, the court may direct the experts to discuss the expert issues and prepare a statement for the court of the matters on which they agree and disagree, giving their reasons. The contents of the discussion must not otherwise be referred to without the court's permission.[204]

[199] In medical negligence claims, there is also a standard direction dealing with disclosure of unpublished literature and lists of published literature on which an expert proposes to rely: see *Wardlaw v Farrar* [2003] 4 All ER 1358, CA.

[200] See CPR r 28.2 and 28.3 and PD28 paras 3.5–3.9.

[201] See CPR r 29.2 and 29.4 and PD29 paras 4.7–4.13.

[202] SI 2005/384.

[203] [2006] 2 Cr App R 22, CA.

[204] Rule 33.5(3).

Single joint experts

Under rule 33.7 of the Criminal Procedure Rules, where more than one accused wants to introduce expert evidence on an issue, the court may direct that the evidence on that issue be given by one expert only. If the co-accused cannot agree who the expert should be, the court may select the expert from a list prepared or identified by them or direct that the expert be selected in such other manner as it may direct. Where the court gives a direction under rule 33.7 for a single joint expert to be used, each of the co-accused may give instructions to the expert and, at the same time, send a copy of his instructions to the other co-accused.[205] The court may also give directions about any examination, measurement, test, or experiment which the expert wishes to carry out.[206]

Disclosure

At common law, the prosecution at a trial on indictment are not permitted to take the defence by surprise by adducing any evidence of which they have not given advance notice to the defence; and where such notice has not been given, the accused may apply for an adjournment.[207] The Royal Commission on Criminal Procedure proposed the introduction of an additional requirement of pre-trial disclosure in the case of defences depending on medical or expert scientific evidence, where the element of surprise involves some risk of the trial being adjourned, so that the prosecution may evaluate the evidence, undertake further inquiries and, if necessary, call its own experts in rebuttal.[208] The recommendation was adopted. Rule 24 of the Criminal Procedure Rules provides as follows:

> **24.1** (1) . . . if any party to . . . [criminal] proceedings proposes to adduce expert evidence (whether of fact or opinion) in the proceedings (otherwise than in relation to sentence) he shall as soon as practicable, unless in relation to the evidence in question he has already done so or the evidence is the subject of an application for leave to adduce such evidence in accordance with section 41 of the Youth Justice and Criminal Evidence Act 1999—
>
> (i) furnish the other party or parties[209] and the court with a statement in writing of any finding or opinion which he proposes to adduce by way of such evidence and notify the expert of this disclosure; and
>
> (ii) where a request in writing is made to him in that behalf by any other party, provide that party also with a copy of (or if it appears to the party proposing to adduce the evidence to be more practicable, a reasonable opportunity to examine) the record of any observation, test, calculation or other procedure on which such finding or opinion is based and any document or other thing or substance in respect of which any such procedure has been carried out.
>
> (2) A party may by notice in writing waive his right to be furnished with any of the matters mentioned in paragraph (1) and, in particular, may agree that the statement mentioned in paragraph (1)(i) may be furnished to him orally and not in writing.
>
> (3) In paragraph (1), 'document' means anything in which information of any description is recorded.
>
> **24.2** (1) If a party has reasonable grounds for believing that the disclosure of any evidence in compliance with the requirements imposed by rule 24.1 might lead to the intimidation,

[205] Rule 33.8(1) and (2).

[206] Rule 33.8(3).

[207] *R v Wright* (1934) 25 Cr App R 35, CCA.

[208] Para 8.22 (Cmnd 8092).

[209] Ie co-accused.

or attempted intimidation, of any person on whose evidence he intends to rely in the proceedings,[210] or otherwise to the course of justice being interfered with, he shall not be obliged to comply with those requirements in relation to that evidence.

(2) Where, in accordance with paragraph (1), a party considers that he is not obliged to comply with the requirements imposed by rule 24.1 with regard to any evidence in relation to any other party, he shall give notice in writing to that party to the effect that the evidence is being withheld and the grounds for doing so.

24.3 A party who seeks to adduce expert evidence in any proceedings and who fails to comply with rule 24.1 shall not adduce that evidence in those proceedings without the leave of the court.

The phrase 'expert evidence (whether of fact or opinion)', in rule 24.1(1), is wide enough to apply not only to evidence to be given by an expert witness, but also to an expert report which, whether or not the person making it attends to give oral evidence in the proceedings, it is proposed to adduce, by way of exception to the hearsay rule, under section 30(1) of the Criminal Justice Act 1988. Section 30(1) is considered in Chapter 10.

Section 11 of the Criminal Justice Act 1967 contained a provision similar in effect to rule 24.3 but applicable to particulars of an alibi defence. Under section 11, it was held that as a general rule, the mere fact that the necessary information was not given within the prescribed period was not, per se, a justification for refusing leave to admit the evidence because the discretion of the court had to be exercised judicially. Thus if, despite notice having been given outside the prescribed period, the prosecution had nevertheless had an opportunity to investigate the information provided, or could be given such an opportunity by means of an adjournment, leave to admit the evidence was granted.[211] It seems likely that rule 24.3 will be interpreted in a similar fashion.

In *R v Ward*[212] the Court of Appeal held that the rules (strictly, the original version of the rules) are helpful, but not exhaustive: they do not in any way supplant or detract from the prosecution's general duty of disclosure in respect of scientific evidence, a duty which exists irrespective of any request by the defence. That duty is not limited to documentation on which the opinion or finding of an expert is based, but extends to anything which may arguably assist the defence. It is a positive duty which, in the case of scientific evidence, obliges the prosecution to make full and proper inquiries from forensic scientists to ascertain whether there is discoverable material. Moreover, an expert witness who has carried out or knows of experiments or tests which tend to cast doubt on the opinion he is expressing is under a clear obligation to bring the records of such experiments or tests to the attention of the solicitor instructing him (so that it may be disclosed to the defence)[213] or the expert advising the defence. The importance of these principles was starkly illustrated in *R v Clark*,[214] where, on a reference back to the Court of Appeal by the Criminal cases Review Commission, Sally Clark's convictions for the murder of her two infant sons were quashed, a forensic pathologist having failed to disclose that in the case of one of the infants, a form of potentially lethal bacteria, which could not be excluded as the possible cause of death, had been isolated.

[210] Ie either the expert or any other potential witness.

[211] See per Salmon LJ in *R v Sullivan* [1971] 1 QB 253 at 258, CA. But see also *R v Jacks* [1991] Crim LR 611, CA, where the trial judge refused leave to admit the evidence and declined to adjourn. On the facts, admission of the evidence would have involved a clear risk of disadvantage to the Crown.

[212] [1993] 2 All ER 577 at 628.

[213] See also per Stuart-Smith LJ in *R v Maguire* [1992] 2 All ER 433 at 447, CA.

[214] [2003] All ER (D) 223 (Apr), [2003] EWCA Crim 1020.

Under section 6D of the Criminal Procedure and Investigations Act 1996, if the accused instructs a person with a view to his providing any expert opinion for possible use as evidence at his trial, he must give to the court and the prosecutor, within a prescribed 'relevant period', a notice specifying the person's name and address. Such a notice need not be given if the expert's name and address have already been given under section 6C of the 1996 Act, which requires the accused to give notice of his intention to call witnesses at the trial.[215]

Non-expert opinion evidence

A non-expert witness, as we have seen, may give opinion evidence on matters in relation to which it is impossible or virtually impossible to separate his inferences from the perceived facts on which those inferences are based. In these circumstances, the witness is permitted to express his opinion as a compendious means of conveying to the court the facts he perceived. The admissibility of non-expert opinion evidence is largely a question of degree and the matters open to proof by such evidence defy comprehensive classification. Examples include the identification of persons,[216] voices,[217] objects[218] and handwriting,[219] speed,[220] temperature, weather, and the passing of time. A non-expert may describe the condition of objects, using adjectives such as 'good', 'new', 'worn', and 'old'. Similarly, non-expert opinion evidence is admissible as to the value of objects. In *R v Beckett*,[221] a non-expert expressed the opinion that a plate-glass window was worth more than five pounds. However, although the point was not canvassed in the case, it seems clear that non-expert opinion evidence of value is only admissible in respect of commonplace objects, of which a plate glass window is perhaps best regarded as a borderline example, as opposed to works of art, antiques and other objects the valuation of which obviously calls for specialized skill or knowledge. A non-expert may also give opinion evidence of a person's age,[222] health, bodily or emotional state, or reaction to an event or set of circumstances. Although a person's sanity is a matter calling for expertise, it would appear that a close acquaintance may express his opinion as a convenient way of conveying the results of his observations of that person's behaviour.[223] A similar distinction was drawn in *R v Davies*.[224] It was held that on a charge of driving when unfit through drink, whereas the fitness of the accused to drive is a matter calling for expert evidence, a non-expert may properly give his general impression as to whether the accused had 'taken drink', provided that he describes the facts upon which his impression was based. Similarly, and

[215] See Ch 14.

[216] *R v Tolson* (1864) 4 F&F 103.

[217] *R v Robb* (1991) 93 Cr App R 161, CA; *R v Deenik* [1992] Crim LR 578, CA. The key to the admissibility of lay listener evidence is the degree of familiarity of the witness with the voice. If the prosecution call police officers to give such evidence, it should be treated with caution and it is desirable that an expert give an opinion on its veracity: *R v Flynn* [2008] 2 Cr App R 266 at 281, considered in Ch 8.

[218] *Lucas v Williams & Sons* [1892] 2 QB 113 (a picture); *Fryer v Gathercole* (1849) 13 Jur 542 (a pamphlet).

[219] *Doe d Mudd v Suckermore* (1837) 5 Ad&El 703: see Ch 9.

[220] Section 89(2) of the Road Traffic Regulation Act 1984: see Ch 8.

[221] (1913) 8 Cr App R 204.

[222] *R v Cox* [1898] 1 QB 179.

[223] Per Parke B in *Wright v Doe d Tatham* (1838) 4 Bing NC 489 at 543–4. But in criminal cases, expert psychiatric evidence is necessary in order to establish insanity: s 1(1) of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, above.

[224] [1962] 1 WLR 1111, C-MAC.

subject to the same proviso, a non-expert may give his opinion as to whether an accused was 'drunk'.[225] In *R v Hill*[226] it was held that scientific evidence is not always required to identify a prohibited drug, but police officers' descriptions of a drug must be sufficient to justify the inference that it is the drug alleged.

At common law, as we have seen, the courts were opposed to any witness expressing his opinion on an ultimate issue, that is one of the very issues which the judge or jury has to decide. In civil proceedings the rule has been abolished. Section 3(2) of the 1972 Act declares that—

> where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

Section 3(3) reads:

> In this section 'relevant matter' includes an issue in the proceedings in question.

Concerning non-expert opinion evidence in criminal proceedings, the rule may subsist.[227] In *R v Davies*[228] Lord Parker CJ held that although the witness could properly state the impression he formed as to whether the accused driver had taken drink, his opinion as to whether as a result of that drink he was fit or unfit to drive a car was inadmissible, being 'the very matter which the court itself has to determine'.[229] However, the rule is easily evaded by a careful use of words, and sometimes it is simply ignored. In *R v Beckett*,[230] it will be recalled, a witness valued a window at more than five pounds, yet that was exactly the issue to be determined by the court.

ADDITIONAL READING

Basten, 'The Court Expert in Civil Trials, a Comparative Appraisal' (1977) 40 *MLR* 174.

Bruce et al, 'Face Recognition in poor Quality Video Evidence from Security Surveilance' (1999) 10 *Psychological Science* 243.

Ellison, 'Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases' (2005) 9 *E&P* 239.

Giles, 'Good Impressions' (1991) *NLJ* 605.

Jackson, 'The Ultimate Issue Rule: One Rule Too Many' [1984] *Crim LR* 75.

Jowett, 'Sittin in the Dock with the Bayes' (2001) *NLJ* 201.

Lewis, 'Expert evidence of delay in complaint in childhood sexual abuse prosecutions' (2006) 10 *E&P* 157.

Mackay, 'Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience' [1991] *Crim LR* 800.

[225] *R v Tagg* [2002] 1 Cr App R 22, CA.

[226] (1992) 96 Cr App R 456, CA.

[227] But see 11th Report, Criminal Law Revision Committee (Cmnd 4991), para 270. The Committee, recommending the enactment for criminal proceedings of provisions similar to those contained in s 3 of the 1972 Act, said: 'we have no doubt that this is the present law, but it seems desirable for the statute to be explicit.'

[228] [1962] 1 WLR 1111, C-MAC. See also *Sherrard v Jacob* [1965] NI 151, NICA.

[229] In Eire, the witness has been allowed to express an opinion on both matters: see *A-G (Rudely) v James Kenny* (1960) 94 ILTR 185.

[230] (1913) 8 Cr App R 204, CCA.

Munday, 'Videotape Evidence and the Advent of the Expert Ad Hoc' (1995) 159 *JP* 547.

O'Brian Jr, 'Court scrutiny of expert evidence: Recent decisions highlight the tensions' (2003) 7 *E&P* 172.

Redmayne, 'The DNA Database: Civil Liberty and Evidentiary Issues' [1995] *Crim LR* 437.

Redmayne, *Expert Evidence and Criminal Justice* (Oxford, 2001).

Roberts, 'Drawing on Expertise: Legal Decision-making and the Reception of Expert Evidence' [2008] *Crim LR* 443.

Roberts, 'Rejecting General Acceptance, Confounding the Gate-keeper: the Law Commission and Expert Evidence' [2009] *Crim LR* 551.